The Supreme Court of South Carolina

In the Matter of Craig J. Poff, Respondent.

ORDER

On August 22, 2011, respondent was definitely suspended from the practice of law for six (6) months. In the Matter of Poff, Op. No. 27028 (S.C. Sup. Ct. filed August 22, 2011) (Shearouse Adv. Sh. No. 28 at 44). The Office of Disciplinary Counsel now petitions the Court to appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Mary Sharp, Esquire, has been duly appointed by this Court.

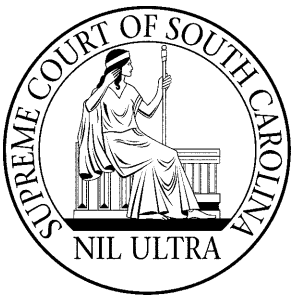
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Mary Sharp, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Sharp's office.

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

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

Columbia, South Carolina

August 26, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
August 29, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2011-UP-400-William McKinnedy v. S.C. Department of Corrections
(Administrative Law Court, Judge John D. McLeod)

2011-UP-401-Back Swamp Community Assocation, et al. v. S.C. Department of Health and Environmental Control and Haselden Turkey Farm
(Administrative Law Court, Judge Ralph King Anderson, III)

2011-UP-402-Erika L. Jones v. Department of Social Services, Employer, and State Accident Fund, Carrier
(Charleston, Judge Thomas L. Hughston, Jr.)

2011-UP-403-SCDSS v. William A. In the interest of two minor children under the age of 18
(Berkeley, Judge Jack A. Landis)

2011-UP-404-State v. Carmichael Trevon Flowers
(Florence, Judge Ralph King Anderson, Jr.)

2011-UP-405-SCDSS v. Martha H., Jimmy J., and John Doe
(Spartanburg, Judge Phillip K. Sinclair)

PETITIONS FOR REHEARING

4805-Limehouse v. Hulsey	Denied 08/12/11
4819-Columbia/CSA v. SC Medical Malpractice	Pending
4834-SLED v. 1-Speedmaster S/N 00218	Pending
4838-Major v. Penn Community	Pending
4839-Martinez v. Spartanburg	Pending
4847-Smith v. Regional Medical	Denied 08/23/11
4851-Davis v. KB Home/Meyer	Denied 08/23/11
4857-Stevens Aviation v. DynCorp	Pending
4858-Pittman v. Pittman	Pending
4861-Moeller v. Moeller	Pending

4862-5 Star v. Ford Motor Company	Pending
4864-Singleton v. Kayla R.	Pending
2011-UP-131-Burton v. Hardaway	Denied 08/24/11
2011-UP-162-Bolds v. UTI Integrated	Denied 08/23/11
2011-UP-174-Doering v. Woodman	Denied 08/24/11
2011-UP-199-Davidson v. City of Beaufort	Denied 08/24/11
2011-UP-209-McKinnedy v. SCDC	Denied 08/23/11
2011-UP-255-State v. Walton	Pending
2011-UP-260-McGonigal's v. RJG Construction	Denied 08/12/11
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent N.	Denied 08/24/11
2011-UP-273-State v. K. Ware	Denied 08/15/11
2011-UP-285-State v. B. Burdine	Denied 08/23/11
2011-UP-300-Service Corp. v. Bahama Sands	Denied 08/23/11
2011-UP-301-Asmussen v. Asmussen	Pending
2011-UP-304-State v. Winchester	Denied 08/17/11
2011-UP-305-SouthCoast Comm. Bank v. Low Country	Denied 08/15/11
2011-UP-325-Meehan v. Newton	Pending
2011-UP-326-Salek v. Nirenblatt	Denied 08/24/11
2011-UP-328-Davison v. Scaffe	Pending

2011-UP-329-Still v. SCBCB	Denied 08/23/11
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-340-Smith v. Morris	Pending
2011-UP-343-State v. Dantzler	Denied 08/23/11
2011-UP-346-Batson v. Northside	Denied 08/23/11
2011-UP-350-Ringstad v. SCDPPPS	Denied 08/24/11
2011-UP-353-McKnight v. Montgomery	Denied 08/23/11
2011-UP-358-JB Properties v. SC Coast & Lakes	Denied 08/23/11
2011-UP-359-Price v. Investors Title Ins.	Denied 08/22/11
2011-UP-361-State v. S. Williams	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-364-Ugino v. Peter	Pending
2011-UP-365-Strickland v. Kinard	Pending
2011-UP-371-Shealy v. The Paul Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring, LLC v. P Mining	Pending
2011-UP-379-Cunningham v. Cason	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-386-Moses v. Smith	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4526-State v. B. Cope	Pending

4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4592-Weston v. Kim's Dollar Store	Pending
4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Pending
4682-Farmer v. Farmer	Pending
4687-State v. Taylor, S.	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending

4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4702-Peterson v. Porter	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4732-Fletcher v. MUSC	Pending
4737-Hutson v. SC Ports Authority	Pending
4738-SC Farm Bureau v. Kennedy	Pending
4742-State v. Theodore Wills	Pending
4746-Crisp v. SouthCo	Pending
4747-State v. A. Gibson	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4755-Williams v. Smalls	Pending
4756-Neeltec Enterprises v. Long	Pending

4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4769-In the interest of Tracy B.	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4781-Banks v. St. Matthews Baptist Church	Pending
4785-State v. W. Smith	Pending
4789-Harris v. USC	Pending
4790-Holly Woods Assoc. v. Hiller	Pending
4792-Curtis v. Blake	Pending
4794-Beaufort School v. United National Ins.	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4800-State v. Wallace	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending

4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-253-State v. M. Green	Pending
2010-UP-256-State v. G. Senior	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-281-State v. J. Moore	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-289-DiMarco v. DiMarco	Pending

2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending
2010-UP-372-State v. Z. Fowler	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-382-Sheep Island Plantation v. Bar-Pen	Pending
2010-UP-406-State v. Larry Brent	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-427-State v. S. Barnes	Pending
2010-UP-437-State v. T. Johnson	Pending

2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-437-State v. T. Johnson	Pending
2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-039-Chevrolet v. Azalea Motors	Pending
2011-UP-041-State v. L. Brown	Pending

2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-110-S. Jackson v. F. Jackson	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending
2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-130-SCDMV v. Brown	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-147-State v. B. Evans	Pending

2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-187-Anasti v. Wilson	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-333-State v. W. Henry	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CFRE, LLC, Appellant,

v.

Greenville County Assessor, Respondent.

Appeal From Richland County
Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 27032
Heard June 21, 2011 – Filed August 29, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. William Ray, of Greenville, for Appellant,

Jeffrey D. Wile, County of Greenville, of Greenville, for Respondent.

ACTING JUSTICE MOORE: CFRE, LLC appeals the decision of the Administrative Law Court (ALC) that real estate owned by the company

is not entitled to the residential tax ratio under Section 12-43-220(c) of the South Carolina Code (Supp. 2010). Furthermore, CFRE argues the ALC erred in not sanctioning the Greenville County Assessor (Assessor) for failing to respond to discovery requests from CFRE. While we hold the ALC did not abuse its discretion in not sanctioning the Assessor, we reverse the ALC's conclusion regarding CFRE's entitlement to the legal residence tax ratio and remand.

FACTUAL/PROCEDURAL BACKGROUND

Sherry Ray purchased residential property in Greenville County, South Carolina, in 1991 and has lived there continuously ever since. Because she owned no other residential property, the property was taxed at the four percent legal residence tax ratio.

In 2004, Ray formed CFRE, a single-member limited liability company with herself as the sole member. CFRE conducts no business and was formed solely for estate planning and asset protection purposes. To that end, Ray declined to have CFRE taxed as a corporation and, in 2006, deeded the title in her home to it. Because there was a conveyance by deed of the property, the Assessor automatically commenced a reassessment of the property for the 2007 tax year. Accordingly, the property was subjected to the default property tax ratio of six percent until CFRE could prove entitlement to the lower ratio under section 12-43-220.[1]

When CFRE sought the four percent ratio, the Assessor denied it eligibility. CFRE then requested a personal interview with the Assessor's office, which is the next step in the appeals process. During that interview, Ray met with Debbie Adkins, who is the manager for the group within the Assessor's office responsible for property classifications. Adkins refused to change the ratio back to four percent because she believed, based primarily on an Attorney General's Opinion from 2003, a limited liability company

[1] This reassessment also resulted in an increase in the property's fair market and taxable market values. CFRE and the Assessor reached a separate agreement with respect to this increase that is not the subject of this appeal.

categorically cannot qualify for it. CFRE then appealed to the Greenville County Board of Assessment Appeals, which affirmed the Assessor's decision.[2] Accordingly, CFRE requested a contested case hearing before the ALC.

Following assignment to the ALC, CFRE filed interrogatories and a request for production on the Assessor. After not receiving a response to either of these, CFRE filed a motion to compel. Apparently in response to CFRE's motion, the ALC ordered the Assessor to produce certain documents pertaining to the case; however, the court did not specifically order the Assessor to respond to the interrogatories or requests for production. Although the Assessor never did respond to CFRE's discovery requests, it fully complied with the court's order, submitting its preliminary tax appeal statement, which set forth a statement of the facts and legal authority it planned to use, and a filing titled "Exchange of Evidence and Foundation for Documents." Furthermore, the Assessor twice supplemented these filings.

Just days before the hearing, CFRE moved to prevent the Assessor from presenting any evidence or argument due to its failure to respond to the discovery requests. The Assessor steadfastly maintained that it had provided CFRE all the information in the Assessor's possession regarding this dispute and asked the court to permit the case to proceed. Although the ALC *sua sponte* offered to grant CFRE a continuance and order the Assessor to specifically respond to CFRE's discovery requests, CFRE declined the court's invitation because it believed the Assessor would simply respond that there is no additional information it could provide.

Ultimately, the ALC found CFRE was not entitled to the four percent ratio. In particular, the ALC held that only a "natural person" could qualify

[2] At some point during this process, Adkins told Ray that if she were to retain a life estate in the property, with CFRE having the remainder, she could receive the four percent ratio. Ray amended the 2006 deed to reflect this and accordingly has received this lower ratio for all subsequent years. Thus, CFRE is only appealing the imposition of the six percent ratio for the 2007 tax year. We express no opinion regarding whether this transfer was valid.

for the legal residence ratio. The court further found that the General Assembly's failure to adopt two amendments to section 12-43-220 specifically stating that single-member limited liability companies could qualify demonstrates the General Assembly's original intent that they could not. Finally, the court supported its ruling with two Attorney General's Opinions stating these companies cannot receive the four percent ratio. CFRE appealed to the court of appeals, and this case was certified to us pursuant to Rule 204, SCACR.

ISSUES PRESENTED

Three issues are raised on appeal:[3]

I. Did the ALC err in concluding that a single-member limited liability company that is not taxed as a corporation cannot qualify for the four percent legal residence property tax ratio?

II. Did the ALC err in not sanctioning the Assessor for its failure to respond to CFRE's discovery requests?

III. Is CFRE entitled to costs and attorney's fees?

LAW/ANALYSIS

I. ELIGIBILITY FOR FOUR PERCENT RATIO

CFRE argues the ALC erred in concluding that section 12-2-25(B)(1) only applies to income taxes[4] and only natural persons can qualify for the legal residence ratio. We agree.

[3] We have consolidated CFRE's Issues on Appeal I, II, and IV because they all concern the ALC's interpretation of Section 12-2-25(B)(1) of the South Carolina Code (Supp. 2010). Furthermore, we have restated CFRE's Issue on Appeal III to reflect the thrust of CFRE's argument as it solely concerns the harm CFRE suffered as a result of the Assessor's conduct during discovery.

Tax appeals to the ALC are subject to the Administrative Procedures Act (APA). *Long Cove Home Owners' Ass'n v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857, 860 (1997). Accordingly, we review the decision of the ALC for errors of law. S.C. Code Ann. § 1-23-380(5)(d) (Supp. 2010). Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Thus if the words are unambiguous, we must apply their literal meaning. *Id.* at 498, 640 S.E.2d at 459.

However, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). We therefore should not concentrate on isolated phrases within the statute. *Id.* Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose. *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010). In that vein, we must read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," *id.* at 377, 665 S.E.2d at 651, for "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law" *id*. at 382, 665 S.E.2d at 654.

---

[4] It is not clear whether the ALC actually held section 12-2-25(B)(1) applies only to income taxes. In fact, the only reference to income taxes comes from the court's quotation of an Attorney General's Opinion and not from any holding of the court. However, because both parties argue this point in their briefs and it would be an additional sustaining ground under Rule 220(c), SCACR, we address this issue in full.

In this case, interlaced with these standard canons of statutory construction is our policy of strictly construing tax exemption statutes against the taxpayer. *See Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981). "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. It does not mean that we will search for an interpretation in [DOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* It is "[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning." *Id.* at 499-90, 280 S.E.2d at 58.

Section 12-43-220 provides, in relevant part:

> (c)(1) The legal residence and not more than five acres contiguous thereto, when owned totally or in part in fee or by life estate and occupied by the owner of the interest, . . . are taxed on an assessment equal to four percent of the fair market value of the property. If residential real estate is held in trust and the income beneficiary of the trust occupies the property as a residence, then the assessment ratio allowed by this item applies . . . . If this property has located on it any . . . business for profit, this four percent value does not apply to those businesses . . . . For purposes of the assessment ratio . . ., a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

Section 12-2-25(B) further provides that "[f]or South Carolina tax purposes: (1) a single-member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

In the case before us, it is undisputed that the residence is on less than five acres, owned in fee by CFRE, has no business for profit conducted on it, and is Ray's sole domicile. It is further undisputed that CFRE is a single-

member limited liability company that conducts no business for profit, is not taxed as a corporation, and has no other location besides the property in question. Thus, the only question presented is whether section 12-2-25(B)(1) permits single-member limited liability companies in the same position as CFRE to receive the lower ratio provided for in section 12-43-220.

Initially, we note that section 12-2-25(B)(1) appears in the "General Provisions" chapter of Title 12, which ostensibly applies to all the different forms of taxation provided for therein, be it income tax, corporate license fees, deed recording fees, gasoline tax, sales and use tax, county property tax, or any of the other myriad taxes imposed through that title. Furthermore, this section contains no language limiting its application within Title 12 in any way; rather, it simply applies generally for "South Carolina tax purposes."[5] Thus, the plain language of section 12-2-25(B)(1) renders it applicable to all forms of taxation in Title 12, and we would have to "search for an interpretation in [DOR]'s favor" to hold otherwise. If the General Assembly had intended its scope to be limited, say to just income taxes, it should have placed this language in the chapter pertaining to those taxes as opposed to the general provisions. Indeed, in this very case the Assessor did not impose a deed recording fee for Ray's transfer of the property to CFRE, a fee it would have been subject to but for section 12-2-25(B)(1). *See* S.C. Rev. Rul. 04-6, 2004 WL 1277696, at *12 ("Deeds that transfer realty to the SMLLC from its single member, and deeds that transfer realty to the single member of the SMLLC from the SMLLC, are not subject to the deed recording fee if the SMLLC is ignored for all tax purposes under the provisions of Code Section 12-2-25(B).").

