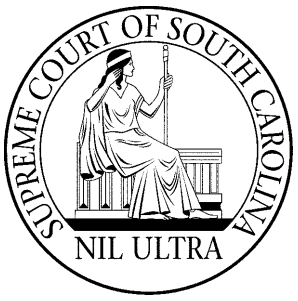

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
June 19, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION OF TIME TO FILE PETITION TO THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27859 - In the Matter of Jennifer Elizabeth Meehan	Pending
27886 - Daniel Hamrick v. State	Pending
27887 - State v. Denzel M. Heyward	Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27884 - Otha Delaney v. First Financial	Granted until 6/19/19

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5641-Robert Palmer v. State	Pending
5643-Ashley Reeves v. SCMIRF	Pending
5646-Grays Hill Baptist Church v. Beaufort County	Pending
5648-State v. Edward Lee Dean	Pending
5650-State v. Felix Kotowski	Pending
2018-UP-432-Thomas Torrence v. SCDC	Pending
2019-UP-042-State v. Ahshaad Mykiel Owens	Pending
2019-UP-132-HSBC Bank USA v. Clifford Ryba	Pending
2019-UP-133-State v, George Holmes	Pending
2019-UP-135-Erika Mizell v. Benny Utley	Pending
2019-UP-140-John McDaniel v. Career Employment	Pending
2019-UP-150-SCDSS v. Kierra R. Young-Gaines (2)	Pending
2019-UP-154-Kenneth Evans v. Chelsea Evans	Pending
2019-UP-158-State v Jawan R. White	Pending
2019-UP-165-Cyril Okadigwe v. SCDLLR	Pending
2019-UP-166-State v. Bryan J. Ellis	Pending
2019-UP-167-Denetra Glover v. Shervon Simpson	Pending
2019-UP-169-State v. Jermaine Antonio Hodge	Pending
2019-UP-176-Town of McBee v. Alligator Rural Water	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-179-Paula Rose v. Charles Rose, III	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5574-State v. Jeffrey D. Andrews	Pending
5582-Norwest Properties v. Michael Strebler	Pending
5583-Leisel Paradis v. Charleston County	Pending
5590-State v. Michael L. Mealor	Pending
5591-State v. Michael Juan Smith	Pending
5592-State v. Aaron S. Young, Jr.	Pending
5593-Lori Stoney v. Richard Stoney	Pending
5596-James B. Williams v. Merle S. Tamsberg	Pending
5600-Stoneledge v. IMK Dev. (Marick/Thoennes)	Pending
5601-Stoneledge v. IMK Dev. (Bostic Brothers)	Pending
5602-John McIntyre v. Securities Commissioner of SC	Pending
5604-Alice Hazel v. Blitz U.S.A., Inc.	Pending
5605-State v. Marshell Hill	Pending
5606-George Clark v. Patricia Clark	Pending
5611-State v. James Bubba Patterson	Pending
5615-Rent-A-Center v. SCDOR	Pending
5616-James Owens v. Bryan Crabtree (ADC Engineering)	Pending
5617-Maria Allwin v. Russ Cooper Associates, Inc.	Pending
5618-Jean Derrick v. Lisa Moore	Pending
5620-Bradley Sanders v. SCDMV	Pending

5621-Gary Nestler v. Joseph Fields	Pending
5624-State v. Trey C. Brown	Pending
5625-Angie Keene v. CNA Holdings	Pending
5627-Georgetown Cty. v. Davis & Floyd, Inc.	Pending
5630-State v. John Kenneth Massey, Jr.	Pending
5631-State v. Heather E. Sims	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-255-Florida Citizens Bank v. Sustainable Building Solutions	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-365-In re Estate of Norman Robert Knight, Jr.	Pending
2018-UP-417-State v. Dajlia S. Torbit	Pending
2018-UP-420-Mark Teseniar v. Fenwick Plantation	Pending
2018-UP-439-State v. Theia D. McArdle	Pending
2018-UP-454-State v. Timothy A. Oertel	Pending
2018-UP-458-State v. Robin Herndon	Pending
2018-UP-461-Mark Anderko v. SLED	Pending
2018-UP-466-State v. Robert Davis Smith, Jr.	Pending
2018-UP-470-William R. Cook, III, v. Benny R. Phillips	Pending
2019-UP-007-State v. Carmine James Miranda, III	Pending
2019-UP-030-Heather Piper v. Kerry Grissinger	Pending
2019-UP-034-State v. Hershel Mark Jefferson, Jr.	Pending

2019-UP-035-State v. Alton J. Crosby	Pending
2019-UP-047-Michael Landry v. Angela Landry	Pending
2019-UP-052-State v. Michael Fulwiley	Pending
2019-UP-067-Lorrie Dibernardo v. Carolina Cardiology	Pending
2019-UP-075-State v. Gerald J. Ancrum	Pending
2019-UP-083-State v. Melvin Durant	Pending
2019-UP-104-Uuno Baum v. SCDC	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Jeffrey Dana Andrews, Respondent.

Appellate Case No. 2018-001765

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 27894
Submitted May 7, 2019 – Filed June 19, 2019

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson and Assistant Attorney General Scott Matthews, both of Columbia, and Solicitor Ernest A. Finney, III, of Sumter, all for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

PER CURIAM: The State of South Carolina has filed a petition for a writ of

certiorari asking this Court to review the Court of Appeals' decision in *State v. Andrews*, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018). We grant the petition, dispense with further briefing, and affirm as modified.

I.

The facts in this case are fully and accurately set forth in the Court of Appeals' opinion. After a fatal shooting at Respondent's home, Respondent was indicted for murder and possession of a weapon during the commission of a violent crime. Respondent moved to dismiss the charges pursuant to the Protection of Persons and Property Act[1] (the Act) on the ground he shot the victim in self-defense.

During the pre-trial immunity hearing, Respondent claimed that, after an altercation and being threatened by the victim, Respondent shot the victim in the threshold of the front door as the victim attempted to reenter his home. Respondent's father corroborated Respondent's version of events. However, another eyewitness, the victim's girlfriend and Respondent's cousin, testified the victim was attempting to peacefully leave Respondent's home and that Respondent followed the victim out of the home, shooting him on the porch. Additional forensic evidence was presented at the hearing, but it did not conclusively support either version of events.

At the conclusion of the immunity hearing, the circuit court rejected Respondent's argument. Relying on *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), the circuit court held:

> The burden clearly is by the preponderance of the evidence. Not the normal criminal case law beyond a reasonable doubt. . . . The testimony in this case from the witnesses and from the defendant have been at least very inconsistent. The testimony has been conflicting as to what the different witnesses saw and what happened on the night in question. And therefore, I find that the defendant has not met [his] burden of proving to me by a preponderance of the evidence, and therefore a request for immunity is hereby denied.

Ultimately, the Court of Appeals affirmed the circuit court's denial of immunity, but reversed Respondent's convictions based on a separate evidentiary issue.

[1] S.C. Code Ann. §§ 16–11–410 to –450 (2015 & Supp. 2017).

While we agree with the result reached by the Court of Appeals, we granted the petition for a writ of certiorari to reiterate the impact of our recent decision in *State v. Cervantes-Pavon*, Op. No. 27872 (S.C. Sup. Ct. filed Mar. 27, 2019).

II.

When the Act was passed, the process for requesting immunity from prosecution was unclear. Therefore, in *State v. Duncan*, we interpreted the Act and provided procedural guidance, instructing that the hearing was properly held prior to trial and the burden of proof is by a preponderance of the evidence. 392 S.C. 404, 709 S.E.2d 662 (2011).

Shortly after *Duncan* was decided, this Court heard *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). However, at the time of the *Curry* trial, which occurred three years before the appeal to this Court, we had not yet decided *Duncan*. Thus, the parties and the circuit court did not have the benefit of the guidance provided by *Duncan* as to the proper procedure through which an immunity determination should be requested. Consequently, in *Curry*, the defense attorney requested immunity at the directed verdict stage of trial, and the accused was ultimately denied immunity from prosecution. 406 S.C. at 369, 752 S.E.2d at 265. In *Curry*, we explained the accused's "claim of self-defense presented a quintessential jury question," which did not warrant immunity from prosecution, and therefore, we held the claim was properly submitted to the jury, with the claim of self-defense having been fully presented at that stage of trial. 406 S.C. at 372, 752 S.E.2d at 267. This excerpt from *Curry* has been the source of much confusion for the bench and bar. We take this opportunity to emphasize that aspect of *Curry* was related to its specific and unique procedural posture at trial—a motion for directed verdict—and was not intended to allow circuit courts to automatically deny immunity in cases with conflicting evidence.

Most recently, in *Cervantes-Pavon*, we revisited the Act, ultimately reversing the circuit court's denial of immunity and remanding for a new immunity hearing. We found the circuit court's immunity hearing was controlled by multiple errors of law, including a misapplication of *Curry*. We rejected the circuit court's finding that the conflicting evidence presented a jury question, supporting a denial of immunity, and we held: "[b]ut just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Thus, the relevant inquiry is not merely whether there is a conflict

in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence.

In the instant case, the circuit court correctly cited the preponderance of the evidence standard and explicitly relied on *Douglas*; a case in which the circuit court gave careful consideration to the issue of immunity, making detailed findings of fact and conclusions of law in determining whether the accused had shown an entitlement to immunity by a preponderance of the evidence. 411 S.C. at 320, 768 S.E.2d at 240. Here, while the circuit court may not have set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent. Thus, we find no error in the circuit court's application of the law.

To the extent the Court of Appeals relied upon the portion of *Curry* relating to the directed verdict procedural posture in affirming the circuit court's denial of immunity in this case, we vacate that portion of the Court of Appeals' opinion. Accordingly, we affirm the Court of Appeals as modified.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jalann Lee Williams, Petitioner.

Appellate Case No. 2017-000727

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27895
Heard October 18, 2018 – Filed June 19, 2019

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown, Assistant Attorney General Sherrie Butterbaugh, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE FEW: In this appeal from a conviction for murder, we hold the trial court properly refused to charge the law of self-defense. The defendant shot and killed

the victim with an unlawfully-possessed pistol the defendant intentionally brought to an illegal drug transaction. We find the defendant was at fault in bringing on the violence. We affirm.

Robert Mitchell made arrangements with Akim Ladson to meet for the purpose of purchasing from Ladson a particularly high-quality variety of marijuana known as "loud."[1] Mitchell then went to the mobile home where he knew Jalann Williams to be living to recruit Williams as a participant in the drug deal. The reasons Mitchell recruited Williams—and Williams agreed to go—are disputed. Mitchell testified Williams told him he was going to the drug deal to rob Ladson because Williams needed money to pay his bail bondsman on other charges. Williams denied any intent to rob Ladson. He testified he loaned Mitchell the money to buy "loud," but the price seemed low, so he went to the drug deal to be sure Mitchell was buying the proper marijuana. His apparent purpose was to ensure his loan would be repaid. Referring to the price, he testified, "I didn't really trust that but I was like, 'That's him buying and as long as I get my money back by the end of the week I was all right.'" Williams further explained his purpose, "I said, 'well, I'm going to go along with you because I don't believe nobody got no price [sic] for that weed.'" He later testified, "Out of the whole my main concern was just to get my money back at the end of the week because I needed the money back."

These disputed facts, however, are not important to our analysis. What is important to our analysis is the undisputed fact that when Williams agreed to participate in the drug deal, he made a conscious choice to take his loaded pistol with him.

Williams and Mitchell waited for Ladson in the same mobile home park where Williams was living. Ladson arrived in a car driven by his girlfriend, Alayah Hamlin. Ladson was in the front passenger seat. Williams and Mitchell entered the backseats of Hamlin's car and began the drug deal. Ladson handed Mitchell the marijuana, and Mitchell began to inspect and weigh it on a portable scale Williams brought with him. Viewing the evidence in the light most favorable to Williams, Ladson attacked Williams, Williams feared for his safety, and Williams had no opportunity to get away. Williams then shot and killed Ladson.

---

[1] "Loud" is defined in the Urban Dictionary as, "A slang term for marijuana of high quality," and, "Bomb-ass weed." See *Loud*, Urban Dictionary, https://www.urbandictionary.com/define.php?term=loud (last visited June 14, 2019).

The State charged Williams with murder, armed robbery, and possession of a firearm during the commission of a violent crime. At trial, Williams requested the trial court charge the jury the law of self-defense as to the murder charge. The trial court refused. The jury convicted Williams of murder and possession of a firearm during the commission of a violent crime. The jury was unable to reach a verdict on the charge that Williams robbed Ladson. The trial court sentenced Williams to thirty years in prison.

Williams appealed, arguing the trial court erred in refusing to charge the law of self-defense. The court of appeals affirmed. *State v. Williams*, Op. No. 2017-UP-015 (S.C. Ct. App. filed Jan. 11, 2017). We granted Williams' petition for a writ of certiorari to review the court of appeals' decision.

The trial court must charge the jury on the law applicable to the jury's deliberations. *See State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("The trial court is required to charge only the current and correct law of South Carolina. The law to be charged must be determined from the evidence presented at trial.") (quotations and citations omitted); *Winkler v. State*, 418 S.C. 643, 655, 795 S.E.2d 686, 693 (2016) (holding a trial court should not answer a jury's question if the answer is "not applicable to the jury's deliberations") (citation omitted). In some cases, the jury must be charged that criminal liability for homicide may be excused under the doctrine of self-defense. The law requires this self-defense charge, however, only when there is evidence in the record that supports the right of the defendant to use deadly force. To enable trial courts to determine when the evidence does support that right, and thus when the law of self-defense must be charged to the jury, this Court has listed four elements that must be present. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury. Whether there is any evidence to support each element is a question of law.

This structure places the burden on the defendant to produce some evidence to support the existence of each element. *See Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (stating "a defendant is entitled to a jury instruction on self-defense if he has produced evidence tending to show the four elements of that defense"); *State v. Bellamy*, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987) (stating the defendant "must . . . produce evidence" to support the charge of self-defense), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). While the State must present evidence to support the existence of each element of the crime charged, the State is under no burden to produce evidence to refute the existence of self-defense. However, if there is some evidence to support

each element of self-defense—whether found in the State's presentation of evidence or produced by the defendant—it becomes the State's burden to persuade the jury beyond a reasonable doubt that at least one element of the defense does not exist. *See State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998) (stating "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt"); *Bellamy*, 293 S.C. at 105, 359 S.E.2d at 64 (finding the trial court erred in holding the defendant to the burden of persuasion (relying on *State v. Glover*, 284 S.C. 152, 326 S.E.2d 150 (1985), and *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984))).

This case involves the element we have traditionally described as, "The defendant [must be] without fault in bringing on the difficulty." *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101. The issue in this case is whether there was any evidence presented at trial that would support a finding Williams was "without fault."[2] We addressed the element in *State v. Bryant*, 336 S.C. 340, 520 S.E.2d 319 (1999). We held the defendant's actions precluded a charge on self-defense as a matter of law because he was "responsible for bringing on the difficulty." 336 S.C. at 346, 520 S.E.2d at 322. We explained, "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a[n] . . . excuse for a homicide." 336 S.C. at 345, 520 S.E.2d at 322 (citing 40 Am. Jur. 2d *Homicide* § 149 (1999)). We established in *Bryant* the principle that a defendant is not entitled to a charge of self-defense if the evidence supports only the conclusion that he acted "in violation of law" in a manner "reasonably calculated to produce [a violent] occasion." *Id.*

Under this principle from *Bryant*, the trial court properly refused to charge self-defense. Williams' act of intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction was a "violation of law" that was "reasonably calculated to produce" violence. *Id.* Williams' act "bars his right to assert self-defense as a[n] . . . excuse for a homicide." *Id.*

Intentionally bringing a loaded, unlawfully-possessed pistol to an illegal marijuana transaction is "in violation of law" in three important respects. First, Williams'

---

[2] We readily acknowledge Ladson was at fault, and perhaps Mitchell and Hamlin. The question, however, is not who else might have been at fault, but whether Williams was *without* fault. In answering that question, it does not matter who else was at fault. Thus, the fact "there is evidence . . . that Ladson . . . produced the violent occasion" is not relevant. The dissent mistakenly relies on the premise that only one person can be at fault.

possession of the pistol was a violation of law. *See* S.C. Code Ann. § 16-23-20 (2015) (providing, "It is unlawful for anyone to carry about the person any handgun . . . except . . ." under circumstances not applicable in this case). Second, the possession, purchase, or sale of marijuana is a violation of state and federal law. S.C. Code Ann. § 44-53-370(a) and (c) (2018); 21 U.S.C.A. §§ 841, 844 (West 2013). Third, and most important, it is a separate violation of federal law to bring any gun to an illegal drug transaction. Subsection 18 U.S.C.A. § 924(c)(1)(A) (West 2015) provides, "any person who, during and in relation to any . . . drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, (i) be sentenced to a term of imprisonment of not less than 5 years . . . ."