[5] Prior to the 2001 amendments to section 12-2-25(B), that section explicitly stated that single-member limited liability companies received this treatment for "*all* South Carolina tax purposes." S.C. Code Ann. § 12-2-25(B) (2000) (emphasis added). The 2001 amendments removed the word "all" from the language, but they also added a host of other provisions to subsection (B) that are not relevant to this case. *See* 2001 Act No. 89 § 5. We do not believe this deletion was substantive, and as discussed *infra*, the Department of Revenue (DOR) has not treated it as such.

Even under the principles of strict construction, we cannot ignore the plain language of section 12-2-25(B)(1) that contains no restrictions on its applicability within Title 12. *See Se.-Kusan*, 276 S.C. at 490, 280 S.E.2d at 59 ("The clear language [of the exemption] does not restrict or condition the exemption upon use [of the machinery] by the owner. To allow Southeastern to claim this exemption produces no absurd result . . . . For these reasons, Southeastern may claim the exemption . . . ."). In fact, restricting its application to solely income taxes would render it completely superfluous. Under the income tax provisions in Title 12, an entity that is not taxed as a corporation under State law will be taxed through the individual member. S.C. Code Ann. § 12-6-510 (2000); *Anonymous Taxpayer v. S.C. Dep't of Rev.*, No. 07-ALJ-17-0189-CC, 2007 WL 2782804, at *2-3 (S.C. Admin. L. Judge Div. Aug. 23, 2007). Thus, for income tax purposes the company is already "not regarded as an entity separate from its owner," irrespective of any other provision; there would be no need for section 12-2-25(B)(1) if its scope were limited to just income taxes.

We further note that DOR, the agency charged with administering this State's revenue laws, has consistently interpreted section 12-2-25(B)(1) as applying broadly. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). For example, we will reject an agency's interpretation if it conflicts with the statute's plain language. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

At the hearing, CFRE introduced five publications from DOR which contain DOR's opinion that section 12-2-25(B)(1) applies to all taxes, not just income taxes: (1) a report from 2004 on legislative changes stating that the definitions in section 12-2-25 apply to all titles administered by DOR; (2) an undated tax worksheet that states "if a single member LLC is disregarded as an entity separate from its owner for federal income tax purposes, it is similarly disregarded for South Carolina income tax purposes" but then, in a later section, states generally that section 12-2-25(B)(1) "provides that a

single member LLC which is not taxed as a corporation will be ignored for all South Carolina tax purposes"; (3) a business tax guide from 2007 that provides, "A single member limited liability corporation [sic] that elects to be disregarded for federal income tax purposes will be disregarded for state tax purposes"; and (4) two publications concerning tax incentives for economic development, one from 2008 and one from 2009, stating that this section "provides that a single member limited liability company that is not taxed as a corporation for South Carolina income tax purposes will be ignored for all South Carolina tax purposes."

DOR has also applied section 12-2-25(B)(1) to provide this tax treatment in specific situations beyond income taxes. We have already noted that DOR believes the company is exempt from deed recording fees if it meets the criteria of section 12-2-25(B)(1). *See* S.C. Rev. Rul. 04-6, 2004 WL 1277696, at *12. DOR also found section 12-2-25(B)(1) means "these entities are treated as part of their member . . . for South Carolina sales and use tax purposes as well as South Carolina income tax purposes." S.C. Rev. Advis. Bull. 01-1, 2001 WL 34035772, at *2; *see also* S.C. Priv. Rev. Op. 00-4, 2000 WL 33941904, at *1-2. Additionally, DOR concluded that, based on section 12-2-25(B)(1), these single-member limited liability companies are not required to pay corporate license fees. S.C. Rev. Rul. 98-11, 1998 WL 34035222, at *2.

Because there is no limitation within section 12-2-25(B)(1) as to which areas of taxation it applies, DOR's construction of this section—both before and after the amendment removing the word "all"—comports with its plain language. Furthermore, we cannot find any compelling reasons to disregard DOR's interpretation, and the Assessor has pointed to none. DOR's own broader interpretation also militates against any effects of strictly construing this statute against CFRE. Therefore, we accord due deference to this agency's view and hold that section 12-2-25(B)(1) generally applies to all forms of taxation under Title 12 absent some other provision limiting it.[6]

[6] In reaching this conclusion, we assign no weight to the two Attorney General's Opinions relied upon the ALC. *See Eargle v. Horry County*, 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001) ("[T]his Court is not bound by

We also hold the ALC erred in finding that only a natural person can qualify for the legal residence ratio.[7] Strictly construing section 12-43-220, it does appear at first blush that only a natural person can qualify for that ratio. However, we cannot examine section 12-43-220 in isolation, and the ALC's

---

opinions of the Attorney General."). The first one did not address the impact of section 12-2-25(B)(1) on section 12-43-220. *See generally* Op. S.C. Att'y Gen. (Sept. 23, 2003), 2003 WL 22378701. The second found section 12-2-25(B)(1) was the General Assembly's attempt to enact a State counterpart to the federal statutes disregarding the corporate form in these circumstances for income tax purposes without citing any authority for this proposition. *See* Op. S.C. Att'y Gen. (Feb. 26, 2009), 2009 WL 580568, at *4. Furthermore, the second relied on the fact that this section references income tax in support of its argument that its scope is limited, *see id.*, but such a reading renders those words meaningless. The reference to income taxes merely is a threshold requirement.

[7] The ALC based its ruling mainly on the use of the first person in the following certification signed by the applicant:

> Under penalty of perjury, I certify that:
> (A) the residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that I do not claim to be a legal resident of a jurisdiction other than South Carolina for any purpose; and
> (B) that neither I nor any other member of my household is residing in or occupying any other residence which I or any member of my immediate family has qualified for the special assessment ratio allowed by this section.

S.C. Code Ann. § 12-43-220(c)(2)(ii); *see also* 27 S.C. Code Ann. Reg. 117-1800.1(2) (Supp. 2010) ("For property tax purposes the term 'Legal Residence' shall mean the permanent *home* or *dwelling place* owned by a person and occupied by the person thereof or where he or she is *domiciled.*" (emphasis added)).

order overlooked the specific impact of section 12-2-25(B)(1). That section disregards the corporate form for single-member limited liability companies that are not taxed as corporations, thereby merging the existence of the company and its member for all tax purposes. This means the company will qualify for any tax benefits its member qualifies for. Section 12-2-25(B)(1) is therefore the General Assembly's conferral of a special benefit on these companies that is not available for other business organizations that are also legally separate entities. It is not that the company itself is eligible independently, but rather it is eligible derivatively through its member; if that member is a natural person who meets all the criteria imposed by section 12-43-220 with respect to property titled in the company's name, then the company is entitled to this lower ratio. Because it is undisputed that Ray herself meets all the requirements of section 12-43-220 with respect to CFRE's property, CFRE is entitled to the legal residence ratio. Accordingly, we remand this matter for a determination of the precise refund owed to it.

As a final matter, we wish to address the ALC's reliance on two unenacted pieces of legislation specifically incorporating single-member limited liability companies within section 12-43-220 as demonstrative of the General Assembly's intent with respect to the current version of section 12-2-25(B)(1).[8] The ALC's logic in relying on these bills went as follows: because

[8] In 2008, the following language was proposed to be added to section 12-43-220(c)(2)(i):

> A single-member limited liability company where the single-member is an individual and that is not taxed for South Carolina income tax purposes as a corporation shall be considered an owner-occupant for purposes of the special property tax assessment ratio allowed by this item, if the single-member limited liability company is able to meet all the requirements of subsection (c).

S. 1313, 117th Gen. Assem. (S.C. 2008). The proposed amendment did not pass. The following year, an identical amendment was introduced and never left the committee. *See* S. 230, 118th Gen. Assem. (S.C. 2009).

an amendment presumably changes a statute, these bills would only be necessary to change section 12-2-25(B)(1)'s impact on section 12-43-220(c), which means 12-2-25(B)(1) currently does not permit these companies to receive the lower ratio. *See Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007) ("We have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law.").

However, the Supreme Court of the United States has stated the problem of relying on unenacted legislation quite succinctly:

> We have stated, however, that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1962)). "The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." *United States v. Wise*, 370 U.S. 405, 411 (1962). Therefore, "[w]hether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act." *United States v. Price*, 361 U.S. 304, 312 (1960); *see also Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) ("Generally, the legislature's subsequent acts 'cast no light on the intent of the legislature which enacted the statute being construed.'").

The present case perfectly illustrates the very folly of relying on unenacted legislation. Both CFRE and the Assessor could use the General Assembly's failure to enact Senate Bills 1313 and 230 equally to their advantage: the Assessor could argue the bills' failure demonstrates the

General Assembly's intent to exclude single-member limited liability companies from section 12-43-220, while CFRE could argue that because an amendment presumes a change to the existing statute, these bills were unnecessary as sections 12-2-25(B)(1) and 12-43-220 already conferred this benefit. Bills are introduced and fail in the General Assembly for any number of reasons, and it would be beyond speculation for us or any court to divine some import and meaning from the mere fact that the bills did not become law. Absent something more, it was error for the ALC to rely on them. *Cf. Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 385 n.13, 556 S.E.2d 357, 361 n.13 (2001) (stating it was permissible to rely, in part, on unenacted amendments because the failed bills were proposed by the same General Assembly that passed the legislation in question).

II. DISCOVERY REQUESTS

CFRE next argues that the ALC erred by not sanctioning the Assessor for its failure to formally respond to CFRE's interrogatories and production requests. We disagree.

As a threshold matter, CFRE has waived this issue. A litigant cannot concede an issue at trial and then raise it on appeal. *Southern Ry. v. Routh*, 161 S.C. 328, 333, 159 S.E. 640, 642 (1930). At the hearing, CFRE moved to prevent the Assessor from presenting any evidence or arguments because the Assessor never responded to CFRE's discovery requests. During arguments on the motion, the court *sua sponte* offered to continue the proceedings and order a formal response from the Assessor. However, CFRE declined the court's invitation and agreed that a continuance would be unlikely to produce anything further. CFRE then admitted "there are no material facts in dispute and the controversy [is] one of the law." This concession before the ALC that CFRE would receive no further information from the Assessor and there were no facts in dispute amounts to a waiver of any discovery issues. If CFRE wished to have the discovery process formally completed because there truly were undisclosed facts, it should have taken the *sua sponte* offer compelling formal responses given by the court.

However, CFRE contends it has not waived this issue because it learned of the existence of another witness after CFRE's initial concessions to the ALC. Adkins, in cross examination, revealed that her staff makes the initial classification of which tax ratio should be applied to the taxpayer, but she alone has the final decision of which ratio to apply. CFRE therefore contends that there is another person who has come in contact with this case previously unknown to it. However, Adkins' testimony makes clear that the unknown witness would not add any material facts or clarify any facts in dispute. Therefore, the existence of this witness is immaterial and CFRE's concession that it would receive nothing more of substance from the Assessor still stands.

Even if CFRE has not waived this issue, the ALC did not abuse its discretion in not ordering sanctions against the Assessor. "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct. App. 2008). A trial court's decision on whether or not to impose discovery sanctions is reviewed for abuse of discretion. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007); *see also Original Blue Ribbon Taxi Corp. v. SC Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (stating that the reviewing tribunal may affirm, reverse, or remand the decision of the ALC if "the substantive rights of the petitioner has been prejudiced because the finding, conclusion, or decision is . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.").

An affirmative duty does exist to answer interrogatories and respond to requests to produce. *See* Rule 33(a), SCRCP ("Each interrogatory *shall* be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer." (emphasis added)); Rule 34(b), SCRCP ("The party upon whom the request is served *shall* serve a written response . . . ." (emphasis added)); *see also Samples v. Mitchell*, 329 S.C. 105, 109-10, 495 S.E.2d 213, 215-16 (Ct. App.

1997) (stating that parties must disclose all evidence, or at least the existence of evidence, that relates to the case, not only evidence which they intend to use at trial).[9]

Here, the Assessor failed to formally answer any of the standard interrogatories or production requests. However, the ALC required the Assessor to produce various documents and enter them into the record, an order with which the Assessor fully complied. Furthermore, the documents submitted to the court created a complete record of the facts. Thus, despite arguing that it has been "prevented from being fully prepared for trial," there is no evidence of what material facts were not produced to CFRE, and anything CFRE contends is missing immaterial and irrelevant. Therefore, CFRE ultimately received all pertinent and material information it would have been entitled to had the Assessor specifically answered CFRE's requests.

Thus, notwithstanding the duty to formally answer the interrogatories and production requests, CFRE was not prejudiced by the Assessor's failure to do so. Although CFRE argues that *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), mandates that prejudice be presumed where there has been a failure of discovery, it fails to relay the remainder of the sentence in question from *Downey*: "[P]rejudice must be presumed and, *unless the party who has failed to submit to discovery can show lack of prejudice*, reversal is required." *Id.* at 46, 362 S.E.2d at 319 (emphasis added). As the Assessor correctly notes, CFRE itself conceded that there was nothing more the Assessor could produce that is of any consequence. The sole undiscovered fact that CFRE contends exists is the identity of an unnamed employee of the Assessor whom CFRE believes could be an additional witness, but that witness would provide no additional information. Accordingly, the Assessor has met its burden in proving that CFRE suffered no prejudice as a result of its merely technical failure to comply with this

[9] Rule 21 of the Rules of Procedure for the Administrative Law Court states that "[d]iscovery shall be conducted according to the procedures in Rules 26-37, SCRCP, except that only the standard interrogatories provided by SCRCP 33(b), as applicable to the pending contested case, are permitted."

Court's discovery rules. Therefore, we hold that the ALC did not abuse its discretion in not sanctioning the Assessor.

III. COSTS

In its brief, CFRE requested that this Court award costs in the amount of $646.50, the same amount it requested from the ALC. Furthermore, in its reply brief, CFRE requested an award of attorney's fees. However, "[i]n an action covered by [the South Carolina Revenue Procedures Act (SCRPA)], no costs or disbursements may be charged or allowed to either party, except for the service of process and attendance of witnesses." S.C. Code Ann. § 12-60-3350 (Supp. 2010). As this action is governed by the SCPRA in the tribunals below, *see id.* § 12-60-2510, *et seq.*, CFRE is not entitled to attorney's fees but may be entitled to some costs. Because CFRE did not identify which costs, if any, are attributable to service of process or attendance of witnesses, the court on remand is to determine which costs are appropriate for CFRE to receive. To the extent CFRE desires an award of costs and attorney's fees incurred before this Court, it must make the appropriate motion at the appropriate time.

CONCLUSION

Therefore, we hold that CFRE was entitled to the four percent legal residence ratio for the 2007 tax year. Accordingly, we remand this case to the ALC for a determination of the refund due to CFRE. A remand is also in order for a determination of which costs, if any, CFRE may receive. However, we affirm the ALC's denial of sanctions against the Assessor for its failure to respond to CFRE's discovery requests.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary DuBose Terry, Petitioner,

v.