In addition, intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction is "calculated to produce a violent occasion." Williams' pistol was not simply a convenience for him so he could protect himself just in case violence arose. Rather, it is well-documented that the mere presence of guns at illegal drug transactions *produces* the violence. *See Harmelin v. Michigan*, 501 U.S. 957, 1003, 111 S. Ct. 2680, 2706, 115 L. Ed. 2d 836, 870 (1991) ("Studies . . . demonstrate a direct nexus between illegal drugs and crimes of violence."); *State v. Banda*, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) (citing, in a different context, the "indisputable nexus between drugs and guns"). Congress enacted subsection 924(c)(1)(A) for the purpose of separately criminalizing the combination of drug dealing and unlawful possession of a gun, not just the individual crimes. *See Smith v. United States*, 508 U.S. 223, 240, 113 S. Ct. 2050, 2060, 124 L. Ed. 2d 138, 155 (1993) ("When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination."). Congress recognized the causal connection between the presence of an unlawfully-possessed gun and violence in illegal drug transactions. *See Muscarello v. United States*, 524 U.S. 125, 132, 118 S. Ct. 1911, 1916, 141 L. Ed. 2d 111, 118 (1998) ("This Court has described [subsection 924(c)(1)'s] basic purpose broadly, as an effort to combat the 'dangerous combination' of 'drugs and guns.'" (citing *Smith*, 508 U.S. at 240, 113 S. Ct. at 2060, 124 L. Ed. 2d at 155).

We have held—in other circumstances—a defendant may lawfully arm himself in self-defense even when in unlawful possession of a firearm. *See, e.g.*, *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). In *Burriss*, several men attacked and attempted to rob the defendant. 334 S.C. at 258, 513 S.E.2d at 106. The defendant pulled a gun and intentionally fired it into the ground. The shot caused a short pause in the fight. When the fight resumed, the gun fired again—the defendant claimed accidentally—killing one of the men who attacked him. 334 S.C. at 258-59, 513

S.E.2d at 106. We reversed the trial court's refusal to charge the law of accident, 334 S.C. at 264, 513 S.E.2d at 109, stating "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting," 334 S.C. at 262, 513 S.E.2d at 108; *see also State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (stating "the [*Burriss* accident] analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense").

The defendant in *Burriss* was not doing anything "in violation of law" except unlawfully possessing a pistol. As the *Burriss* majority explained, the defendant simply "went to visit a friend at [the friend's] apartment" and "was waiting for his friend to come out of the apartment" when the men attacked him. 334 S.C. at 258, 513 S.E.2d at 106. In this case, Williams was doing something "in violation of law" in addition to merely unlawfully possessing a pistol. He was participating in an illegal drug deal for which he illegally armed himself in violation of 18 U.S.C.A. § 924(c)(1)(A).

For this reason, Williams' case is more like *Slater*. In that case, Lord Byron Slater "noticed that [a] disturbance was taking place in an adjacent parking lot. Carrying his gun with him, [Lord Byron] went to the adjacent parking lot to investigate." 373 S.C. at 68, 644 S.E.2d at 51. The "disturbance" turned out to be a robbery, and when Lord Byron "surprised one of the attackers . . . , the man turned around and pointed a gun." *Id.* Lord Byron shot and killed him. *Id.* At Lord Byron's trial for "murder and possession of a firearm during the commission of a violent crime," 373 S.C. at 67-68, 644 S.E.2d at 51, the trial court refused to charge self-defense, 373 S.C. at 69, 644 S.E.2d at 52. The jury convicted Lord Byron of both charges. *Id.*

On appeal, relying on *Burriss*, Lord Byron argued the trial court erred in refusing the self-defense charge. 373 S.C. at 69-70, 644 S.E.2d at 52. We affirmed the trial court,[3] stating, Lord Byron "fails to meet the first requirement for the self-defense charge: specifically, [Lord Byron] was not without fault in bringing on the difficulty." 373 S.C. at 70, 644 S.E.2d at 52. We cited the passage above from *Bryant*, and observed that Lord Byron "approached an altercation that was already

[3] The court of appeals reversed the trial court in a split decision. *State v. Slater*, 360 S.C. 487, 493, 602 S.E.2d 90, 94 (Ct. App. 2004) (Hearn, C.J., dissenting), *rev'd*, 373 S.C. 66, 644 S.E.2d 50 (2007). On the State's petition for a writ of certiorari, we reversed the court of appeals and reinstated the jury verdict. 373 S.C. at 71, 644 S.E.2d at 53.

underway with a loaded weapon by his side," which we found was "reasonably calculated to bring the difficulty." 373 S.C. at 70, 644 S.E.2d at 52.

Slater is not identical to Williams' case. In fact, we stated Lord Byron "carried the cocked weapon, in open view, into an already violent attack." 373 S.C. at 71, 644 S.E.2d at 53. Here—although Williams made his gun possession known to Mitchell—the evidence indicates Williams concealed his pistol from Ladson until he was attacked. However, *Slater* is important to our analysis in this case because Lord Byron armed himself for the purpose of entering into a situation he knew to be rife with violence—just like Williams did here.

Slater is also important because we explained *Burriss*. Referring to *Burriss*, we "reject[ed] the position that the unlawful possession of a weapon could never constitute an unlawful activity which would preclude the assertion of self-defense." 373 S.C. at 70, 644 S.E.2d at 52-53. Further explaining *Burriss*, we stated, "Clarifying an ambiguity in this Court's prior case law, we noted [in *Burriss*] that where the defendant's unlawful possession of a weapon is *merely incidental* to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense." 373 S.C. at 71, 644 S.E.2d at 53 (emphasis added) (citing *Burriss*, 334 S.C. at 262 n.5, 513 S.E.2d at 108 n.5).

Where the unlawful possession of a weapon is not "merely incidental," as we found it was not in *Slater*, the unlawful possession of a weapon does foreclose a self-defense charge. Like Lord Byron, Williams illegally armed himself before he chose to enter a situation he knew to be unlawful, and which he knew was likely to be violent. Williams' actions proximately caused the difficulty[4] as a matter of established law because his act of taking a loaded, unlawfully-possessed pistol into an illegal drug transaction was not "merely incidental" to the act of arming himself in self-defense. *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322; *Slater*, 373 S.C. at 71, 644 S.E.2d at 53; *see also State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) (holding, "Because Smith was acting unlawfully" in taking a loaded, unlawfully-carried pistol into an illegal drug transaction, "he was not entitled to an accident charge").

---

[4] In *Slater*, we said the question was whether "the weapon is the proximate cause of the killing." 373 S.C. at 71, 644 S.E.2d at 53. We should have said the question is whether it is the proximate cause of the "difficulty" or "occasion" that led to the killing.

We conclude with a quote from now Chief Judge Lockemy of the court of appeals in *State v. Smith*, 406 S.C. 547, 752 S.E.2d 795 (Ct. App. 2013). Concurring in the majority's decision to affirm the trial court's refusal to grant the defendant a directed verdict on the basis of self-defense, Judge Lockemy argued that bringing a loaded, unlawfully-possessed pistol to an illegal drug deal forecloses self-defense,

> At the time of the shooting, Smith was engaged in the crime of selling illegal drugs. This activity, in addition to damaging the lives of untold numbers of people, also results in shootings and deaths on a very frequent basis. Smith's decision to bring a loaded weapon to the drug deal clearly shows his knowledge of the danger of the situation. His criminal conduct brought on the necessity to take the life of another. Smith created a situation fraught with peril. He cannot be excused for the violence that logically and tragically often occurs when engaging in such conduct, nor can he claim he did not anticipate the high probability of such violence.

406 S.C. at 557, 752 S.E.2d at 800 (Lockemy, J., concurring).

In some future case involving facts different from these, perhaps the defendant will convince the trial court he has produced evidence he was not at fault in bringing on the violent occasion. In this case, however, there is no evidence on which a jury may find Williams' unlawful possession of a loaded pistol during an illegal drug transaction was "merely incidental" to arming himself in self-defense. Rather—as a matter of law—Williams' act of taking the pistol to the drug deal was a violation of law that produced the violent occasion. *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. The trial court correctly refused the charge.

AFFIRMED.

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

JUSTICE JAMES: I dissent. Presumably, the majority would not balk at the giving of a self-defense instruction if Ladson and Williams (with a gun illegally concealed in his back pocket) had not been engaged in a drug deal but had instead been arguing about which radio station to listen to. I fully agree illegal drug transactions are rife with violence. They are an absolute blight on civilized society. However, I believe our self-defense law already adequately sets forth the parameters of how judges and juries are to consider the question of whether a drug-dealing or drug-purchasing defendant was or was not "without fault in bringing on the difficulty."

The majority cites this Court's holding in *State v. Bryant* that a defendant's act "in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense." 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). As does the majority, I emphasize the portion of our holding in *Bryant* that self-defense is barred if the defendant's act was reasonably calculated to produce the violent occasion. Here, even the majority acknowledges the evidence indicates the gun was in Williams' back pocket the entire time before Ladson climbed over the front seat and then got on top of and began to choke Williams, who was in the back seat. I respectfully reject the majority's supposition that I rely upon the premise that only one person can be at fault in "bringing on the difficulty" as contemplated in our self-defense law. I do not. I simply conclude there is evidence in this case that Ladson, and Ladson only, produced the violent occasion by attacking Williams, which in turn led to Williams retrieving his gun from his back pocket and firing in self-defense.

In its footnote 4, the majority clarifies our holding in *State v. Slater*,[5] by stating, "In *Slater*, we said the question was whether 'the weapon is the proximate cause of the killing.' 373 S.C. at 71, 644 S.E.2d at 53. We should have said the question is whether it is the proximate cause of the 'difficulty' or 'occasion' that led to the killing." I agree with that clarification, and I believe it requires the giving of a self-defense instruction in this case; as applied to the evidence in this record, there is evidence to support a finding by a jury that, in this case, the sole proximate cause of the "difficulty" or the "occasion" that led to the killing was Ladson choking Williams, not Williams having a gun in his back pocket.

The majority cites *Slater* for the proposition that "where the defendant's unlawful possession of a weapon is *merely incidental* to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the

[5] 373 S.C. 66, 644 S.E.2d 50 (2007).

use of an accident defense." 373 S.C. at 71, 644 S.E.2d at 53 (emphasis added) (citing *State v. Burriss*, 334 S.C. 256, 262 n.5, 513 S.E.2d 104, 108 n.5 (1999)).[6] Again, the majority acknowledges the evidence indicates Williams' gun was in his back pocket until he was attacked by Ladson. Consequently, there is evidence that the taking of the gun to the transaction was "merely incidental" to Williams lawfully arming himself in self-defense after being attacked. In other words, Williams' possession of the gun was a moot point, legally and factually, until Ladson brought about the difficulty by choking Williams.

The defendant who, without first being attacked, brandishes a firearm during the course of any transaction, whether it is an illegal drug deal or otherwise, will likely be considered, as a matter of law, to have "brought about the difficulty." In virtually every such scenario, any violence that breaks out would likely be "calculated to produce" the violence that ensued. However, the majority makes an illogical and unnecessary leap when it broadly concludes that "intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction is 'calculated to produce a violent occasion.'"

Finally, and most respectfully, I take issue with the majority's emphasis of now Chief Judge Lockemy's concurrence in *State v. Smith*, in which he expresses his view that because the defendant was engaged in the crime of selling illegal drugs, his decision to bring a loaded weapon to the transaction foreclosed self-defense. 406 S.C. 547, 557, 752 S.E.2d 795, 800 (Ct. App. 2013). In the very next paragraph, however, the majority states it does not foreclose the possibility that a future drug-dealing or drug-purchasing defendant will rightly convince a trial court that a self-defense instruction is warranted. At the least, the majority is giving the trial bench mixed signals on this issue.

I would reverse Williams' convictions and remand for a new trial.

BEATTY, C.J., concurs.

[6] Of course, we have extended our reasoning to the issue of self-defense. *See Slater*, 373 S.C. at 71, 644 S.E.2d at 53.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert L. Harrison, Employee, Petitioner,

v.

Owen Steel Company, Inc., Employer, and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2018-000769

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27896
Heard June 13, 2019 – Filed June 19, 2019

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Frank Anthony Barton, of West Columbia, for Petitioner.

Helen F. Hiser, of Mount Pleasant, and Jason Wendell Lockhart, of Columbia, both of McAngus Goudelock & Courie, LLC, for Respondents.

PER CURIAM: We granted Robert L. Harrison's petition for a writ of certiorari to review the decision of the court of appeals affirming the decision of the appellate panel of the workers' compensation commission.[1] We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW, JJ., and Acting Justice D. Garrison Hill, concur.

[1] *Harrison v. Owen Steel Co., Inc.*, 422 S.C. 132, 810 S.E.2d 433 (Ct. App. 2018).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clair Craver Johnson, Respondent,

v.

John Roberts, M.D., Petitioner.

and

Clair Craver Johnson, Respondent,

v.

Medical University of South Carolina, Petitioner.

Appellate Case No. 2018-000914

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27897
Submitted June 17, 2019 – Filed June 19, 2019

AFFIRMED

Donald J. Davis, Jr., Stephen L. Brown, James E. Scott, IV, and Russell G. Hines, all of Young Clement Rivers,

LLP, Joseph C. Wilson, IV and William P. Early, both of Pierce, Sloan, Wilson, Kennedy & Early, L.L.C., all of Charleston, for Petitioner.

Jonathan B. Asbill, of Baker Ravenel & Bender, LLP of Columbia, for Respondent.

JUSTICE HEARN: Petitioners Dr. John Roberts and the Medical University of South Carolina (MUSC) sought a writ of certiorari to review the court of appeals' decision in *Johnson v. Roberts*, 422 S.C. 406, 812 S.E.2d 207 (Ct. App. 2018).[1] Respondent Clair Johnson filed a medical malpractice action alleging Roberts and MUSC negligently treated Johnson with electroconvulsive therapy. Roberts and MUSC moved for summary judgment, contending the six-year statute of repose[2] barred her claims, and the circuit court agreed, holding the repose period began on the first date of treatment. On appeal, the court of appeals reversed, relying on its decision in *Marshall v. Dodds*[3] to hold that there was evidence to support Johnson's claim that Roberts and MUSC acted negligently within six years of filing her lawsuit. This Court recently affirmed as modified the court of appeals' *Marshall* decision, holding the statute of repose begins to run after each occurrence.

Roberts and MUSC now contend that the court of appeals erred in finding Johnson's claims preserved for review and in holding the statute of repose began after each occurrence. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: (1) As to issue preservation, see *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) ("While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved.") (emphasis added), and (2) As

---

[1] For a full recitation of the facts, see the court of appeals' opinion.

[2] S.C. Code Ann. § 15-3-545(A) (2005).

[3] 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), *aff'd as modified*, Op. No. 27873 (S.C. Sup. Ct. filed March 27, 2019) (Shearouse Ad. Sh. No. 13 at 37), *reh'g denied* (May 30, 2019).

to the merits, we find the allegations of medical malpractice indistinguishable from those in *Marshall*.

AFFIRMED.

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

JUSTICE JAMES: I dissent based on my dissenting opinion in *Marshall*.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James A. Ashford, Employee, Claimant, Respondent,

v.

Prysmian Power Cables & Systems, USA, Employer, and Sentry Insurance Company, Carrier, Appellants.

Appellate Case No. 2016-002423

Appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission

---

Opinion No. 5656
Heard April 17, 2019 – Filed June 19, 2019

APPEAL DISMISSED

Nicolas Lee Haigler, of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Appellants.

David Newton Truitt, of Truitt Law Firm, LLC, of Columbia, for Respondent.

LOCKEMY, C.J.: Prysmian Power Cables & Systems, USA and Sentry Insurance Company (collectively Prysmian) appeal an order issued by the South Carolina Workers' Compensation Commission Appellate Panel declining to address injuries asserted in a Form 50 filed by the claimant, James A. Ashford, because they were not properly before the Appellate Panel. Prysmian argues the

findings of the Appellate Panel were in error and violate its due process rights. We dismiss the appeal as interlocutory.

FACTS

On October 30, 2013, Ashford sustained an injury to his right wrist when his right hand and wrist were caught and crushed in a machine while working for Prysmian. Ashford's injuries resulted in a crush injury, right dorsal wound, right ulnar styloid fracture, right triangular fibrocartilage complex tear, and carpal tunnel syndrome.

On February 16, 2015, Ashford filed a Form 50 with the South Carolina Workers' Compensation Commission (the Commission) alleging injury to his right upper extremity, right lower extremity, right side, and a resultant psychological injury. In addition, Ashford alleged the injury resulted in a permanent disability and mediation is required pursuant to section 67-1802 of the South Carolina Code of Regulations (Supp. 2018).

In response, Prysmian filed a Form 51 on March 12, 2015 admitting a compensable injury to Ashford's right wrist, but denying injuries to Ashford's right lower extremity, right side and/or psyche. Prysmian asserted mediation was not appropriate in the matter "until there is a finding regarding the compensability of the alleged body parts. If the claim is limited to a single scheduled member, mediation cannot be ordered." Prysmian also alleged

> All affirmative and specific defenses (see Reg. 67-603), including but not limited to § 42-15-20, pre-existing disability to allegedly injured members; degree of disability, if any, attributable to this injury [sic] speculative; claimant's problems [sic] personal in nature and not work-related; defendants reserve the right to amend this Answer and plead additional defenses.