State of South Carolina, Respondent.

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

ON WRIT OF CERTIORARI

Opinion No. 27033
Heard June 21, 2011 – Filed August 29, 2011

AFFIRMED

Teresa L. Norris, of Blume Weyble and Norris, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, for Respondent.

JUSTICE PLEICONES: Petitioner was sentenced to death for murder, life imprisonment for first-degree burglary, thirty years' imprisonment for first-degree criminal sexual conduct, and ten years' imprisonment for malicious injury to a telephone system. All sentences were consecutive. This Court affirmed petitioner's convictions and sentences on direct appeal. State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000), cert. denied, 531 U.S. 882 (2000).

We granted a writ of certiorari to review the denial of petitioner's application for post-conviction relief (PCR). We affirm.

FACTS

The underlying facts, as taken from Terry, supra, are as follows: the victim, forty-seven-year-old Urai Jackson, was found beaten to death in her Lexington County home. The window on the carport door to her home had been broken out and the telephone wires had been pulled from the phone box. Victim's mostly nude body was found in her living room, and semen was found in her vagina. She had several blunt trauma wounds to the head, and a number of defensive wound injuries. The cause of death was blunt trauma with skull fracture and brain injury.

After his arrest, petitioner gave a statement to police in which he maintained he had gone to victim's house and had consensual sex with her. According to petitioner, the victim became angered when he started to leave and grabbed him by the hair. He lost his temper and began hitting her with an object. He could not recall the object but believed the victim may have brought it with her from the bedroom. He hit her several times, then left.

Prior to trial, the State requested a Jackson v. Denno[1] hearing to determine the voluntariness of petitioner's statement. The trial judge found, by a preponderance of the evidence, the statement was voluntary.

In an attempt to minimize the statement's effect on the jury, trial counsel alluded to the statement in his opening statement. Trial counsel stated:

> Ladies and Gentlemen, [petitioner] over here told the police that he did it. He told the police that he had sexual intercourse with [victim]. He told the police that he killed her, okay. It's called a confession and he made one. He told the police he did it. So what in the world are we doing here? Why are we even having one of these guilt phases?

The State did not seek to introduce the statement in the guilt phase of trial.

As part of its case in chief, the State called the police officer who took petitioner's statement. Before the officer testified, the State moved *in limine* to prevent the admission of the statement. Trial counsel argued the statement was admissible pursuant to Rule 804(b)(3), SCRE, as a statement against interest. The trial court ruled the statement was inadmissible under Rule 804 because petitioner procured his unavailability by exercising his right to remain silent.

Petitioner elected not to testify at trial. Although the statement was never introduced in the guilt phase of trial, the State did introduce it during the penalty phase.

ISSUES

I. Were trial counsel ineffective for failing to object to the exclusion of petitioner's statement based on prosecutorial misconduct?

[1] 378 U.S. 368 (1964).

II. Were trial counsel ineffective for failing to adjust their strategy and continuing to pursue a "reasonable doubt" defense?

STANDARD OF REVIEW

On certiorari in a PCR action, the Court applies the "any evidence" standard of review. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. Id. at 119, 386 S.E.2d at 626.

LAW/ANALYSIS

I. Petitioner's Statement

Petitioner argues trial counsel were ineffective in failing to argue during the hearing on the State's *in limine* motion that the statement should have been introduced because of the State's misconduct and trial counsels' detrimental reliance on the State's "apparent intent" to offer the statement into evidence. Petitioner contends the State engaged in trickery and abandoned its duty to seek justice by improperly arguing during the pre-trial Jackson v. Denno hearing that the statement was admissible, when the State never intended to introduce the statement at the guilt phase of trial. We disagree.

A PCR applicant bears the burden of establishing he is entitled to relief. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). To prove counsel was ineffective, the applicant must show counsel's performance was deficient and the deficient performance caused prejudice to the applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, supra.

"[I]t is generally recognized that the prosecution and the defense should be afforded wide discretion in the selection and presentation of evidence." State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000) (citing State v. Richardson, 253 S.C. 468, 171 S.E.2d 717 (1969). It is "unquestionably true as a general matter" that "the prosecution is entitled to prove its case by evidence of its own choice . . . ." Old Chief v. U.S., 519 U.S. 172 (1997).

Trial counsel testified he assumed the State would try to introduce the statement during the guilt phase because the State argued at the Jackson v. Denno hearing that the statement was voluntarily given. He acknowledged, however, that no one from the prosecution team told him affirmatively that the State intended to introduce the statement during the guilt phase.

One solicitor testified the State decided well before trial not to present petitioner's statement during the guilt phase because it was contrary to what the State sought to prove. The solicitor opined that, without the statement, petitioner would have to testify and subject himself to cross-examination in order to present his version of the incident in the guilt phase. The State therefore moved *in limine* to bar petitioner from introducing the statement when the police officer to whom the statement was made was called as a witness during the guilt phase.

Another solicitor testified the prosecution decided not to use the statement in the guilt phase unless petitioner testified. The solicitor also stated that even if trial counsel had approached him before opening argument and asked whether the State intended to introduce the statement, he would not have disclosed that information because whether or when to introduce the statement was part of their strategy in trying the case.

We find there is evidence to support the PCR judge's finding trial counsel were not ineffective. Cherry, supra. The State requested the Jackson v. Denno hearing to determine the voluntariness of the statement for use in the penalty phase and in the event it decided to introduce the statement to cross-examine petitioner, should he choose to testify. In doing so, the State

used the wide discretion it is afforded in the selection and presentation of evidence. Johnson, supra. The solicitors' decision not to present petitioner's statement during its case in chief did not constitute prosecutorial misconduct, but was a matter of trial strategy. For this reason, we affirm the PCR judge's order.

II. Trial strategy

Petitioner contends trial counsel were ineffective in failing to adjust their defense strategy in the guilt phase of trial in order to maintain credibility with the jury during sentencing. Specifically, petitioner argues trial counsel had a duty, after stating during the opening statement that petitioner "confessed," to adjust their trial strategy and not continue to pursue a reasonable doubt defense. We disagree.

Assuming trial counsel were deficient in not changing their trial strategy to gain credibility with the jury, petitioner has failed to meet his burden of showing he was prejudiced. Strickland, supra. Considering the evidence the State presented during the guilt phase of trial, petitioner cannot show the outcome of the penalty phase would have been different had trial counsel conceded petitioner's guilt in the guilt phase.

CONCLUSION

Because there is evidence to support the dismissal of petitioner's application for PCR, the order of the PCR judge is

AFFIRMED.

TOAL, C.J., BEATTY, J., and Acting Justice James E. Moore, concur. KITTREDGE, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Federal Credit Union, Respondent,

v.

Mildred R. Higgins and Stivers Automotive of Lexington, Inc., Defendants,

of which Stivers Automotive of Lexington, Inc., is Appellant.

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 27034
Heard May 4, 2011 – Filed August 29, 2011

REVERSED AND REMANDED

Joseph Gregory Studemeyer, of Columbia, for Appellant.

Robert E. Sumner, IV, and Cynthia J. Lowery, of Moore & Van Allen, PLLC, of Charleston, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal from the trial court's grant of a directed verdict against Appellant Stivers Automotive of Lexington, Inc., in its contract dispute with Respondent South Carolina Federal Credit Union. We reverse and remand for a new trial.[1]

I.

Appellant Stivers Automotive of Lexington, Inc. (Stivers) and Respondent South Carolina Federal Credit Union (SCFCU) were parties to a Dealer Agreement (Agreement), under which SCFCU agreed to purchase sales contracts between Stivers and purchasers of its vehicles. Among other provisions in the Agreement, Stivers warranted with respect to its sales contracts assigned to SCFCU:

> (5) the Contract is genuine and the statements and amounts inserted therein are correct;
>
> . . . .
>
> (9) the collateral and/or service have been sold, provided and delivered to and accepted by buyer;
>
> . . . .
>
> (16) Dealer has not knowingly communicated to Lender incorrect information relating to the buyer's application or credit statement or knowingly failed to communicate information relating to such application or credit statement;

[1] The underlying case involved a claim against Mildred R. Higgins. The original claim by SCFCU against Higgins was dismissed at the conclusion of the evidence and that dismissal is not challenged on appeal. While the retrial will require the remaining parties to litigate the issue of Higgins' capacity as it relates to the Dealer Agreement, Higgins is no longer a party to this case.

(17) the facts set forth in the Contract are true;

(18) buyer has no defense or counterclaim to payment of the obligation evidenced by the Contract;

(19) buyer is . . . not a minor and has legal capacity to execute this Contract and is liable thereon . . . .

The Agreement also provided that Stivers would be in default "if any warranty, representation or statement made or furnished by or on behalf of [Stivers] in connection with this Agreement or any Contract purchased by [SCFCU] is false or has been breached in any material respect."

In November 2005, Hiram Riley (Riley) sought to purchase a vehicle from Stivers but was unable to qualify for financing. Stivers' salesman, Tom Roper (Roper), indicated that Riley could get the car if he found a co-signer. Riley contacted his sister, Mildred Higgins (Higgins), who agreed to co-sign for the car. Upon receiving that information from Riley, Roper contacted Higgins to check her credit and prepare the appropriate documents.[2] Roper then visited Higgins at her home in Charleston to sign the appropriate paperwork. After Roper thoroughly explained the documents, Higgins indicated she understood and signed the paperwork. As it turned out, the paperwork was drafted so that Higgins was the sole purchaser of the car, not a co-signer.

Ultimately, SCFCU approved the loan to Higgins for the purchase price. Riley picked up the vehicle, with the understanding that he was to make the payments. Shortly thereafter, Riley drove the vehicle to Charleston, and Higgins told him that she wanted to see "what she signed for." After viewing the car, she and Riley again visited in her home.

[2] Higgins' credit report reflected that she had good credit, including a home equity line of credit and a credit card, both of which were current.

After making initial payments, one of Riley's checks bounced.[3] At that point, Riley stopped making payments on the car, stopped driving it, and told SCFCU where it could recover the car. SCFCU hired an agent to repossess the vehicle, which was subsequently sold in July 2006 at an auction.

In December 2006, SCFCU filed a complaint against Higgins, given that her name was on the loan. Higgins denied the allegations in the complaint, stating that she was incompetent at the time of the execution of the contract. Subsequently, SCFCU amended its complaint, alleging Stivers breached the Agreement.

A jury trial was held in December 2008. At the conclusion of the testimony, the trial court granted SCFCU's motion for a directed verdict against Stivers, finding Higgins lacked capacity to contract and Stivers breached the Agreement in that regard. The trial court's initial order focused solely upon the issue of capacity. In February 2009, the trial court amended its order, affirming its initial order, but adding that Stivers committed "six unequivocal breaches of the contract," including the capacity issue.[4] This appeal followed.

---

[3] In February 2006, SCFCU discovered the vehicle was not insured and included a forced insurance policy on the vehicle, essentially doubling the payments. SCFCU purchased the insurance because Higgins' insurance (which appeared on the sales contract) did not cover Riley. It appears that the addition of the insurance to the monthly payment was more than Riley could afford.

[4] In its initial order, the trial judge referenced his personal experience with family who suffered from dementia. Based on this newly disclosed information, coupled with the trial court's handling of the trial, Stivers moved for the judge's recusal based on alleged bias. The trial court denied the recusal motion. The trial judge also increased the award of attorney's fees in the amended order to an amount he essentially acknowledged was excessive.

II.

Stivers raises six issues on appeal.

(1) Did the trial court err by granting a directed verdict motion on the issue of Higgins' capacity?

(2) Did the trial court err by concluding Stivers breached other warranties contained in the Agreement?

(3) Did the trial court err by granting SCFCU's directed verdict motion on the issue of damages?

(4) Did the trial court err by concluding Stivers conducted a "straw purchase" in violation of the Agreement?

(5) Did the trial court abuse its discretion in the amount of attorney's fees it awarded?

(6) Did the trial judge abuse his discretion by not removing himself from the case due to alleged bias?

We dispose of this appeal on the basis of the first three issues and need not reach the remaining issues.

III.

When considering a directed verdict motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citing Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)). "If more than one reasonable inference can be drawn . . . the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)

(citing Mahon v. Spartanburg County, 205 S.C. 441, 449, 32 S.E.2d 368, 371 (1944)). The trial court should be "concerned only with the existence or non-existence of evidence," not its credibility or weight. Jones v. General Elec. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (citing Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992)). We view the evidence in a light most favorable to Stivers, as our standard of review requires.

A.

We find that the trial court erred by directing a verdict against Stivers on the issue of capacity.[5] There was sufficient evidence to submit the issue of capacity to the jury. Riley's testimony, if believed, pointed to Higgins' capacity. Riley had contact with his sister, Higgins, including interaction with her shortly after the transaction. Riley's testimony, as well as Roper's, tended to establish that Higgins had capacity to contract. Additionally, the testimony of Higgins' physician was less than conclusive as to whether Higgins was suffering from dementia at the time the sales contract was executed.[6] Moreover, Higgins maintained a valid driver's license and was still driving at the time. She also maintained an open line of credit for a home equity loan and a credit card, both of which were current.

The trial court erred by weighing the evidence presented. Garrett, 309 S.C. at 99, 419 S.E.2d at 845 (stating that the trial court should not be concerned with the credibility or weight of evidence, only its existence). The

---

[5] We summarily reject as meritless SCFCU's position that Stivers is precluded from challenging the directed verdict because Higgins is not a party on appeal. Rule 220(b)(1), SCACR.

[6] The evidence from Dr. Little indicated that in December of 2006, Higgins was "experiencing some decreased memory/secondary to early stage dementia." Although Dr. Little subsequently opined that Higgins' diagnosis was "early stage dementia which began early November 2005," his December 18, 2006, letter concludes that Higgins "is not capable of making business decisions … at this time." The medical evidence may not be viewed as expressing a definitive opinion as to Higgins' capacity at the time of the November 2005 transaction.

trial court stated, "It is not what the car salesman on one brief visit may have thought Higgins' condition was, it is what it actually was based on her doctor's exams and her husband's experience with her that is important." That statement reflects the trial court's favoring of one party's evidence and improper weighing of credibility. There may be a clear basis for the fact-finder to reject the testimony of Riley and Roper, but that credibility determination lies with the jury, not the court at the directed verdict stage. We hold the evidence under the proper standard of review presented a question of fact as to Higgins' capacity.

B.

We additionally hold that the trial court erred in granting a directed verdict to SCFCU as to the other warranties contained in the contract, as well as the amount of damages due SCFCU. As stated above, the trial court's original order held Stivers breached the warranty as to capacity. Following Stivers' motion to reconsider, the trial court expanded upon its initial and sole basis for a directed verdict by adding that Stivers breached other warranties as well, providing only a conclusory discussion and analysis. It is unclear whether the trial court's post-trial attempt to expand the directed verdict grounds was in recognition of the improper grant of a directed verdict based on Higgins' lack of capacity to contract.