Prysmian filed a Form 21 on April 30, 2015, requesting a hearing to stop compensation. In its Form 21, Prysmian asserted Ashford reached maximum medical improvement (MMI), requested compensation be terminated, and requested a credit for overpayment of temporary compensation.

On June 23, 2015, the commissioner held a hearing to address Prysmian's Form 21. At the hearing, Prysmian objected to Ashford's submission of the reports and

opinions of Todd Hanson, a licensed marriage and family therapist, based on the fact they were untimely and Hanson did not qualify as an expert on the issue of psychological injuries or conditions. The commissioner allowed the admission of the reports and opinions. Furthermore, he stated he would address Hanson's qualifications in his order. The commissioner also indicated he would "leave the record open so that [Prysmian] could depose the doctor."

The commissioner issued an order on May 4, 2016. In the order, the commissioner determined Ashford was not at MMI for his wrist injury, he was entitled to future medical treatment for his wrist injury by a physician of his choosing, and Prysmian was prohibited from stopping temporary total disability benefits. Concerning the issue of additional injuries to Ashford's psyche, right lower extremity, and right side, and permanent and total disability, the commissioner determined these issues require mandatory mediation, and therefore, they were not timely for purposes of the hearing and "are not properly before me."

Prysmian appealed the commissioner's order to the Appellate Panel. The Appellate Panel held a hearing on August 15, 2016. At the hearing, Prysmian argued the commissioner should have determined Ashford's claim for psyche injury. Ashford argued again that his additional injuries are subject to mandatory mediation. The Appellate Panel issued an order affirming the commissioner's finding that Ashford had not attained MMI and was entitled to future medical treatment for his wrist. However, the Appellate Panel reversed the commissioner's finding as to temporary total disability benefits. The Appellate Panel allowed Prysmian to terminate the temporary total disability benefits and awarded Prysmian a credit against benefits paid as of May 4, 2015. In regard to Ashford's other injuries, the Appellate Panel, like the commissioner, determined "Claimant has a pending Form 50 that alleged injuries to his psyche, right lower extremity, and right side which are not timely for the purposes of this hearing and are not properly before me [sic]." Prysmian appeals the Appellate Panel's order.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 346, 656 S.E.2d 753, 757 (Ct. App. 2007). According to section 1-23-380 of the South Carolina Code (Supp.

2018), under the APA:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

"An appellate court may reverse or modify the decision of the appellate panel if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law." *Houston v. Deloach & Deloach*, 378 S.C. 543, 552, 663 S.E.2d 85, 89 (Ct. App. 2008).

LAW/ANALYSIS

As cited above, section 1-23-380 of the APA allows judicial review when a party has exhausted all administrative remedies and the agency issues a final decision. S.C. Code Ann. § 1-23-380. Furthermore, section 1-23-380 provides "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." *Id*.

Ashford argues the Commission has not made a final decision. "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010). "If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory." *Id*. at 267, 692 S.E.2d at 894. Moreover, as we explained in *Ex parte South Carolina Property & Casualty Insurance Guarantee Association*, 411 S.C. 501, 504, 768 S.E.2d 670, 672 (Ct. App. 2015),

"[a]n order of the commission is not a final decision unless it resolves the entire action."

The Appellate Panel's order determined Ashford has not reached MMI and he is entitled to future medical treatment. The Appellate Panel also reversed the commissioner's determination that Ashford was entitled to temporary total disability benefits. However, the Appellate Panel declined to address Ashford's other injuries and his claim for permanent disability. Thus, the Commission must address these issues to resolve the entire action. Accordingly, the Appellate Panel's decision is not final for purposes of section 1-23-380 and is only reviewable if review of the final agency decision would not provide an adequate remedy.

In this case, Prysmian does not appeal the Appellate Panel's decision regarding Ashford's MMI or his entitlement to future medical treatment. Rather, Prysmian seeks a determination as to Ashford's other injuries and his claim for permanent disability benefits. The Commission has not addressed these issues, which is the crux of this appeal, but it is not precluded from addressing them. [1] A final agency decision is the exact remedy Prysmian seeks. Prysmian has an adequate remedy available, if not through mediation, through "the normal course of the docket scheduling" as provided in regulation 67-1804. A review of that decision would provide an adequate remedy should either of the parties assert error in the decision. Therefore, section 1-23-380 does not allow judicial review of the issue Prysmian appeals. Accordingly, Prysmian's appeal is

[1] Presumably the Appellate Panel based its decision not to make a determination on Ashford's other injuries on section 67-1802 of the South Carolina Code of Regulations. This regulation provides "Claims for permanent and total disability arising under either Section 42-9-10 or Section 42-9-30(21)" must be mediated prior to a hearing. However, section 67-1804 of the South Carolina Code of Regulations (Supp. 2018) states, "If the mediation is not completed within the sixty-day timeframe, the case may be set in the normal course of the docket scheduling." Because the sixty-day mediation period passed, the Commission has the ability to set the case in the normal course of docket scheduling.

DISMISSED.[2]

SHORT and MCDONALD, JJ., concur.

[2] Our decision does not conflict with the supreme court's recent holding in *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019). In *Russell*, the supreme court found a remand order was immediately appealable because of the unnecessary delays and repeated remands over the eight-year period the claimant's claim was pending. *Id.* Under these circumstances, the supreme court found the claimant was without an adequate remedy on appeal from a final decision under section 1-23-380. *Id.* Prysmian's appeal involves issues the parties have yet to litigate, rather than repeated remands of issues litigated by the parties. Thus, the parties in this case have an adequate remedy through the review of a final agency decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Adele J. Pope, Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina, Respondent.

Appellate Case No. 2016-001708

Appeal From Richland County
Frank R. Addy, Jr., Circuit Court Judge
Doyet A. Early, III, Circuit Court Judge

Opinion No. Op. 5657
Heard February 12, 2019 – Filed June 19, 2019

REVERSED AND REMANDED

Adam Tremaine Silvernail, of Law Office of Adam T. Silvernail, of Columbia, for Appellant.

Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., both of Columbia, for Respondent.

GEATHERS, J.: In this action seeking relief under the Freedom of Information Act (FOIA), Appellant Adele J. Pope seeks review of the circuit court's order

dismissing her complaint on the ground that the records she sought were potentially discoverable in a pending breach of fiduciary duty action.[1] We reverse and remand.[2]

FACTS/PROCEDURAL HISTORY

In November 2007, the Aiken County circuit court appointed Pope and Robert L. Buchanan, Jr. to serve as personal representatives for The Estate of James Brown and trustees of The James Brown 2000 Irrevocable Trust to replace the original fiduciaries named in the trust and in Brown's will. *See Wilson v. Dallas*, 403 S.C. 411, 416–19, 743 S.E.2d 746, 749–51 (2013).[3] The circuit court later removed Pope and Buchanan from these positions. *Id.* at 422, 743 S.E.2d at 752.

On May 19, 2010, then-Attorney General Henry McMaster and Russell Bauknight, the newly appointed personal representative and trustee, filed a breach of fiduciary duty action against Pope and Buchanan in the Richland County Probate Court. Most of the additional listed plaintiffs were also plaintiffs in *Wilson*.[4] The complaint alleged, inter alia, that Pope and Buchanan failed to engage necessary advisors; failed to use due diligence in pursuing business opportunities and in determining the estate's value, thereby "making the estate vulnerable to millions of dollars in unnecessary and incorrect tax liability;" failed to keep accurate accounting records; engaged in self-dealing by "paying themselves hundreds of thousands of dollars in fees, which left the estate and trust with a solvency crisis;" took improper positions that were adversarial to the settlement "entered into by the beneficiaries of the Estate and Trust and approved by the [c]ircuit [c]ourt;" and failed "to account to the Attorney General as required by law."

---

[1] *Bauknight v. Pope*, Civil Action No. 2010-CP-40-4900.

[2] We decline to address the Attorney General's additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

[3] This appointment occurred within the context of complex probate litigation in which then-Attorney General Henry McMaster, now Governor, intervened on behalf of the trust's charitable beneficiaries and directed settlement negotiations resulting in a compromise agreement ultimately invalidated by the supreme court. *Id.* at 419–22, 432–47, 743 S.E.2d at 751–52, 758–66. Soon after intervening in the case, the Attorney General unsuccessfully opposed the appointment of Pope and Buchanan and later sought their removal. *Id.* at 419–22, 743 S.E.2d at 751–52.

[4] 403 S.C. at 411, 743 S.E.2d at 746.

The breach of fiduciary duty action was later transferred to the circuit court. *See supra* n.1. Among the documents sought by Pope during discovery were

> 1. The published policies and/or rules and regulations of the Office of the Attorney General of South Carolina ("AG") with respect to the engagement of private attorneys, including contingency-fee attorneys, by the AG in effect in May 2010.
>
> 2. The published policies and/or rules and regulations of the Office of the AG with respect to the engagement of private attorneys, including contingency-fee attorneys, by the AG currently in effect (July 19, 2011).
>
> 3. The contract of the then-AG (Henry D. McMaster) and/or the State of South Carolina engaging Kenneth B. Wingate and Everett Kendall, II to commence Civil Action No. 2010-GC-4000073 in the Probate Court for Richland County on May 19, 2010[,] on behalf of the AG.
>
> 4. Any contract and/or other document authorizing Russell L. Bauknight to commence Civil Action No. 2010-GC-40-0073 on behalf of the AG and/or the State of South Carolina.

Pope also sent a FOIA request for these items to the Attorney General and filed a motion to compel the production of items 3 and 4. In a letter dated August 5, 2011, the Attorney General proposed to place the FOIA request on hold pending the resolution of the fiduciary litigation. The Attorney General and Bauknight later sought a protective order concerning item 3, the Attorney General's agreement engaging Wingate and Kendall (the Wingate Agreement).

Subsequently, Pope filed this action against the Attorney General in Newberry County on August 10, 2011, seeking items 1 through 4. By this time, Respondent Alan Wilson had been elected to the office of Attorney General (the AG). The AG later filed a motion to dismiss Pope's complaint and to strike the attached affidavits, and Pope filed a motion for summary judgment. In an order dated November 22, 2011, the circuit court denied the motion to dismiss, required the AG to answer Pope's complaint, required the consolidation of this action with the fiduciary litigation pending in Richland County, and declined to address the remaining

motions. On January 11, 2012, the circuit court denied Pope's motion to alter or amend its order and issued a Form 4 order transferring venue to Richland County.

The AG later filed a motion for judgment on the pleadings pursuant to Rule 12(c), SCRCP,[5] asserting that the items sought by Pope were exempt from FOIA because they were subject to discovery in the fiduciary litigation. Subsequently, the AG sought to amend his answer to assert that he had no documents responsive to Pope's FOIA request other than certain attached exhibits and an unsigned copy of the Wingate Agreement, which was subject to the AG's motion for a protective order that was "under judicial review."

The exhibits attached to the proposed amended answer included a copy of the AG's policy concerning the engagement of private counsel, the AG's correspondence with Russell Bauknight, and an unexecuted copy of the standard "Litigation Retention Agreement For Special Counsel Appointed by the South Carolina Attorney General." The proposed amended answer also stated (1) the AG had no objection to disclosing the Wingate Agreement if the circuit court ruled it could be released and (2) he did not have any documents pertaining to item 4 of Pope's request.

In an order dated June 14, 2016, the circuit court granted the AG's motion for judgment on the pleadings and dismissed this action. In its order, the circuit court concluded that FOIA was "not a tool that may be used to bypass civil discovery in a pending case." The circuit court also concluded that the requested documents were exempt under FOIA because the South Carolina Rules of Civil Procedure constitute "law" for purposes of the exemption in section 30-4-40(a)(4) of the South Carolina Code (2007), which allows a public body to exempt from disclosure "[m]atters specifically exempted from disclosure by statute or law." Pope filed a motion to alter or amend the circuit court's order, but the circuit court denied the motion. This appeal followed.[6]

---

[5] Rule 12(c) states, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[6] Included in Pope's assignments of error is the argument that the circuit court should have granted her summary judgment motion. However, "the denial of a motion for

STANDARD OF REVIEW

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id.*

In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.* at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). Moreover, "a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.* (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339).

LAW/ANALYSIS

I. FOIA Exemption

Pope argues the circuit court erred in concluding her FOIA request was subordinate to discovery rules. She asserts that her status as a defendant in the fiduciary litigation does not affect her rights under FOIA.

Within FOIA, our legislature has found that

> it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials *at a*

---

summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

> *minimum cost or delay to the persons seeking access* to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007) (emphasis added). Accordingly, our supreme court has stated, "FOIA is remedial in nature and should be liberally construed to carry out its purpose." *Evening Post Publ'g. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011).

In keeping with this construction, "the exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA . . . 'to guarantee the public reasonable access to certain activities of the government.' To further advance this purpose, the government has the burden of proving that an exemption applies." *Evening Post Publ'g. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (citations omitted) (quoting *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996)); *see also Berkeley Cty. Sch. Dist.*, 392 S.C. at 83, 708 S.E.2d at 748 ("[T]he exemptions should be narrowly construed *to not provide a blanket prohibition of disclosure* in order to 'guarantee the public reasonable access to certain activities of the government.'" (emphasis added) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)). Moreover, "[t]he determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis." *Berkeley Cty. Sch. Dist.*, 392 S.C. at 82, 708 S.E.2d at 748.

In *State v. Robinson*, our supreme court considered whether FOIA allowed a criminal defendant to obtain certain law enforcement records that were not discoverable under Rule 5(a)(2), SCRCrimP.[7] 305 S.C. 469, 476–77, 409 S.E.2d

[7] Rule 5(a)(2) states,

> Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents *in connection with the investigation or prosecution of the case*, or of statements made by prosecution witnesses or prospective prosecution witnesses[,] provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution [that] relates to the subject matter as to

404, 409 (1991). The court concluded that FOIA "exempts discovery of material that is not otherwise discoverable under Rule 5(a)(2)," stating that item (3) of section 30-4-40(a) "clearly exempts information regarding pending criminal prosecutions." *Id.* at 476, 409 S.E.2d at 409.

In discussing the defendant's FOIA request, the court noted the holdings of the United States Supreme Court in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989) and *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978): "In construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the *applicable* rules of discovery." *Robinson*, 305 S.C. at 476, 409 S.E.2d at 409 (emphasis added). The court cited *Robbins Tire* regarding the federal FOIA exemption for certain law enforcement records: "An exemption to disclosure based on 'interference with enforcement proceedings' has been construed to exempt disclosure of any information that would give a party litigant greater access to the government's opposing case." *Id.* at 476, 409 S.E.2d at 409.[8]

In the present case, the circuit court relied heavily on the above-quoted language from *Robinson*. Significantly, *Robinson* and the other opinions on which the circuit court relied invoked a specific exemption listed in FOIA or the federal FOIA to address a legitimate concern of a government agency. In *John Doe Agency*, the Court examined the applicability of the federal FOIA's exemption for law enforcement records: "In deciding whether Exemption 7 applies, . . . a court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery." 493 U.S. at 153.

> which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

(emphasis added).

[8] Citing *Robbins Tire*, the court added, "The government need not prove the need for nondisclosure on a case-by-case basis." *Id.* We interpret this statement as specific to the law enforcement records exemption and not FOIA in general, as the court has stated more recently that the "determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis." *Berkeley Cty. Sch. Dist.*, 392 S.C. at 82, 708 S.E.2d at 748.

Further, in *Robbins Tire*, the Court applied the exemption for law enforcement records when production of those records would interfere with law enforcement proceedings. The Court noted,

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. Respondent concedes that it seeks these statements solely for litigation discovery purposes, and that FOIA was *not* intended to function as a private discovery tool[.] Most, if not all, persons who have sought prehearing disclosure of Board witnesses' statements have been in precisely this posture—parties respondent in Board proceedings. Since we are dealing here with the narrow question [of] whether witnesses' statements must be released five days prior to an unfair labor practice hearing, we cannot see how FOIA's purposes would be defeated by deferring disclosure until after the Government has [completed the presentation of its case].

437 U.S. at 242 (citations omitted).

Importantly, the Court acknowledged, "This is *not* to suggest that respondent's rights are in any way *diminished* by its being a private litigant, but neither are they enhanced by respondent's particular, litigation-generated need for these materials." *Id.* n. 23 (emphases added).

The circuit court also relied on *United States v. Weber Aircraft Corp.*, in which the United States Supreme Court examined "whether confidential statements obtained during an Air Force investigation of an air crash are protected from disclosure by [the federal FOIA exemption for] 'inter-agency or intra-agency memorandums or letters [that] would not be available by law to a party other than an agency in litigation with the agency.'" 465 U.S. 792, 794–95 (1984). The Court held that the two witness statements in question were "unquestionably 'intra-agency memorandums or letters'" and they were privileged with respect to pretrial discovery as confidential statements made to air crash safety investigators pursuant to established federal case law. *Id.* at 798. The Court concluded that this privilege brought the statements within the exemption's language "would not be available by law to a party other than an agency in litigation with the agency." *Id.* at 797–98.