We recognize the option to remand the matter for further development of the additional warranty issues. We decline a remand limited to the liability issue because a new trial is warranted on the issue of damages in any event. The vehicle was repossessed only months after the sale. Following repossession of the car by SCFCU, it was sold at auction for approximately $9,700, which was less than fifty percent of its original sale price. We are aware the sale price included the finance charges and a sale at auction would bring less. Stivers challenged the reasonableness of SCFCU's disposition of the car and presented evidence calling into question the commercial reasonableness of SCFCU's actions. The evidence creates a question of fact on the issue of damages. Because a new trial is warranted and given the

circumstances in which a directed verdict was granted on the liability question, we remand for a new trial on liability and damages.[7]

In light of our reversal of the trial court's grant of a directed verdict, we decline to address any remaining issues raised by Stivers.

REVERSED AND REMANDED.

TOAL, C.J., and PLEICONES, J., concur. BEATTY, J., concurring in part and dissenting in part in a separate opinion in which HEARN, J., concurs.

[7] We do not foreclose upon retrial the consideration and grant of a directed verdict, if appropriate.

JUSTICE BEATTY: Having reviewed the facts in the light most favorable to Stivers, I would affirm the trial judge's granting of a directed verdict on the breach of warranty claim; however, I would reverse on the damages issue and remand.

It is undisputed that the collateral was delivered to Riley not Higgins. This violated paragraph (9) of the warranties agreement. Roper knew that he had prepared the documents to reflect Higgins as the buyer although Riley was the true purchaser. This resulted in Higgins being a "straw purchaser," which violated paragraph (9).

It is also undisputed that Roper never informed SCFCU of Riley's involvement in the purchase and that the application for credit was actually for Riley and that Higgins should have been a co-signer. This arguably caused SCFCU to lower its interest rate because Higgins had good credit; it also deprived SCFCU of an opportunity to fairly assess the loan's risk. This failure to disclose material information violated paragraph (16) of the warranties agreement.

For the foregoing reasons I would affirm the directed verdict. I concur in the majority's decision to remand the damages issue for further consideration.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Board of Trustees of the School District of Fairfield County, Plaintiff/Joint Petitioner,

v.

State of South Carolina and Legislative Delegation of Fairfield County, Defendants,

of whom Legislative Delegation of Fairfield County is Defendant/Joint Petitioner,

and Glenn F. McConnell, in his representative capacity as President Pro Tempore of the South Carolina Senate and as representative thereof; Robert W. Harrell, Jr., as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives, Intervenors/Joint Petitioners.

ORIGINAL JURISDICTION

Opinion No. 27035
Heard November 30, 2010 – Filed August 29, 2011

JUDGMENT FOR PLAINTIFF

Armand Derfner, D. Peters Wilborn, Jr., and Jonathan S. Altman, all of Derfner, Altman & Wilborn, of Charleston, for Plaintiff/Joint Petitioner.

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Defendant.

Robert E. Stepp, Robert E. Tyson, Jr., and Roland M. Franklin, Jr., of Sowell, Gray, Stepp & Laffitte, all of Columbia, for Defendant/Joint Petitioner.

Michael R. Hitchcock, John P. Hazzard, V, and Kenneth M. Moffitt, all of Columbia, for Intervenor/Joint Petitioner Glen F. McConnell.

Bradley S. Wright and Charles F. Reid, both of Columbia, for Intervenor/Joint Petitioner Robert W. Harrell, Jr.

JUSTICE KITTREDGE: This case is before this Court in its original jurisdiction. Plaintiff Board of Trustees of the School District of Fairfield County (Board), Defendants State of South Carolina and the Legislative Delegation of Fairfield County (collectively, the State), and Defendant-Intervenors House of Representatives and the Senate (collectively, the General Assembly), jointly petition this Court to determine the constitutionality of Act 308 of the South Carolina Acts of 2010 (Act 308). The Board raises two challenges to the constitutionality of Act 308. First, the Board asserts the General Assembly did not override the Governor's veto of Act 308 in accordance with Article IV, section 21 of the South Carolina Constitution. Second, the Board asserts Act 308 is impermissible special legislation in violation of Article III, section 34 of the South Carolina Constitution. Because we find the General Assembly did not override the

Governor's veto of Act 308 in accordance with our constitution, we enter judgment for Plaintiff, the Board.

I.
Procedural Background

In January and February of 2010, the South Carolina General Assembly passed Act 308, which transferred the oversight of financial operations of the Fairfield County School District from its board of trustees to a finance committee to be appointed by the Fairfield Legislative Delegation. Governor Sanford vetoed Act 308 on February 24, 2010. On March 2, 2010, the House of Representatives voted to override the Governor's veto by a vote of 33 to 10. At the time of the vote, a quorum (or majority) of the House was present. Specifically, 120 representatives were present for roll call, although only 43 representatives voted on the matter. H.R.J. Res. 135, 118th Gen. Assem., 1st Reg. Sess. (S.C. 2010). On March 4, 2010, the Senate voted 1 to 0 to override the Governor's veto. S.J. Res. 135, 118th Gen. Assem., 1st Reg. Sess. (S.C. 2010). On that day, although a quorum of the Senate was present, only Fairfield County Senator Creighton Coleman voted. The 1 to 0 vote was in accordance with a purported "long-held precedent in the Senate where members do not vote on legislation affecting solely one county, also known as local legislation." *Id.*

On August 27, 2010, the Board filed a complaint against the State in circuit court challenging the constitutionality of Act 308. The circuit court granted the Board a temporary restraining order. The General Assembly then moved to intervene, after which the Board and the State jointly petitioned this Court to take the case in its original jurisdiction. We granted the original jurisdiction petition.

II.
Article IV, section 21 of the South Carolina Constitution

Article IV, section 21 of the constitution provides that if the Governor vetoes a bill or resolution, the bill or resolution is returned with objections to the originating house, and:

> If after such reconsideration *two-thirds of that house shall agree to pass it*, it shall be sent, together with the objections, to the other house, by which it shall be reconsidered, *and if approved by two-thirds of that house* it shall have the same effect as if it had been signed by the Governor.

S.C. Const. art. IV, § 21 (emphasis added).

The question before the Court is: what does the constitutional mandate "two-thirds of that house shall agree" mean? This Court's precedent and a plain reading of this unambiguous constitutional provision combine to compel a construction that the two-thirds requirement means two-thirds of a quorum "shall agree." Indeed, that has been the General Assembly's longstanding understanding and application of its veto override authority, until relatively recently.

A.

We begin with the acknowledgement that absent a constitutional mandate providing otherwise, each house in the General Assembly determines its rules of procedure free from interference from the judicial and executive branches. S.C. Const. art. III, § 12. We further note the premise that, absent a constitutional provision to the contrary, the legislature acts and conducts business through majority vote. The South Carolina Constitution provides "a majority of each house shall constitute a quorum to do business . . . ." S.C. Const. art. III, § 11. Yet, the people of South Carolina, through their constitution, have established certain areas that require a supermajority of the legislature to act. The constitutional grant of legislative authority to override a governor's veto is one such example. *See also* S.C. Const. art. XV, § 1 ("The affirmative vote of two-thirds of all [Representatives] elected shall be required for an impeachment."); art. XV, § 2 ("No person shall be convicted except by a vote of two-thirds of all [Senators] elected."); art. XVI, § 1 (requiring two-thirds "of the members elected to each House" to approve a constitutional amendment); art. XVI, § 3 (requiring "two-thirds of the members elected to each branch of the General Assembly" to call a constitutional convention).

In *Smith v. Jennings*, 67 S.C. 324, 45 S.E. 821 (1903), this Court considered the meaning of the legislature's constitutional veto override authority juxtaposed to other constitutional provisions requiring a supermajority:

> While the Constitution, in article 3, § 3, declares that the House of Representatives shall consist of 124 members, it also declares, in section 11, art. 3, that a majority of each house shall constitute a quorum to do business. A quorum, therefore, possesses the power of the whole body in all matters of business wherein the action of a larger proportion of the entire membership is not clearly and expressly required. So, ordinarily, when a quorum is present acting, the House is present, acting in all its potentiality. When the Constitution speaks of "two-thirds of that house" as the vote required to pass a bill or joint resolution over the veto of the Governor, it means two-thirds of the house as then legally constituted, and acting upon the matter. Whenever the framers of the Constitution intended otherwise, the purpose was expressly declared, as in article 15, § 1, "a vote of two-thirds of all members elected shall be required for an impeachment," and in article 16, § 1, where, in proposing amendments to the Constitution, "two-thirds of the members elected to each house" must agree thereto. Questions like this arose under the Constitution of 1868, and were decided in accordance with the view we take. *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 462; Bond Debt Cases, 12 S.C. 285. *See also, Cooley's Constitutional Limitations* (5th ed.) p. 170; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636. As the house at the time of the passage of the joint resolution was lawfully constituted, with 85 members present, and, as 60 of these voted for its passage, the vote was "two-thirds of that house," in the sense of section [21], art. 4, of the Constitution.

Id. at 328–329, 45 S.E. at 823.

We interpret *Smith v. Jennings* to manifestly require two-thirds of a quorum to override a governor's veto.[1] We find further support for our view in the authorities favorably cited in *Smith v. Jennings*, including *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 430 (1873). In *Morton, Bliss*, we were asked to determine, in the context of bills creating public debt, whether the constitution required "two-thirds of a quorum of each House, or … two-thirds of the whole membership of each House." *Id.* at 462. The Court emphasized that a quorum is authorized to act in the name of the body[2] and "if the rule is that of two-thirds, *then two-thirds of such quorum must concur for effective action*." *Id*. at 463 (emphasis added). The Court concluded "that *a vote of two-thirds of the members present at the time the vote was taken* satisfies the requirements of the Constitution." *Id.* at 467 (emphasis added).

Cooley on Constitutional Limitations, referenced in *Morton, Bliss*, correctly states the rule in light of the unambiguous language in article IV, section 21:

---

[1] That requirement was met in *Smith v. Jennings*, as a quorum was present with 85 House members and 60 of those "voted for its passage." *Id*. at 329, 45 S.E. at 823.

[2] The full quorum discussion in *Morton, Bliss* is as follows:

> [O]ur Constitution fixes the quorum competent to transact business on a numerical basis. A majority of each House is competent to transact all business not embraced in certain special provisions requiring for action the concurrence of a greater number of votes than the number required to constitute such quorum. [citation omitted] A quorum is, then, when competent to act for all legal interests and purposes, the 'Senate,' or the 'House,' as the case may be; and whatever authority is conferred on the bodies designated by such names, or upon the General Assembly as a whole, must be regarded as fully vested, for all actual purposes, in the quorum thus constituted . . . . It would follow that provisions ascertaining the mode in which the body should divide, in order to complete action in any given case, whether by a mere majority or by a still greater proportion, must be interpreted primarily as applicable to the body as legally organized at the time such action is taken. If the rule is the mere majority rule, then a majority of the quorum present and acting is intended; if the rule is that of two-thirds, then two-thirds of such quorum must concur for effective action.

Id. at 463.

> For the vote required in the passage of any particular law the reader is referred to the constitution of his State. A simple majority of a quorum is sufficient, unless the constitution establishes some other rule; and *where, by the constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood*, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 169–70 (5th ed. 1883) (emphasis added).

B.

We are further persuaded that the constitutional two-thirds voting requirement demands that we reject the General Assembly's view that it lawfully overrides a governor's veto with a vote of 1 to 0 when a quorum is present. The constitution allows the legislative branch to override the executive branch—but that legislative power is limited and circumscribed by the heightened vote requirement.[3] We described the significantly important check and balance inherent in the two-thirds requirement in *Morton*, *Bliss*:

> The object of this provision was to create a check, operating directly on the respective Houses of the General Assembly, tending to limit the exercise of the power of creating public debt to cases where its expediency was determined as the result of a clear and solid judgment of the legislative body. Experience had shown that a mere majority does not necessarily express a conviction of that nature, but often depends on a mere accident, that, according to its occurrence, at one time or another, may reverse the conclusions of the deliberating body . . . . These

[3] *See also* James L. Underwood, *The Constitution of South Carolina, Volume 1: The Relationship of the Legislative, Executive, and Judicial Branches* 86 (1986) (stating the executive veto serves as a check and balance against the General Assembly's plenary power).

> considerations have led to constitutional provisions requiring, in certain cases, that a greater number than a mere majority should unite where acts of a certain class of a more important character than the ordinary subjects of legislation are involved.

Morton, Bliss, 4 S.C. at 462–63.

C.

Plaintiff has provided research detailing well over one thousand veto override votes by one or both houses since our decision in *Smith v. Jennings*. For generations, the General Assembly followed *Smith v. Jennings* and the clear constitutional requirement—two-thirds of a house in article IV, section 21 means two-thirds of the quorum. The data shows that beginning in 1980, the House of Representatives began the practice of overriding local bills with less than two-thirds of a quorum. It appears that practice became customary in the House of Representatives by the mid-1980s.

The data further reveals that in the 104 years following *Smith v. Jennings*, the Senate never declared any bill, statewide or local, to be overridden with less than two-thirds of a quorum, except for once in 1989 and once in 2006. Beginning in 2008, the Senate changed its posture and the vast majority of local bills passed as overrides were enacted without obtaining the vote of two-thirds the quorum. We conclude that what the General Assembly contends is a "long-held precedent in the Senate" is not as rooted as the General Assembly represents.[4]

In support of their defense of the veto override, the State and General Assembly offer parliamentary manuals, *Mason's Manual of Legislative*

[4] Similarly, the dissent's efforts to support the 1 to 0 veto override fall short. The dissent posits that the General Assembly has been "voting on bills and joint resolutions" in reliance on our precedent "for over a century." We agree. As established above, the General Assembly for generations followed the clear language of our constitution ("[i]f … two-thirds of that house shall agree to pass [the override]") in its efforts to override a governor's veto. The historical practice of the General Assembly has, in fact, mirrored our *Morton, Bliss* and *Smith v. Jennings* precedent requiring that "two-thirds of [a] quorum must concur for effective action." Today we adhere to *stare decisis* and reject the General Assembly's recently adopted practice, which circumvents and violates the constitutionally mandated two-thirds requirement for overriding a governor's veto.

Procedure and *Jefferson's Manual of Parliamentary Practice*, which generally construe the quorum requirement in terms of "present and voting." The ability of the General Assembly to determine its procedural rules, however, is constrained where the constitution mandates a particular procedure. The parliamentary manuals cited by the State and General Assembly are replete with the recognition that their general rules may apply "in the absence of a contrary provision." *See, e.g., Mason's Manual of Legislative Procedure* § 503.3 ("Under the generally accepted rules of parliamentary procedure *in the absence of a contrary provision* . . . ."); *Mason's* § 512.3 (a two-thirds vote requirement "*unless otherwise specified*, means two-thirds of the legal votes cast, not two-thirds of the members present . . . . ") (emphasis added). We observe that article IV, section 21 of the constitution specifies otherwise. In short, these parliamentary authorities cannot be invoked to trump a constitutional provision.[5]

II.

In sum, the two-thirds mandate in article IV, section 21 of the South Carolina Constitution requires two-thirds of a quorum. Assuming full membership, the minimum quorum in the House of Representatives is 63 and the minimum quorum in the Senate is 24; two-thirds of those numbers would be 42 Representatives and 16 Senators, respectively. Here, a quorum was present in each house. We hold the veto override votes of 33 to 10 in the House of Representatives and 1 to 0 in the Senate fell short of the constitutionally mandated two-thirds requirement. Accordingly, we hold the Governor's veto of H. 4431 was sustained and enter judgment for Plaintiff. Having rendered judgment for Plaintiff, the Court need not reach the Article III, section 34 special legislation challenge.

---

[5] *Mason's* and other parliamentary resource manuals provide default rules in the absence of specific requirements "otherwise." In a sense, these parliamentary resource manuals fill in gaps. *See Mason's* § 37.1 ("All matters of procedure not governed by constitutional provisions . . . are governed by the rules of the general parliamentary law."). But when the constitution unambiguously declares the process to be followed, and there are no gaps to be filled, as is the case here, the constitution controls. *See Mason's* § 6.2 ("A constitutional provision regulating procedure controls over all other rules of procedure."); *Mason's* § 7.1 ("Constitutional provisions prescribing exact or exclusive time or methods for certain acts are mandatory and must be complied with."); *Mason's* § 12.1 ("A legislative body cannot make a rule that evades or avoids the effect of a rule prescribed by the constitution governing it . . . .").

JUDGMENT FOR PLAINTIFF.

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

JUSTICE BEATTY: I concur with the majority; however, I write separately to express my view that Act 308 is also unconstitutional special legislation beyond a reasonable doubt. Article III, Section 34 of the South Carolina Constitution prohibits special laws where general laws can be made applicable. There is no evidence in the record of this case that distinguishes The Board of Trustees of the School District of Fairfield County from the majority of school district governing bodies in this state; all are susceptible to fiscal mismanagement.

Further, Act 308 clearly conflicts with provisions of Title 59 of the South Carolina Code which grant authority to boards of trustees to manage and control school districts. See S.C. Code Ann. § 59-19-10 (2004). Budget making authority is inherent in the board of trustees' management and control mandate. Moreover, Title 59 specifically authorizes school trustees to set the salaries of teachers (§ 59-19-90(2)), charge fees (§ 59-19-90(8)), sell or lease property (§ 59-19-250), and purchase land (§ 59-19-180). These powers are manifestations of the Legislature's intent that school boards of trustees manage the finances of school districts. Act 308 is in direct conflict with general law and is therefore unconstitutional. See Henry v. Horry County, 334 S.C. 461, 514 S.E.2d, 122 (1999).[6]

Allegations of fiscal ineptness and mismanagement by school boards are plentiful throughout this state. Assuming that Act 308 is efficacious, its tenets could prove beneficial to the entire state, not just Fairfield County.

[6] The dissent illuminates in part this court's history of turning a blind eye to legislative constitutional infractions when it comes to public education. I would posit that the sordid reasons for having turned a blind eye supposedly no longer exist so we should cleanse our eyes with the "moistened clay" of justice and rule accordingly. It is time to end this court-created education exception to our constitutional mandate.

CHIEF JUSTICE TOAL: Respectfully, I dissent. In my opinion, the General Assembly effectively overrode the gubernatorial veto of Act 308. Accordingly, I would reach the merits of the Board's second constitutional challenge and find Act 308 is constitutional special legislation.

I. The Veto Override

I agree with the majority's acknowledgement that "absent a constitutional mandate providing otherwise, each house in the General Assembly determines its rules of procedure free from interference with judicial and executive branches." However, I disagree with the majority's determination that our constitution provides otherwise. The majority reads Article IV, section 21 of the South Carolina Constitution to require the affirmative vote of two-thirds of a full quorum to override a gubernatorial veto, rather than abiding by our long-standing precedent requiring the affirmative vote of two-thirds of the membership present and *acting upon the matter*, so long as a quorum is present to conduct business. The majority's approach focuses on the number of affirmative votes cast, rather than the ratio of votes constitutionally required. For instance, two-thirds of a quorum of the House equals 42 members. Under the majority's holding, a vote of 42–0 in the House is sufficient to override a governor's veto, as long as a quorum of the House is present. However, a vote of 41–1 would be insufficient to override a veto because the number of affirmative votes does not equal two-thirds of the full quorum. A vote of 41–1 is a ratio that far exceeds two-thirds of the votes cast. In my view, this is contrary to the plain language of our constitution and contrary to our opinions thus far interpreting constitutional vote requirements.

The concept that a vote ratio prescribed by our constitution applies only to those members voting in the presence of a quorum dates back to 1873. In *Morton, Bliss & Co. v. Comptroller General*, we stated, "If the rule is the mere majority rule, then a majority of the quorum present *and acting* is intended; if the rule is that of two-thirds, then two thirds of such quorum [present and acting] must concur for effective action." 4 S.C. 430, 463 (1873) (emphasis added). This Court specifically applied this concept to the constitutional provision at issue in this case in *Smith v. Jennings*. In that

case, the Court determined "[w]hen the Constitution speaks of 'two-thirds of that house' as the vote required to pass a bill or joint resolution over the veto of the governor, it means two-thirds of the house as then legally constituted *and acting upon the matter*." *Smith v. Jennings*, 67 S.C. 324, 328, 45 S.E. 821, 823 (1903) (emphasis added).

The General Assembly has since relied upon our holdings in *Morton*, *Bliss* and *Smith v. Jennings* when establishing its rules. While debating a concurrent resolution in 1984, a point of order was raised concerning the amount of votes required to pass the resolution. H.R. Con. Res. 3947, 106th Gen. Assem., 1st Reg. Sess. (S.C. 1984). It was urged that the House adopt the *Smith* veto override standard that two-thirds of the house means "two-thirds vote of those present and voting, a quorum being present." *Id.* Following a discussion on the matter, the Speaker of the House of Representatives ruled that "it takes two-thirds of those present and voting to adopt a Resolution." *Id.* Along these same lines, the current Rules of the Senate and Rules of the House provide that a veto may be overridden by a two-thirds vote of the members present and voting. Rules of the Senate of South Carolina 50 (2009); Rules of the House of Representatives 10.3 (2010–11).

This Court's precedent combines with parliamentary authority to solidify the concept that legislation may be passed as long as a quorum is present and those voting meet the constitutionally prescribed ratio of votes required. *Mason's Manual of Legislative Procedure*, the preferred parliamentary authority of the South Carolina House of Representatives, states "[t]he requirement of a two-thirds vote, unless otherwise specified, means two-thirds of the legal votes cast, not two-thirds of the members present, or two-thirds of all the members." *Mason's* § 512.3 (2000). The majority quotes this authority, but finds that our constitution specifies otherwise. In my view, the only means of finding a different specification in our constitution is to ignore the constitutional interpretation provided in *Morton* and *Smith v. Jennings*, which focuses on those voters acting upon the matter rather than the threshold number of votes required.

The parliamentary rules of the United States Congress additionally support the General Assembly's "voting and present" requirement. The

preferred parliamentary manual of the South Carolina Senate is an amalgamated version of the United States Constitution and Jefferson's *Manual of Parliamentary Practice*, which contains commentary on the provisions of these documents written by the United States Congress. The Senate of South Carolina, Constitution of the United States and Jefferson's Manual (1989) (unpublished pamphlet, on file with the South Carolina Senate). In this document, the commentary of Article I, section 5 of the United States Constitution[7] recounts events that took place in the late nineteenth century that "established the principle that a quorum present made valid any action by the House, although an actual quorum might not vote." *Id.* § 54. The United States Supreme Court sustained that principle in *United States v. Ballin*, 144 U.S. 1, 12 S. Ct. 507 (1892).

For over a century, the General Assembly has relied upon our interpretation of Article IV, section 21 and the common standards of parliamentary procedure when voting on bills and joint resolutions. The doctrine of "[*s*]*tare decisis* exists to 'insure a quality of justice which results from certainty and stability.'" *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (*quoting McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985) (Chandler, J., concurring)). Therefore, in the interest of promoting the stability of existing laws, and with recognition that the execution of parliamentary procedure is generally within the purview of the legislature, I would find that when a quorum of the voting body is present, it is equipped to conduct business, and as such, the General Assembly effectively overrides a gubernatorial veto when two-thirds of the votes cast affirm the passage of that bill.

[7] Article I, section 5 of the United States Constitution requires a "Quorum to do Business." U.S. Const. art. I, § 5. Between 1861 and 1891, a quorum in the United States Congress was determined only by noting the number of members voting. The Senate of South Carolina, Constitution of the United States and Jefferson's Manual § 54. This method of determining the existence of a quorum encouraged a practice where members would refuse to vote in order to break the quorum and "obstruct the public business." *Id.* In 1890, the Speaker of the House directed the clerk to enter on the Journal as part of the record of votes the names of the members present, but not voting. Since, the standard method of ascertaining the presence of a quorum is to count all members present, even if not voting. *Id.*

II. Special Legislation

Because I believe the General Assembly validly passed Act 308, I find it necessary to reach the Board's second constitutional challenge. The Board argues that Act 308 is unconstitutional under Article III, section 34(IX) of the South Carolina Constitution because it is a special, or local, law that conflicts with the general law; or alternatively, that it is a special law where a general law can be made applicable. I do not believe that Act 308 conflicts with an existing general law. Further, in my view, the history of special legislation addressing the manner and means of school district budget preparation in individual counties precludes a finding that a general law could be made applicable statewide. Therefore, I would find that Act 308 complies with Article III, section 34(IX) of the South Carolina Constitution, and is wholly constitutional.

Article III, section 34 of the South Carolina Constitution prohibits the General Assembly from enacting local laws in several enumerated instances. Of note in this case, subsection IX of that section restricts the passage of local laws "where a general law can be made applicable." S.C. Const. art. III, § 34(IX). This provision not only prevents the enactment of special legislation where a general law is already applicable, but also where an applicable general law may be created. *Horry County v. Horry County Higher Educ. Com'n*, 306 S.C. 416, 418, 412 S.E.2d 421, 423 (1991) (citations omitted). The purpose of restricting local or special legislation is to promote uniformity in the laws of the state where possible, and to "avoid duplicative or conflicting laws on the same subject." *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). Also pertinent to this issue, subsection X of Article III, section 34 states that "nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." S.C. Const. art. III, § 34(X).

This Court is deferential to the General Assembly when determining the constitutionality of a local law and will not declare that law unconstitutional "unless its repugnance to the Constitution is clear beyond a reasonable doubt," *Med. Soc'y of S.C.*, 334 S.C. at 279, 513 S.E.2d at 357, or "there has been a clear and palpable abuse of legislative discretion." *Sirrine*

v. State, 132 S.C. 241, 248, 128 S.E. 172, 174 (1925), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Even greater deference is afforded the General Assembly when evaluating local laws relating to school matters. *See McElveen v. Stokes*, 240 S.C. 1, 10, 124 S.E.2d 592, 596 (1962). When local legislation involves public education, the constitutional restriction on the enactment of local laws must be viewed in light of the General Assembly's Article XI duty to "provide for the maintenance and support of a system of free public schools open to all children in the State . . . ." S.C. Const. art. XI, section 3; *McElveen,* 240 S.C. at 10, 124 S.E.2d at 596. In *McElveen v. Stokes*, this Court summarized this jurisprudence as follows:

> In determining whether a statute pertaining to school matters is obnoxious to subsection IX of Section 34, Article III, it is well settled that this subsection must be construed in connection with the applicable provisions of Article XI, which deal with education and various school matters. It is clear from a study of these cases and the constitutional provisions that the scope of the legislative power is much broader in dealing with school matters than is the scope in dealing with various other subjects.

Id. Accordingly, this Court traditionally sustains local laws relating to the state's public education system. *Bradley v. Cherokee Sch. Dist.*, 322 S.C. 181, 470 S.E.2d 570 (1996); *Smythe v. Stroman,* 251 S.C. 277, 289, 162 S.E.2d 168, 173 (1968); *Moseley v. Welch*, 209 S.C. 19, 33, 39 S.E.2d 133, 140 (1946); *Walker v. Bennett*, 125 S.C. 389, 118 S.E. 779 (1923).

The constitutional prohibition against local laws not only includes local laws that conflict with an existing general law, but also local laws that are passed when a general law could be made applicable. *Horry County*, 306 S.C. at 418, 412 S.E.2d at 423. Therefore, to arrive at whether a general law could be made applicable, this Court has stated:

> There must . . . be a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction upon which the classification

> is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.

Id. Thus, "the General Assembly must have a 'logical basis and sound reason' for resorting to special legislation." *Id.* (*quoting Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E.2d 900 (1941)).

A. Whether Act 308 is a Special Provision in a General Law

The State and General Assembly first argue that Act 308 is a special provision in a general law, acceptable under subsection X of Article III, section 34.[8] Therefore, they argue, Act 308 is not subject to the prohibition against local laws where general laws can be made applicable found in subsection IX of Article III, section 34. I disagree.

Local laws and general laws are distinctly different session laws and are treated as such in the Statutes at Large published each year. The Statutes at Large, a publication of the Acts and Joint Resolutions passed by the General Assembly during a calendar year, is divided into two parts. The first part contains general and permanent laws that will ultimately be codified in the South Carolina Code. The second part contains local and temporary laws which are not codified, but are executed as session laws. It is my opinion that where the constitution states "nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws," S.C. Const. art. III, § 34(X), it is referring to special provisions that are contained within the codified general law. These special provisions may make a general law's effect different in certain counties, but they may not exempt a county from the general law's entire operation. *Horry County*, 306 S.C. at 419, 412 S.E.2d at 423.

Here, Act 308 cannot be fairly construed as a special provision in a general law. The General Assembly passed Act 308 as an amendment to a local law relating to the manner of selection of the Board of Trustees of the

[8] "[N]othing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." S.C. Const. art. III, § 34(X).

Fairfield County School District. It will not be codified in Title 59 of the South Carolina Code as will other acts and resolutions involving education. If this Court found that acts passed as local laws can be considered special provisions in general laws, subsection X of Article III, section 34 would be left with few limitations. Such a reading would permit subsection X to essentially swallow subsection IX's prohibition on local laws where general laws can be made applicable. I do not believe this to be the intention of the constitution's drafters, and therefore, I believe Act 308 should be analyzed under the constraints of Article III, section 34(IX).

B. Whether Act 308 Directly Conflicts with a General Law

This Court has on two occasions invalidated a local law involving county school districts because of a conflict with existing general law. In *Smythe v. Stroman*, a provision in the act at issue provided that a newly consolidated school district would not assume the bonded indebtedness of its original school districts. 251 S.C. at 282, 162 S.E.2d at 170. The general law required that when school districts are consolidated, the consolidated district shall take on the liabilities of the original districts. *Id.* Finding that provision to be in direct conflict with the general law, this Court struck the provision from the act, while upholding the remainder of the act as a special provision in a general law under subsection X of Article III, section 34. *Id.* at 289, 162 S.E.2d at 173.