The Court also reiterated its previous holding that the statutory exemption in question "simply incorporates civil discovery privileges." *Id.* at 799. The Court responded to the contention of the FOIA plaintiffs that they could "obtain through the FOIA material that is normally privileged" by stating that such an ability "would create an anomaly in that the FOIA could be used to supplement civil discovery" and noting that the Court has "consistently rejected such a construction of the FOIA." *Id.* at 801. The Court further stated, "We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." *Id.* at 801–802. Again, the discovery policy to which the Court subordinated a citizen's FOIA rights was one recognized by the federal FOIA itself and incorporated into a FOIA exemption.

Based on the foregoing, we conclude that when a citizen in litigation with a governmental agency directs a FOIA request to that agency, the agency must show the applicability of a specific FOIA exemption to each requested public record.[9] If

---

[9] The seriousness with which our appellate courts have viewed FOIA rights in the past is an additional reason for our appellate courts to continue requiring the government to show an exemption. *See Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 554, 762 S.E.2d 687, 688 (2014) (requiring strict compliance with section 30-4-30(c), which requires the agency to issue a final opinion as to the public availability of the requested record within fifteen days of receipt of a FOIA request, and holding the agency's response was equivocal and evasive and, therefore, not a final opinion on the public availability of the requested documents); *id.* at 553, 762 S.E.2d at 688 (quoting from the agency's response: "'if we are unable to . . . release the requested file(s)[,] you will be notified of the decision,'" and characterizing it as "we will get to it when we get to it"); *id.* (stating that the response sought to delay the final determination on the public availability of the requested documents and was "manifestly at odds with the clarity mandated by section 30–4–30(c)"); *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 156–58, 711 S.E.2d 895, 897–98 (2011) (recounting how the defendant's provision of the requested documents mooted the plaintiff's action, interpreting the language "at a minimum cost or delay" in section 30-4-15 and concluding, "Honoring legislative intent as expressed in FOIA by awarding attorney's fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney's fee award"); *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (rejecting the defendant's assertion that, even in the absence of an exemption, public policy subordinated disclosure of a murder victim's death certificate and stating, "In the instant case, we find no public policy [that] overrides

the government invokes the exemption in section 30-4-40(a)(4), "[m]atters *specifically* exempted from disclosure by statute or law,"[10] to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record rather than vaguely referencing "discovery rules" or the "South Carolina Rules of Civil Procedure" and lumping all of the requested documents together into one category to justify nondisclosure.[11] *See City of N. Charleston*, 363 S.C. at 457, 611 S.E.2d at 499 ("[T]he exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA . . . 'to guarantee the public reasonable access to certain activities of the government.' To further advance this purpose, the government has the burden of proving that an exemption applies." (citations omitted) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)); *see also Berkeley Cty. Sch. Dist.*, 392 S.C. at 83, 708 S.E.2d at 748 ("[T]he exemptions should be narrowly construed *to not provide a blanket prohibition of disclosure* in order to 'guarantee the public reasonable access to certain activities of the government.'" (emphasis added) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)). In sum, we decline to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in possession of those records.

Here, the circuit court did not address a specific discovery rule in its order but merely stated that the requested documents "are potentially discoverable documents under pending litigation in Richland/Aiken counties and will be governed by the South Carolina Rules of Civil Procedure." Such a vague assertion comes close to the "blanket prohibition" that our supreme court has cautioned against. *See Berkeley Cty. Sch. Dist.*, 392 S.C. at 83, 708 S.E.2d at 748 ("[T]he exemptions should be narrowly construed *to not provide a blanket prohibition of disclosure* in order to 'guarantee the public reasonable access to certain activities of the government.'" (emphasis added) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)). Affirming such a conclusion could possibly encourage circuit courts to gloss over what should be a case-specific analysis. *See id.* at 82, 708 S.E.2d at 748 ("The determination of whether documents or portions thereof are exempt from FOIA must be made on a

---

the goals of FOIA"); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 166 (Ct. App. 2003) ("The essential purpose of the FOIA is to protect the public from secret government activity.").

[10] (emphasis added).

[11] We note that in the present case, the AG did not assert an exemption in his initial response to Pope's July 2011 FOIA request. The record indicates the first assertion of an exemption was in a bench brief dated May 2, 2016, nearly five years later.

case-by-case basis."). Therefore, we reverse the circuit court's order granting judgment on the pleadings and remand for further proceedings consistent with this opinion. *See Falk*, 341 S.C. at 287, 533 S.E.2d at 353 ("[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339)); *id.* ("[A] judgment on the pleadings is considered to be a drastic procedure by our courts." (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339)).

II. Attorney's Fees

Pope argues she is entitled to attorney's fees because the AG violated FOIA by (1) failing to respond to her initial request with a final determination within 15 days, as required by section 30-4-30(c) of the South Carolina Code (2007),[12] (2) refusing to provide documentation satisfying items 1 and 2 until he filed his proposed amended answer on March 7, 2013, and (3) continuing to refuse to provide item 3 of her request even after a federal court concluded that it is a public document.

Section 30-4-100(B) of the South Carolina Code (Supp. 2018) provides,

> If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

Our supreme court has interpreted this provision to mean that even if a person seeking FOIA relief prevails in full, the circuit court has discretion as to whether to award attorney's fees and costs. *See Litchfield Plantation Co. v. Georgetown Cty. Water & Sewer Dist.*, 314 S.C. 30, 33, 443 S.E.2d 574, 576 (1994) ("As § 30-4-100(b) provides attorneys' fees *may* be awarded, the special referee has the discretion to award fees."); *see also Sexton*, 283 S.C. at 567–68, 324 S.E.2d at 315–16 (holding the circuit court did not abuse its discretion in awarding attorney's fees to the plaintiff "to encourage agencies to comply with FOIA requests" despite the agency's purported good faith reliance on a regulation limiting public access to death

[12] The statute was amended in 2017 to require a response within ten days unless the record is more than two years old.

certificates, which the court concluded was repugnant to FOIA). Because we are remanding the case for further proceedings, the question of attorney's fees is premature.

CONCLUSION

Based on the foregoing, we reverse the circuit court's order dismissing Pope's complaint and remand for further proceedings consistent with this opinion. In light of this disposition, we need not address Pope's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

REVERSED AND REMANDED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Tony Latrell Kinard, Respondent.

Appellate Case No. 2016-001639

Appeal From Newberry County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5658
Heard March 12, 2019 – Filed June 19, 2019

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, for Appellant.

Michael Vincent Laubshire and Richard James Dolce, both of the Laubshire Law Firm, LLC, of Columbia, for Respondent.

LOCKEMY, C.J.: The State appeals the dismissal of a driving under the influence (DUI) charge arguing the trial court misinterpreted sections 56-5-2953(A) and (B) of the South Carolina Code (2018). We reverse the dismissal of the DUI charge against Tony Latrell Kinard and remand the case for trial.

FACTS

On November 3, 2015, at approximately 6:30 in the evening, Tony Latrell Kinard was involved in a two-car accident in Newberry County. Newberry County Deputy Jesse Snelgrove, whose vehicle was not equipped with a video camera, responded to the scene after the arrival of fire and EMS personnel. Deputy Snelgrove testified that when he arrived at the scene, he observed Kinard yelling at the EMS personnel and at a female he later found out was Kinard's girlfriend. Deputy Snelgrove testified he attempted to calm Kinard. Kinard responded by yelling and cursing at him and staring at him with his fist balled up. Deputy Snelgrove, citing concern about being assaulted, handcuffed Kinard, placed him under arrest for disorderly conduct, and put Kinard in his car. Shortly afterward, Trooper Mickey Barnett with the Highway Patrol arrived at the scene. Prior to his arrival, Trooper Barnett activated his in-car video camera. He parked his patrol car directly behind Deputy Snelgrove's car, which had its blue lights on. Deputy Snelgrove informed Trooper Barnett that Kinard's girlfriend removed bottles of alcohol from Kinard's car. Trooper Barnett testified he observed Kinard in the backseat of Deputy Snelgrove's car staring straight ahead and Kinard refused to speak to him. Trooper Barnett placed Kinard under arrest for driving under the influence, citing his demeanor and the fact he "smelled of alcohol." Trooper Barnett's video camera recorded the scene. From the video, Trooper Barnett can be heard Mirandizing Kinard, but because Kinard is inside of Deputy Snelgrove's car and he does not verbally respond to Trooper Barnett, Kinard is neither seen nor heard on the video.

Kinard's trial was set to begin on June 8, 2016, in Newberry County. Just prior to trial, Kinard made a motion to dismiss the DUI charge arguing the video failed to meet the requirements of section 56-5-2953 of the South Carolina Code (2018). The trial court heard the testimony of Deputy Snelgrove and Trooper Barnett, viewed the video of Kinard's arrest, and heard arguments from both Kinard and the State. The trial court granted Kinard's motion on the record and prepared a written order to that effect dated July 25, 2016. The State filed a motion to reconsider on June 9, 2016. The trial court held a hearing on the State's motion to reconsider on July 25, 2016, and in an order issued the same day, the trial court denied the State's motion. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. Thus, on review, the appellate court is limited to determining whether the trial judge abused

his discretion." *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011) (citations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id.* (citations omitted).