In *Kearse v. Lancaster*, a school district had been previously created by consolidating the Olar and the Three-Mile districts. 172 S.C. 59, 61, 172 S.E. 767, 768 (1934). The Three-Mile district wished to withdraw from the consolidated district and re-establish itself as it formerly existed. *Id.* The act at issue allowed only those residing in the Three-Mile district to vote in an election to determine the question of whether it should be withdrawn from the consolidated district. *Id.* This Court found that the local law conflicted with the general law that addressed school incorporation, and as such, the act violated subsection IX of Article III, section 34. *Id.* at 63, 172 S.E. at 769.

In my opinion, the South Carolina Code does not include a general law that explicitly vests budget-making authority with a school district's board of trustees. The Board cites to several provisions within Title 59 of the South

Carolina Code to support its contention there is a direct conflict between Act 308 and the general law. Of note, section 59-19-10 provides that "[e]ach school district shall be under the management and control of the board of trustees . . . ." S.C. Code Ann. § 59-19-10 (2004). Act 308 vests sole budget-making authority with a finance committee and requires its approval for a list of enumerated expenses. H. 4431, Act 308 of S.C. Acts 2010. Outside of this function, however, the ability to execute the budget provisions made by the finance committee and the duty to establish the policy of the school district remains with the Board. *Id.* Act 308 does not affect the Board's ability to promulgate rules and regulations regarding standards of achievement or conduct within the district, to call meetings, or generally, to control the educational interests of the district. Therefore, I do not believe Act 308 squarely conflicts with section 59-19-10 of the Code.

The general law also provides that school trustees have the power to manage and control school property, S.C. Code Ann. § 59-19-90(5) (2004), to provide suitable school houses, *Id.* § 59-19-90(1), and to purchase, rent, and lease supplies and equipment necessary for the operation of the public schools of the district, *Id.* § 59-19-130. Again, Act 308 does not conflict with any of these laws because under the act, the finance committee is charged only with preparing the annual budget and approving any fiscally related activity of the district. The Board continues to be the body that acquires the goods necessary for the upkeep and operation of its schools.

The Board has not directed this Court to a provision in the Code that explicitly grants a board of trustees the budget-making power that Act 308 has now taken away. For the reasons stated above, I do not believe that Act 308 conflicts with an existing general law.

C. Whether a General Law Can be Made Applicable

In determining whether a general law could be fashioned to standardize school district budget-making statewide, this Court's decision in *Moseley v. Welch* is instructive on both points of fact and law. 209 S.C. 19, 24, 39 S.E.2d 133, 135 (1946). In that case, plaintiffs sought to have declared invalid an act that would abolish the Williamsburg County Board of Education, replacing it with a new board consisting of seven members to be

appointed by the governor upon the recommendation of the local delegation from that county. *Id.* at 24, 39 S.E.2d at 136. In pertinent part, the act empowered the new board with the final authority to approve budgets submitted by trustees in the individual districts within the county, to set teacher salaries, to borrow funds, and to order the construction and repair of buildings. *Id.* at 25, 39 S.E.2d at 136.

In that case, it was urged that the act was a special law where a general law could be made applicable. *Id.* at 27, 39 S.E.2d at 137. This Court explained that the chapter in the 1942 South Carolina Code containing general school law was followed by a chapter containing special legislation relating mostly to the fiscal affairs of the schools in each of the forty-six counties in the state. *Id.* This Court recognized that the General Assembly's opinion that "conditions in the various counties . . . preclude uniformity of treatment in relation to the administration of school affairs . . . . is entitled to much respect and in doubtful cases should be followed." *Id.* at 27–28, 39 S.E.2d at 137. The Court further observed that, although public education is a matter of general concern across the state, the act in question only related to the fiscal operation of the schools, and did not invade the general field of education. *Id.* at 30, 39 S.E.2d at 138. Specifically, the act did not

> regulate the textbooks to be used or the subjects to be taught . . . , the qualifications of teachers or the manner in which they shall be elected, school attendance or enrollment of pupils, the length of the school term, or various other matters pertaining to the general field of education. The general law regulating all these subject areas is left undisturbed.

Id. This Court ultimately found the act was constitutional as a special provision in a general law. *Id.* at 28–29, 39 S.E.2d at 138.

The General Assembly, which has been granted wide authority to legislate the field of education, has chosen not to enact a law that explicitly vests budget-making authority with district boards of trustees. Because the general law is silent on the matter, local legislation in several counties specifically grants this authority to a district's board of trustees. *See, e.g.*, H. 3655, Act 578 of S.C. Acts 1984 ("In addition to the powers and duties of the

board of trustees of the School District of Calhoun County provided by the law, the board shall prepare and adopt the budget for the operation of the district . . . ."); H. 3069, Act 268 of S.C. Acts 1977 ("The county board of education (board) shall be granted all of the powers and charged with all of the duties otherwise provided by law and shall have executive, financial and administrative control of the public schools in the school district . . . .").

Since this Court's holding in *Moseley*, the manner in which school district budgets are formulated and approved continues to vary county by county. For instance, in Aiken County, the board of trustees has the authority to prepare the annual budget; however, if the proposed budget exceeds the budget of the previous year, the Aiken County Legislative Delegation must approve it. H. 3069, Act 268 of S.C. Acts 1977. In Anderson County, the board of trustees of each district prepares the annual budget and then recommends to the Anderson County Board of Education the amount of tax millage, H. 3589, Act 96 of S.C. Acts 2009, while in Orangeburg County, the board of trustees directly notifies the county auditor of the tax levy needed, H. 2788, Act 245 of S.C. Acts 1983. In Horry County, the budget may be prepared by the board of trustees, superintendents, *or* principals of the several schools, who are then to submit the prepared budgets to the county board of education. S.492, Act 239 of S.C. Acts 1983 (emphasis added). Thus, by passing local laws in this area instead of enacting a general law that standardizes the school district budget-making process, the General Assembly has signaled its belief that a tailored approach best meets the needs of the varied districts within our state.

In recognition of the General Assembly's constitutional duty to provide for the maintenance and support of a public school system, I believe the following statement in *Moseley* aptly states my opinion on this issue: "[i]t is exceedingly doubtful whether a general law, uniform in operation throughout the State, regulating . . . the extent of the control which should be vested in the county boards of education, could be made applicable." *Moseley*, 209 S.C. at 28, 39 S.E.2d at 138. I would find Act 308 is sustainable under Article III, section 34(IX). Therefore, I would enter judgment for the Defendants and Defendant-Intervenors.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Foreign Academic & Cultural Exchange Services, Inc., Appellant,

v.

Daniela Tripon, Respondent.

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

Opinion No. 27036
Heard May 24, 2011 – Filed August 29, 2011

REVERSED

Rebecca Guental Fulmer, of Columbia, for Appellant.

David Eliot Rothstein, of Greenville, for Respondent.

PER CURIAM: Appellant Foreign Academic & Cultural Exchange Services, Inc. (FACES) instituted this action against respondent for breach of

contract, breach of the duty of loyalty, and injunctive relief. The circuit court granted summary judgment in favor of respondent as to all causes of action. FACES appeals.[1] We reverse.

FACTS

FACES, a for-profit company headquartered in South Carolina, recruits teachers from outside the United States and places them with schools within the state pursuant to the Mutual Educational and Cultural Exchange Program. See 22 U.S.C.A. §§ 2451 et seq. In 2003, respondent, a Romanian citizen, contracted with FACES to participate in its program, and entered the United States on a J-1 visa. Pursuant to the "foreign residency requirement" of the J-1 visa, respondent was required to return to her home country and remain there for at least two years following departure from the United States. See 8 U.S.C.A. § 1182(e).

After respondent had taught for two years, she and FACES entered into a revised agreement for the term of an additional school year. The agreement included a "covenant not to compete" stating respondent would not teach within the state for two years after leaving the FACES program, consonant with the foreign residency requirement. The new contract also increased respondent's salary and contained an acknowledgement that respondent would return home for two years after the contract expired. Finally, the revised agreement contained a liquidated damages provision providing that, in the event of a breach of contract, FACES would be entitled to an award including, but not limited to, monetary damages in an amount not less than $36,000.

Shortly after executing the new contract, respondent married a former FACES teacher. Respondent applied for, and was granted, a waiver of the J-1 foreign residency requirement, allowing her to remain in the United States. Subsequently, respondent accepted a full-time position with another school

[1] FACES does not appeal the grant of summary judgment as to the action for injunctive relief.

district and received an H-1B visa allowing her to remain in the United States after the expiration of her J-1 visa.

Following respondent's failure to return to Romania as contracted, FACES instituted this action for breach of contract, breach of duty of loyalty, and injunctive relief.

The circuit court granted summary judgment in favor of respondent as to all of FACES' claims, finding: (1) the covenant not to compete was unenforceable; (2) respondent did not violate the covenant not to compete; (3) the grant of an injunction requiring respondent to return home would be pre-empted by federal immigration law; (4) the liquidated damages provision was unenforceable; and (5) respondent did not breach any duty of loyalty.

The circuit court also denied FACES' motion for partial summary judgment, concluding a ruling that the acknowledgement and covenant not to compete were enforceable on foreign policy grounds would amount to an advisory opinion.[2]

ISSUES

I. Did the circuit court err in granting summary judgment in favor of respondent as to FACES' breach of contract claim?

II. Did the circuit court err in granting summary judgment in favor of respondent as to FACES' breach of duty of loyalty claim?

---

[2] While FACES purports to appeal this denial of partial summary judgment, we decline to address this issue as the denial of the motion for summary judgment was not a final determination of the merits of the case, and therefore it is not immediately appealable. See Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994) (denial of summary judgment motion that decides nothing about the merits of the case is not immediately appealable).

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

LAW/ANALYSIS

We reverse the circuit court's order granting summary judgment, finding there are material questions of fact whether respondent breached the revised contract by not returning to her home country and accepting another job, whether FACES suffered any actual as opposed to liquidated damages, and whether respondent breached the duty of loyalty implied in every employment contract.

I. Breach of Contract

FACES argues the circuit court erred in granting summary judgment in favor of respondent as to FACES' breach of contract claim. We agree.

A. Respondent's failure to return home

The circuit court only addressed respondent's failure to return home in terms of FACES' claim for injunctive relief, finding an order requiring respondent to return home would be pre-empted by federal immigration law. The circuit court did not consider that respondent's failure to return home could be considered a breach of contract. Rather, the circuit court granted summary judgment as to FACES' breach of contract claim, focusing solely on

the enforceability of the covenant not to compete and respondent's continuing to teach within the state.

We find the circuit court erred by simply finding the covenant not to compete was unenforceable and failing to address that respondent's failure to return home could itself be considered a breach of contract. The fact respondent was granted a waiver does not preclude FACES' ability to enforce the contract because FACES' claim for breach of contract is not pre-empted by federal immigration law. While the circuit court may have correctly found it did not have the power to order respondent to return home through injunctive relief, the separate breach of contract action does not involve respondent's immigration status.

B. Covenant not to compete

We are also persuaded by FACES' argument that the non-compete provision, although inartfully named, is not actually a covenant not to compete, but rather an agreed upon contract term, the purpose of which was to ensure respondent complied with the foreign residency requirement. Accordingly, we find the circuit court erred in applying the common law governing covenants not to compete and in granting summary judgment for this reason.

C. Damages

FACES argues the circuit court erred in finding the liquidated damages provision in the revised agreement was unenforceable. FACES maintains that, in the alternative, it has also suffered actual damages as a result of respondent's failure to return home. Specifically, FACES contends it lost its significant investment in respondent because she diverted the funds provided for her own personal use. FACES further claims its sponsorship designation is at risk because of the large numbers of teachers who, like respondent, do not complete the foreign residency requirement.

"Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance." Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002). "Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." Id. If a clause is held to be a penalty, the plaintiff may still recover any actual damages that can be proved to have resulted from the breach. Tate v. LeMaster, 231 S.C. 429, 99 S.E.2d 39 (1957).

The circuit court found the liquidated damages provision contained in the parties' agreement constituted an unenforceable penalty because it had no relationship to any actual damages FACES might sustain as a result of respondent's alleged breach.

We find the circuit court properly concluded the liquidated damages provision is unenforceable because $36,000 is plainly disproportionate to any probable damage resulting from respondent's failure to return home. FACES' purported "lost investment" in respondent, totaling $29,400, accounts for the majority of that stipulated amount. We agree with respondent that the money FACES invested in respondent is a "sunk cost" over which respondent's failure to return home had no effect. In other words, FACES would have invested that money regardless whether respondent returned home. Accordingly, we hold the circuit court properly found the amount of liquidated damages constituted an unenforceable penalty.

Regarding actual damages, initially, FACES' argument that respondent's failure to return home somehow financially harmed FACES appears largely speculative. Other than the threat of losing its sponsor designation and its lost investment in respondent, FACES claims to have lost the future net income it would have received by placing a new teacher in the place occupied by respondent for three to six years while in her new position, in addition to less readily quantifiable damages such as FACES' lost goodwill. It is questionable whether FACES' lost income and goodwill would constitute an appropriate award of actual damages. We nonetheless

find the circuit court erred in only addressing the liquidated damages provision to support its grant of summary judgment as to FACES' breach of contract claim. Assuming the circuit court correctly found the liquidated damages provision was unenforceable, it is possible FACES is alternatively entitled to actual damages, and more factual development is necessary to make that determination. Tate, supra.

II. Breach of Duty of Loyalty

FACES also argues the circuit court erred in granting summary judgment in favor of respondent as to FACES' tort action for breach of the duty of loyalty. We agree.

"It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978). This Court has recognized a tort action for breach of the duty of loyalty. See Lowndes Products, Inc. v. Brower, 259 S.C. 322, 335-39, 191 S.E.2d 761, 767-70 (1972) (key employees who contacted and met with investors and a customer of current employer to lay plans to start a competing textile company, who left their employer without notice, and who leased space and ordered materials to build manufacturing equipment were guilty of disloyalty, and owed damages to employer).

While we express no opinion as to the viability of the breach of the duty of loyalty claim as one independent of the breach of contract action, we find the circuit court erred in granting summary judgment because respondent did not seek summary judgment as to this claim.

CONCLUSION

The circuit court erred in granting summary judgment as to FACES' claims for breach of contract and breach of the duty of loyalty. Accordingly, the order of the circuit court is

REVERSED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, J., and Acting Justice James E. Moore, concur. HEARN, J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE HEARN: Respectfully, I concur in part and dissent in part. I agree with the majority that the circuit court erroneously granted summary judgment as to FACES' duty of loyalty claim because Tripon did not move for summary judgment on it. I further agree that Tripon's failure to return to Romania can constitute a breach of contract, the so-called covenant not to compete does not fit this Court's definition of one, and the liquidated damages provision in the contract is unenforceable. However, in my opinion FACES' claim for actual damages is too speculative and cannot withstand summary judgment. I would therefore affirm the circuit court's dismissal of FACES' breach of contract claim.[3]

FACES' claim for damages falls into two groups. The first is what FACES terms its "lost investment" in Tripon, which it measures by the expenditures it incurred in bringing her to the United States, providing her benefits, training and certifying her, and other related costs. However, those are all sunk costs that FACES would have expended regardless of whether Tripon left the country as planned or remained. Thus, they were not caused by her alleged breach of the contract and are not recoverable. *See Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (stating a plaintiff must prove the breach caused damages).

The second group of damages is loss of goodwill and future profits stemming from FACES' tarnished reputation and potential decertification due to teachers refusing to leave the country as they originally agreed to do. The amount of lost profits or diminution in goodwill must be at least reasonably certain. *See Sterling Dev. Co. v. Collins*, 309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992) ("In claiming lost profits, the degree of proof required is that of reasonable certainty."); Restatement (Second) of Contracts § 352 cmt. a

[3] I recognize that the circuit court's order did not address FACES' actual damages. However, FACES requested the court consider actual damages in its Rule 59(e), SCRCP, motion and raised this issue elsewhere as well. This issue therefore appears in the record and I would affirm the circuit court on that basis. *See* Rule 220(c), SCACR. FACES at no point argues summary judgment was premature, and the majority therefore errs in reversing on this ground.

(1981) ("Damages need not be calculable with mathematical accuracy and are often at best approximate. This is especially true for items such as loss of good will as to which great precision cannot be expected."). "The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." *Sterling Dev. Co.*, 309 S.C. at 242, 421 S.E.2d at 405. All that is necessary is "a certain standard or fixed method" to estimate losses "with a fair degree of accuracy." *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E.2d 332, 334 (2004) (quoting *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 123, 113 S.E.2d 329, 336 (1960)).

From my review of the record, FACES' claim for damages is too speculative even when viewed in the light most favorable to it. Because proving lost profits and loss of goodwill can be difficult, only reasonable certainty, as opposed to mathematical precision, is required. Here, however, FACES has provided nothing but bald assertions and conjecture, with no real factual support, that it will be damaged in the future as a result of Tripon's actions. Indeed, it is exceedingly difficult to fathom, absent pure speculation, how FACES was actually and monetarily damaged by Tripon's failure to return to her own country. In my view, allowing this case to proceed to trial will place a jury in the impossible position of assessing damages where none can even be articulated, let alone proven. Accordingly, I do not believe the information contained in the record is sufficient to withstand summary judgment and would affirm the circuit court's dismissal of FACES' breach of contract claim.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

In the Matter of Robert A. Gamble, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

Columbia, South Carolina

August 24, 2011

The Supreme Court of South Carolina

In the Matter of Kristie Ann McAuley, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

Columbia, South Carolina

August 24, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wachovia Bank, National Association, Respondent,

v.

William E. Blackburn, Judith Blackburn, Tammy S. Winner, Watson E. Felder, Gary F. Ownbey, and South Island Plantation Association, Inc., Defendants,

Of Whom William E. Blackburn and Judith Blackburn are, Appellants.

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 4874
Heard April 5, 2011 – Filed August 24, 2011

AFFIRMED IN PART AND REVERSED IN PART

Glenn V. Ohanesian, of Myrtle Beach, for Appellant.

Robert C. Byrd and Krista McGuire, both of Charleston, for Respondent.

LOCKEMY, J.: In this mortgage foreclosure action, William and Judith Blackburn appeal the circuit court's order granting Wachovia's motion to strike their jury trial demand. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

On February 14, 2006, William Blackburn delivered a promissory note (the note) to Wachovia in the amount of $463,967 to finance the purchase of "investment property" (the property) in South Island Plantation, a Georgetown County planned development. The note was secured by a mortgage on the property executed by William Blackburn, Judith Blackburn, Tammy Winner, and Watson Felder. Judith Blackburn, Winner, and Felder also executed personal guaranties to secure the note.[1] The note and each of the guaranties contained waiver of jury trial provisions. The note signed by William Blackburn contained the following jury trial provision:

> **WAVIER OF JURY TRIAL.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR

[1] On October 12, 2007, Felder conveyed his interest in the property to Gary Ownbey.

> ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE . . . .

(bold and capitalization in original, font size not to scale). The guaranty signed by Judith Blackburn contained the following jury trial provision:

> **WAIVER OF JURY TRIAL.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO ACCEPT THIS GUARANTY. . . .

(bold and capitalization in original, font size not to scale).

On November 13, 2008, Wachovia filed this foreclosure action against the Blackburns, Winner, and Felder, asserting the note was in default and it was entitled to a judgment against the defendants in the amount of $473,747.24. In response, the Blackburns filed a second amended answer, counterclaim, cross-claim, and third-party complaint in which they asserted

claims against Wachovia and several third-party defendants.[2] The Blackburns asserted the following counterclaims against Wachovia: (1) negligent misrepresentation, (2) unfair trade practices, (3) promissory estoppel, (4) breach of contract/breach of contract accompanied by a fraudulent act, (5) breach of fiduciary duty, (6) fraud/fraud in the inducement, (7) breach of contract/negligence, (8) breach of contract, (9) civil conspiracy, and (10) illegality of contract. The Blackburns alleged Wachovia partnered with the third-party defendants[3] to promote and sell the property at a "high pressure" sales event which included a lottery. According to the Blackburns, Wachovia and the third-party defendants defrauded buyers by artificially inflating property values and making misrepresentations regarding the construction of amenities in the development. The Blackburns demanded a jury trial.

On June 18, 2009, Wachovia filed a motion to strike the Blackburns' jury trial demand and refer the case to the master-in-equity. Wachovia argued the Blackburns waived their right to a jury trial in the note and guaranty. In a memorandum opposing Wachovia's motion to strike, the Blackburns alleged (1) there was not a knowing and voluntary waiver, (2) the language of the waivers did not apply to their counterclaims, (3) the waivers were unconscionable, and (4) the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRCP. In a December 7, 2009 order, the circuit court granted Wachovia's motion, finding the jury trial waivers in the note and guaranty were clear and unambiguous and the Blackburns' counterclaims were within the scope of the waivers. The circuit court held the Blackburns were charged with having read the contents of the note and guaranty and were on notice of the jury trial waivers. The circuit court found the Blackburns' Rule 39(b), SCRCP, argument was without merit, and referred the action to the master. This appeal followed.

---

[2] The Blackburns filed their original answer on February 2, 2009, and amended answer, counterclaim, cross-claim, and third party complaint on February 13, 2009.

[3] The third-party defendants included Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence." Id. "Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." Id. at 15, 690 S.E.2d at 772-73.

LAW/ANALYSIS

I. Knowing and Voluntary Waiver

The Blackburns argue they did not knowingly and voluntarily waive their right to a jury trial. We disagree.

The Blackburns contend there is no evidence in the record they had actual knowledge of the waivers. They maintain the only evidence regarding whether they knowingly and voluntarily waived their right to a jury trial is their affidavit. In their affidavit, the Blackburns asserted they did not knowingly, voluntarily, or intentionally waive their right to a jury trial and were "not aware of any jury trial waiver" until Wachovia's motion to strike jury demand. In their brief, the Blackburns rely on Leasing Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) to support their contention that a party seeking the enforcement of a waiver must prove that consent was both voluntary and informed. The Blackburns note the Crane court cited National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977), wherein the Second Circuit affirmed a finding that a provision whereby a lessee waived a jury trial buried in the eleventh paragraph of a fine print, 16-clause agreement did not constitute a knowing and intelligent waiver of the lessee's right to a jury trial.

Wachovia argues that by signing the note and guaranty, the Blackburns are deemed to have read the documents and cannot avoid their effects by arguing otherwise. Wachovia maintains it did not have a duty to ensure the

Blackburns had read and understood the terms of the note and guaranty. Wachovia further contends the waivers are conspicuous, the note and guaranty are not lengthy documents, and there is no evidence the Blackburns are unsophisticated or were incapable of understanding the note and guaranty.

We agree with Wachovia. First, we note that while the Blackburns rely on federal case law in their brief, a parties' right to a jury trial in South Carolina is governed by state law. See Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (holding the Seventh Amendment to the United State Constitution is not applicable to the States).

We do not believe the Blackburns can avoid the waivers in the note and guaranty by arguing they were not knowing and voluntary. "A party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). "Such a waiver must be strictly construed as the right to trial by jury is a substantial right." Id. at 64, 566 S.E.2d at 866. "When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003). "A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). "A person signing a document is responsible for reading the document and making sure of its contents." Id. "Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." Id. "One who signs a written instrument has the duty to exercise reasonable care to protect himself." Id. at 665, 582 S.E.2d at 440. "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." Id.

Here, the waivers are conspicuous and unambiguous. They are printed in all capital letters with the bold heading, "**WAIVER OF JURY TRIAL**." Furthermore, the note and guaranty are not lengthy documents and the waivers contained therein are not buried within the language of other provisions. Rather, the waivers are contained in separate paragraphs located just above the signature lines. By signing the note and guaranty, the

Blackburns are charged with having read their contents, and therefore, they cannot avoid their effects by arguing they were unaware of the inclusion of the waivers. See Regions Bank, 354 S.C. at 663, 582 S.E.2d at 440 ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it."); see also Id. ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."). Accordingly, we find the jury trial waivers are enforceable.

II. Applicability

The Blackburns argue the jury trial waivers in the note and guaranty do not apply to their counterclaims. We agree.

Pursuant to the note and guaranty, the waivers at issue apply to

> any litigation based on, or arising out of, under or in connection with this note [or guaranty], the loan documents or any agreement contemplated to be executed in connection with this note [or guaranty], or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.

The Blackburns allege that while their counterclaims arise out of the same occurrence as the note, they do not arise out of the loan documents as required by the waivers. Pursuant to the note, "loan documents"

> refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a commitment letter that

> survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements.

The Blackburns contend their counterclaims arise from Wachovia's sales misrepresentations and failure to abide by promises to build infrastructure, amenities, and docks, and do not arise from the loan documents.[4] They maintain the definition of "loan documents" does not include sales contracts, deeds, promotional literature from the developer/seller, lottery procedure, or promises regarding docks and amenities and infrastructure. They also assert their counterclaims do not arise from the note, mortgage, loan application, financing statements, letters of credit, or any of the loan documents defined above. The Blackburns further argue the allegations of sales misrepresentations in their counterclaims are unrelated to the note, and thus, not subject to the waivers. The Blackburns rely heavily on Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007) and Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010), two supreme court cases involving arbitration agreements, to support their argument.

Aiken involved a tort action based on the theft of Aiken's personal information by employees of World Finance. 373 S.C. at 146, 644 S.E.2d at 706. In Aiken, World Finance sought to enforce an arbitration clause to which Aiken had agreed in applying for a loan. Id. at 147, 644 S.E.2d at 707. The Aiken court found that "even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law," and therefore, the court "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer

[4] The Blackburns maintain Wachovia "injected itself into the marketing and sale of [the] property . . . , became a joint venturer or partner, and is therefore equally liable for sales misrepresentations made and failures to provide infrastructure, amenities, docks, etc."

in the context of normal business dealings." Id. at 151, 644 S.E.2d at 709. The court provided that it did not seek to exclude all intentional torts from the scope of arbitration, but only "those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id. at 152, 644 S.E.2d at 709. The Aiken court found the theft of Aiken's personal information by World Finance employees to be unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement. Id. at 151, 644 S.E.2d at 709.

In Partain, Partain alleged Upstate Auto fraudulently replaced the truck he purchased with a different truck at the time of pick-up. 386 S.C. at 490, 689 S.E.2d at 603. Partain filed suit against Upstate Auto alleging he was the victim of a "bait and switch" in violation of the South Carolina Unfair Trade Practices Act. Id. Based on an arbitration agreement, Upstate Auto moved to dismiss Partain's claim. Id. The Partain court found Aiken was controlling and concluded the arbitration clause did not apply because "the alleged actions of Upstate Auto constituted 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Partain, 386 S.C. at 493, 689 S.E.2d at 604-05. Our supreme court noted Partain could not be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase. Id. at 494, 689 S.E.2d at 605. Moreover, the court found Partain could not have "contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." Id.

Similarly, the Blackburns argue they cannot be held to have contemplated that, in signing the note and guaranty, they were agreeing to waive jury trial claims arising from allegedly fraudulent conduct. They contend that a reasonable person attempting to secure a loan from a bank could not foresee that the bank would partner with the developer/seller and make misrepresentations about the property and the construction of amenities.

Wachovia asserts the Blackburns' counterclaims are within the scope of the waivers because their claims concern Wachovia's "course of conduct,"

"course of dealing," "actions," and "statements" with respect to the loan transaction. Wachovia maintains the counterclaims arise out of the note because the Blackburns allege Wachovia, as part of its course of dealing, made misrepresentations to induce them to enter into the loan. Wachovia notes the Blackburns allege the marketing of the property, the sale of the lots, and the provision of Wachovia loans were all part of a single transaction orchestrated by a partnership between Wachovia and the developers. Wachovia also alleges the Blackburns' counterclaims arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with the note" and guaranty. Wachovia maintains our supreme court's holdings in Aiken and Partain (1) do not apply outside of the context of arbitration agreements, (2) apply only to consumer transactions, and (3) the Blackburns have not alleged any "outrageous" conduct like that which was excepted in Aiken and Partain.

We do not believe the allegations of sales misrepresentations and pre-purchase fraud by the Blackburns are sufficiently related to the note, and thus, we do not believe they are subject to the waivers. Jury trial waivers are a substantial right and must be strictly construed. Beach Co., 351 S.C. at 64, 566 S.E.2d at 866. Pursuant to the note and guaranty, the waivers apply to "any litigation based on, or arising out of, under or in connection with [the] note, the loan documents or any agreement contemplated to be executed in connection with [the] note." First, we find the Blackburns' counterclaims are not based on nor do they arise out of the note. The Blackburns' claims are based on the sales contract, the promotional literature regarding the development, the lottery procedure, and the promises made regarding amenities. Second, we find the Blackburns' claims are not based on or arise out of the loan documents. The definition of "loan documents" does not include sales documents, and the sales documents were not "executed in connection with or related to the loan" as required by the definition. Third, we find the sales contract was not an "agreement contemplated to be executed in connection with [the] note," as it was executed months prior to the note. Finally, we find the waivers do not apply to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect [to the note]." We note this clause refers to conduct and actions with respect to the note and does not refer to the sales transaction.