LAW/ANALYSIS

A. Section 56-5-2953(A)

The State first argues the trial court erred in dismissing the DUI charge due to its misinterpretation of section 56-5-2953(A) of the South Carolina Code (2018). Section 56-5-2953(A) provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, *and show the person being advised of his Miranda rights*.
>
> . . .

(emphasis added).

"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). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably

discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (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 Auction of Lexington, Inc.,* 324 S.C. at 69, 476 S.E.2d at 692.

Our courts examined the legislative intent of section 56-5-2953 and determined "the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." *State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011), *aff'd*, 403 S.C. 606, 743 S.E.2d 802 (2013). In *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), we determined section 56-5-2953 serves two primary purposes. The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. *Id.* at 306, 768 S.E.2d at 77. The other purpose, which is relevant to the case at hand, is to protect the rights of the defendant by "requiring video recording of the person's arrest and of the officer issuing *Miranda* warnings." *Id*.

The State concedes Kinard is not seen or heard on the video, but rather argues the video demonstrates Trooper Barnett talking to Kinard and advising Kinard of his *Miranda* rights. Therefore, the State maintains it did not fail to meet the requirements of section 56-5-2953(A).

Section 56-5-2953(A)(1)(a) states the "video recording at the incident site must: . . . show the person being advised of his Miranda rights." The trial court interpreted the word "show" to mean "to cause or to permit the person being advised of his Miranda rights to be seen." This interpretation comports with the plain language of the statute and with the legislative purpose of protecting the rights of the defendant. In addition, section 56-5-2953(A) states a person who violates the DUI provision "must have his conduct at the incident cite . . . video recorded." Under a plain reading of the statute, a person's conduct cannot be captured from a video in which he cannot be seen.

Although South Carolina courts have not specifically addressed a situation identical to the facts of this case, our courts have dealt with similar situations. In *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183 (2014), the supreme court considered whether a silent video meets the requirements of section 56-5-2953(A). That court found "the statute required a videotape not merely of the individual's

conduct while being read his *Miranda* and informed consent rights, but also that it 'must include' 'the reading of *Miranda* rights' and 'the person being informed that he is being videotaped, and that he has the right to refuse the test.'" *Id.* at 480, 763 S.E.2d at 185-86 (quoting S.C. Code Ann. § 56-5-2953(A)(2)(b)). Thus, the court held the silent video did not meet the requirements of section 56-5-2953(A). *Id.*

In addition, we considered a situation in which an officer moved the defendant off camera during the administration of the breath test in *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). The viewer could hear the breath test, but the viewer could not see defendant on the videotape. Interpreting section 56-5-2953(A), we determined "the officer violated section 56-5-2953(A)(2)(c) when he failed to capture the administration of the breath test on the videotape." *Id.* at 189, 720 S.E.2d at 520.

However, in *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), we found no violation of section 56-5-2953 when the video recording of the incident briefly omitted the suspect. We based our decision on the fact the "omission does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant." *Id*. at 306, 768 S.E.2d at 77.

Given our understanding of the legislative intent in section 56-5-2953(A), the requirement that the arrest and *Miranda* reading be videotaped serves to protect the rights of the defendant. We agree with the trial court "[w]ithout being able to see [Kinard] on the video it is not possible to determine if he actually heard and understood his Miranda rights." Like the circumstances in *Johnson*, the officer failed to capture the arrest and *Miranda* warning on the videotape. Furthermore, in accordance with *Sawyer*, one cannot glean Kinard's conduct while being read his *Miranda* and informed consent rights from the video. Unlike the defendant in *Taylor*, this omission occurs during the event serving to protect the rights of the defendant. Accordingly, we find the trial court did not abuse its discretion in finding the video did not comply with section 56-5-2953(A).

B. Section 56-5-2953(B)

Next, the State argues the trial court erred in not finding compliance with 56-5-2953(A) was excused under section 56-5-2953(B) of the South Carolina Code (2018). Section 56-5-2953(B) provides:

> (B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in

> the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

In *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011), the supreme court explained noncompliance with section 56-5-2953(A) is excused pursuant to section 56-5-2953(B):

> (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a

> sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

The supreme court further clarified in *Teamer v. State*, 416 S.C. 171, 177, 786 S.E.2d 109, 112 (2016), "based on this [c]ourt's interpretation of the statute in *Roberts*, an affidavit is not needed to qualify for the third and fourth exceptions."

The trial court found section 56-5-2953(B) generally did not apply to this case because a video recording exists. The trial court presumably focused on the fact that the officer did not fail to "produce the video." However, this reading does not comport with the legislative intent of the statute. As we stated previously, "[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc.*, 324 S.C. at 69, 476 S.E.2d at 692. "The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 334, 592 S.E.2d 335, 339 (Ct. App. 2004). Furthermore, "[i]n construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

As we previously mentioned, the legislature intended for section 56-5-2953 to require the State to video important events in the process of collecting DUI evidence. Reading the statute as a whole, we note section 56-5-2953(B) states: "Failure by the arresting officer to produce the video recording *required by this section* . . . ." (emphasis added). As the supreme court noted in *Town of Mount Pleasant,* the legislature intended subsection (B) to excuse noncompliance with subsection (A) in certain situations. 393 S.C. at 346, 713 S.E.2d at 285 (stating "[s]ubsection (B) of section 56–5–2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements."). A reading to the contrary would incentivize law enforcement not to produce videos in questionable cases, which is contrary to the purpose of this statute. Moreover, although we have not addressed this specifically, in cases like *Johnson*, 396 S.C. at

182, 720 S.E.2d at 516, cited above, we analyzed the applicability of 56-5-2953(B) before dismissing the case. Thus, we hold the trial court erred as a matter of law in finding 56-5-2953(B) inapplicable.

The State argues because this case involves an accident scene rather than a traditional DUI traffic stop, it qualifies for the third exception under 56-5-2953(B) and therefore, conformity with the statute must only begin as soon as practicable. Initially, the fact that Trooper Barnett started the video upon his arrival at the scene strongly supports a finding it was practicable at that time. The State relies on *State v. Henkel*, 413 S.C. 9, 774 S.E.2d 458 (2015) to support its argument that section 56-5-2953(B) applies to this case. Similar to this case, *Henkel* involved a car accident. *Id.* The defendant, Henkel, left the scene of the accident and law enforcement found him several hours later. *Id*. When the officer arrived, Henkel was receiving medical treatment in the back of an ambulance. *Id*. At that point, the officer read Henkel his *Miranda* rights and performed a field sobriety test on him while he was in the ambulance and out of view of the camera. *Id*. Later, while on camera, the officer read him his *Miranda* rights again. *Id*. The issue was whether the requirements of section 56-5-2953(A) were met. *Id*. The court determined section 56-5-2953(B) applied and the first reading of *Miranda* occurred prior to the time video recording became practicable because Henkel was in the back of an ambulance receiving medical treatment. *Id*. at 15-16, 774 S.E.2d at 462.

This case also involves an accident. However, the accident is not the reason Kinard could not be videotaped. Deputy Snelgrove testified Kinard was yelling at multiple individuals and was not cooperating with EMS workers when he arrived at the scene. When Deputy Snelgrove attempted to calm him down, Kinard yelled profanities at him and "squared off" at him twice, once with a balled up fist. Kinard's behavior lead to Deputy Snelgrove putting him in handcuffs, placing him under arrest for disorderly conduct, and putting him in his car. Deputy Snelgrove apprised Trooper Barnett of Kinard's behavior. Trooper Barnett decided not to attempt to remove Kinard from Deputy Snelgrove's car based on Kinard's prior behavior and refusal to respond to him. Thus, similar to *Henkel*, it was impractical to remove Kinard from the car to capture him on the video. However, unlike *Henkel*, the practicality of videoing Kinard's conduct was not due to the accident, but Kinard's own conduct. Therefore, based on the totality of the circumstances, we find the failure to video Kinard while Trooper Barnett read him his *Miranda* rights qualifies under the fourth exception under section 56-5-2953(B).

CONCLUSION

The trial court correctly found the State did not comply with section 56-5-2953(A) when it failed to show Kinard during the reading of *Miranda*. However, the trial court abused discretion in finding section 56-5-2953(B) inapplicable. Based on the totality of the circumstances, the State's failure to comply with section 56-5-2953(A) is excused under 56-5-2953(B). The dismissal of the DUI charge against Kinard is

REVERSED and REMANDED.

SHORT and MCDONALD, JJ., concur.