Furthermore, the Blackburns could not have contemplated that in signing the note and guaranty, they were waiving their right to a jury trial on claims arising from allegedly fraudulent conduct. See Aiken, 373 S.C. at 151, 644 S.E.2d at 709 (holding the theft of Aiken's personal information by World Finance employees was unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement); see also Partain, 386 S.C. at 494, 689 S.E.2d at 605 (holding Partain could not have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct).[5] We find a reasonable buyer would not contemplate that a bank would partner with a developer/seller and make misrepresentations about a property and the construction of amenities. The Blackburns' counterclaims arise out of the alleged pre-sale misrepresentations and fraud of Wachovia, and not out of the note. Although the waivers are enforceable with regard to claims arising from the note, we find the Blackburns' allegations of sales misrepresentations and pre-purchase fraud are not within the scope of the waivers. Accordingly, applying a strict construction of the language of the waivers, we find they are unenforceable with regard to the Blackburns' counterclaims.[6]

CONCLUSION

We affirm the circuit court's determination that the Blackburns knowingly and voluntarily waived their right to a jury trial. However, we reverse the circuit court's determination that the Blackburns' counterclaims were within the scope of the waivers.[7]

---

[5] While Aiken and Partain involve arbitration agreements and not jury trial waivers, we believe they are instructive.

[6] We note this opinion does not preclude the circuit court, after appropriate discovery and/or testimony, from striking any or all of these counterclaims as insufficient and, if appropriate, referring any remaining equitable matters to the master-in-equity.

[7] Based upon our reversal of the circuit court's order granting Wachovia's motion to strike jury demand, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and GEATHERS, JJ., concur.

---

remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cody P., by and through his Conservator Kelly H. Kelley, and his natural and legal guardian Elizabeth Powell, Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis Powell, Defendants,

of whom Bank of America, N.A. is the Appellant.

Appeal From Williamsburg County
Clifton B. Newman, Circuit Court Judge

Opinion No. 4875
Heard December 8, 2010 – Filed August 23, 2011

AFFIRMED

C. Mitchell Brown, Clarence Davis, T. William McGee, III, and A. Mattison Bogan, all of Columbia, for Appellant.

W.E. Jenkinson, III, Jennifer R. Kellahan, and Ronnie A. Sabb, all of Kingstree, for Respondent.

LOCKEMY, J.: In this negligence action, a jury found Bank of America, North America (BOA) liable for negligence and awarded Cody P. by and through his Conservator, Kelly H. Kelley, and his natural and legal guardian Elizabeth Powell (collectively Powell) $205,735.37 in actual damages and $1,583,000 in punitive damages. BOA appeals arguing the trial court erred in denying its (1) motions for judgment notwithstanding the verdict (JNOV) as to negligence and punitive damages and (2) motion for a new trial based on the admission of evidence regarding its size. BOA also contends the trial court erred in finding the award of punitive damages was constitutionally proper. We affirm.

FACTS

Steven Powell died in a tragic accident at work entitling his minor son, Cody, to approximately $252,000 in life insurance proceeds. Karen Unrue, Steven's sister, approached Elizabeth Powell, Steven's widow, and offered to manage the insurance proceeds for Cody. Unrue was a trusted family member who had occasionally assisted the Powells with managing their personal finances in the past. Powell agreed to allow Unrue to serve as conservator over the insurance proceeds. Unrue also suggested Steven's brother, Travis Powell, serve as co-conservator.

Powell petitioned the probate court to appoint Unrue and Travis as co-conservators, and after a hearing, the court appointed Unrue and Travis as co-conservators. The probate court also waived the bond requirement and ordered "that the funds of the minor child, [Cody], be deposited in a restricted account and that no funds be withdrawn or transferred from such account without written [o]rder of [the probate court]." The certificate of appointment and fiduciary letter included the following restriction: "No withdrawals without court order."

On Cody's behalf, Unrue received seven checks totaling $252,447.51. Three of the checks were made payable to her and Travis jointly and included

the designation "Co-conservators For [Cody], A Minor" or "Co-Cn For Minor, [Cody]."[1] The other four checks were made payable to Unrue and included the designation "As Conservator Of [Cody], A Minor." Unrue endorsed the checks without including her title as co-conservator. Unbeknownst to Travis, Unrue forged his name on the three checks made payable to her and Travis as co-conservators and took all the checks to the Pawleys Island BOA. Unrue met with Lee Ann Yourko, a personal banker, and requested she open a certificate of deposit (CD) account. Yourko opened a CD account titled "Karen M. Unrue Guardian [Cody]." Yourko collected the checks and took them to a teller who processed the checks and deposited the proceeds into the CD account Yourko created. Neither Yourko nor the teller questioned the significance of the conservator designation in the payee line of the checks.

A few days later, Unrue returned to the Pawleys Island BOA with a single check for $253.67 made payable to her "As Conservator For Cody A Minor." Unrue met with branch manager Meredith Lawrence and requested she open a Uniform Gift to Minors Act (UGMA) account.[2] Lawrence opened a savings account titled "Karen M. Unrue – cust [Cody] – UMGA [sic]." Lawrence did not question the significance of the conservator title on the payee line of the check. Lawrence also failed to notice Unrue endorsed the check without including her title.

Approximately a month later, after the CD matured, Unrue entered the Garden City BOA and withdrew 100% of the funds, $253,991.50, from the CD account. Unrue took the funds to the Pawleys Island BOA and deposited them in the UGMA savings account. Over the next several months, Unrue made seven online transfers totaling $258,500 from the UGMA savings account to her personal checking account.

Powell initiated this action for negligence alleging BOA breached its duty to honor the restrictions set forth in the probate court's order, certificate

[1] The checks were made to payable to Karen Powell, Unrue's maiden name. The order appointing Unrue as co-conservator, the certificate of appointment, and the fiduciary letter were also in Unrue's maiden name.

[2] S.C. Code Ann. § 63-5-500 to -600 (2010).

of appointment, and fiduciary letter. Powell also sought actual and punitive damages. After a trial, the jury found in favor of Powell and awarded actual damages in the amount of $205,735.37 as stipulated by the parties. The jury also found BOA's conduct was willful, wanton, or reckless and awarded punitive damages in the amount of $1,583,000.

BOA sought a post-trial review of the punitive damages award alleging it was improper under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). BOA moved for JNOV as to Powell's negligence claim and the award of punitive damages. BOA also moved for a new trial arguing the trial court erred in allowing the admission of evidence regarding its size. After a hearing, the trial court denied BOA's post-trial motions and determined the award of punitive damages was constitutionally proper. This appeal followed.

LAW/ANALYSIS

I. Judgment Notwithstanding the Verdict: Negligence

BOA argues the trial court erred in denying its motion for JNOV on Powell's negligence claim because Unrue's actions were unforeseeable intervening acts that proximately caused Powell's loss.[3] We disagree.

In ruling on a motion for JNOV, the trial court must view the evidence, and the inferences that can reasonably be drawn from the evidence, in a light most favorable to the party opposing the motion. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The trial court should deny a motion for JNOV when the evidence yields more than one inference or its inferences are in doubt. Id. "This [c]ourt will reverse the trial court's rulings on [a motion for JNOV] only where there is no evidence to

[3] BOA also argues Powell failed to prove it was the cause-in-fact of the injury. However, BOA failed to raise this issue in its directed verdict motion; accordingly, it is unpreserved for our review. In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (finding only grounds raised in a directed verdict motion can be raised in a JNOV motion).

support the rulings or where the rulings are controlled by an error of law." Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

Generally, the elements of negligence are (1) duty, (2) breach, (3) proximate cause, and (4) injury. Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 482-83, 238 S.E.2d 167, 168 (1977). To show the defendant was the proximate cause of the injury, the plaintiff must establish the defendant was both the cause-in-fact and the legal cause of the injury. Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). The cause-in-fact requirement is proved by showing the injury would not have occurred but for the defendant's negligence. Id. The legal cause requirement is proved by establishing the plaintiff's injury was foreseeable. Id. at 278-79, 659 S.E.2d at 245.

Generally, an injury is foreseeable if it is the natural and probable consequence of the defendant's conduct in light of the attendant circumstances. See Young v. Tide Craft, Inc., 270 S.C. 453, 462-63, 242 S.E.2d 671, 675-76 (1978); Mellen, 377 S.C. at 279-80, 659 S.E.2d at 246. However, "[a] special case is presented if the injury is independently caused by the intervening act of a third party." Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). In that case, the general rule is "that when, between negligence and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person producing the injury, but that such was not intended by the negligent person and could not have been foreseen by him, the causal chain between the negligence and the accident is broken." Stone v. Bethea, 251 S.C. 157, 162, 161 S.E.2d 171, 173-74 (1968). In other words, "[t]he test is whether the intervening act and the injury resulting therefrom are of such a character that the author of the primary negligence should have reasonably anticipated them in light of the attendant circumstances." Shepard, 299 S.C. at 375, 385 S.E.2d at 38-39; see Young, 270 S.C. at 463, 242 S.E.2d at 676 ("Where there is a contention that an intervening agency interrupts the foreseeable chain of events, there are two consequences to be tested: (1) the injury complained of, and (2) the acts of the intervening agency.").

"The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there

is no liability." Stone, 251 S.C. at 161, 161 S.E.2d at 173. "One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." Id. at 161-62, 161 S.E.2d at 173. However, "it is not necessary that the actor should have contemplated the particular chain of events that occurred, but only that the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." Shepard, 299 S.C. at 375, 385 S.E.2d at 38.

Foreseeability is determined from the defendant's perspective at the time of the negligent act allegedly causing the plaintiff's injury. Mellen, 377 S.C. at 280, 659 S.E.2d at 246; Shepard, 299 S.C. at 375, 385 S.E.2d at 38 (noting "[f]oreseeability is to be judged from the perspective of the actor at the time of the negligent act, not after the injury has occurred"). Ordinarily, legal cause is a question of fact for the jury. Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). "The particular facts and circumstances of each case determine whether the question of proximate cause is for the court or for the jury." Id. "If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Id. at 147-48, 352 S.E.2d at 493. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Oliver, 309 S.C. at 317, 422 S.E.2d at 131.

We find the trial court properly denied BOA's motion for JNOV on Powell's negligence claim. Here, Robert Hubbs, an expert in banking and banking operations, testified banks anticipate theft. Hubbs explained banks implement and follow standard policies and procedures for establishing accounts and negotiating checks that are designed to prevent theft. BOA's designated representative, Elizabeth Reeves, also explained that banks anticipate theft and implement safeguards to prevent the misappropriation of customer's funds. According to Reeves, when an individual is managing funds for another, additional safeguards are used by banks to protect the funds of the minor or incapacitated person.

BOA implemented policies and procedures designed to avoid fraud and loss situations. For instance, when creating an account for an individual who is appointed by the court to manage the funds of another, such as a conservatorship account, BOA is required to obtain an original or certified copy of the court order appointing the individual. If a court order is required for withdrawals, "Court Restricted Account" must be placed in the title of the account. If the court order contains restrictions, the employee creating the account is required to contact BOA Banking Group Support-Legal Support. When negotiating a check made payable to a payee with a title such as a conservator, BOA's Teller Operations Manual requires the employee to verify the authority of the payee. Individuals named on the "payable to" line of a check must endorse the check exactly as it is payable. Individuals with a title such as conservator or guardian must use the title when endorsing a check. In fact, BOA's Teller Operations Manual and Platform Manual conspicuously indicate the best way for employee's to avoid a fraud or loss situation is to "KNOW YOUR ENDORSER."

Furthermore, Unrue presented eight checks to BOA indicating she was a conservator or co-conservator. The conservator title indicated to Yourko and Lawrence that Unrue was court appointed and court documents existed that they were required to request and review. However, Unrue never offered the court documents or otherwise alerted Yourko or Lawrence to her status as a court appointed conservator. Although BOA policy required Unrue to include her title when endorsing the checks, she endorsed the checks without including her title as conservator. Finally, Travis Powell was not present to negotiate the checks that listed him as co-conservator, even though BOA policy required his presence to negotiate the checks payable to him and Unrue jointly as co-conservators.

Reviewing the evidence in a light most favorable to Powell, we find the evidence presented at trial yields more than one inference regarding whether BOA should have reasonably foreseen Unrue's actions and the theft of Cody's funds in light of the attendant circumstances. Accordingly, we find the trial court properly denied BOA's motion for JNOV as to Powell's negligence claim.

II. New Trial Motion: BOA's Size

BOA argues the trial court abused its discretion in denying its motion for a new trial because allowing Powell to refer to its size during trial unfairly prejudiced BOA. We disagree.

"The grant or denial of new trial motions rests within the discretion of the trial [court] and . . . will not be disturbed on appeal unless [the trial court's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by [an] error of law." Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id. This court "reviews Rule 403[, SCRE,] rulings pursuant to an abuse of discretion standard and gives great deference to the trial court." Lee v. Bunch, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Johnson v. Horry Cnty. Solid Waste Auth., 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)) (internal quotation marks omitted).

Initially, Powell argues this issue is unpreserved because BOA failed to contemporaneously object to testimony regarding BOA's size. BOA moved in limine to exclude the deposition testimony of its designated representative, Floretta Denning. Specifically, BOA objected to Denning's statement that BOA is the "third largest bank in the world." The trial court denied BOA's motion. BOA contemporaneously objected to Denning's testimony when it was introduced at trial. A bench conference was held and the trial court overruled BOA's objection. Later, during a recess BOA requested the trial court state the grounds for overruling its objection on the record. The trial court explained it found the statement was not prejudicial in light of earlier testimony regarding the size of the bank where Cody's funds are currently deposited and its policies and procedures. During the remainder of trial, several references to BOA's size occurred in the jury's presence. We find this issue is preserved for our review. BOA was not required to continue

objecting to preserve this issue for appeal. See Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 546-47 (2000) (concluding parties are not required "to engage in futile actions in order to preserve issues for appellate review").

Turning to the merits, we find BOA's argument is misplaced. At trial, BOA was referred to as "big," "the largest" bank in America, and the "third largest bank in the world" on several occasions in the jury's presence. These references were brief and isolated and occurred only a few times over the course of a four-day trial. We find no prejudice in merely referring to BOA as what it is; a big bank. Accordingly, the trial court properly denied BOA's motion for a new trial on this ground.

III. Punitive Damages

A. JNOV

BOA argues the trial court erred in denying its motion for JNOV on punitive damages because Powell failed to present clear and convincing evidence BOA's actions were willful, wanton, or undertaken in reckless disregard of Powell's rights. We disagree.

In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." Rogers v. Florence Printing Co., 233 S.C. 567, 577-78, 106 S.E.2d 258, 263 (1958); see also Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting Rogers). "It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor . . . ." Rogers, 233 S.C. at 578, 106 S.E.2d at 263. In other words, "at the time of his act or omission to act the

tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing." Id. at 578, 106 S.E.2d at 264.

We find the trial court properly denied BOA's motion for JNOV on punitive damages. Here, Yourko received training as a personal banker in Charlotte, North Carolina on three separate occasions for one week at a time. Yourko explained she was trained to employ the policies and procedures outlined in BOA's Platform Manual. Yourko also received on-the-job training in BOA's policies and procedures from the personal banker she replaced. Lawrence received six months training as branch manager. This training included working as a teller, personal banker, and training in a banking center manager role. Lawrence explained each BOA branch had a Platform Manual available for its employees. BOA also had a computer system that provided prompts based upon the Platform Manual for its employees to use in conducting business. Furthermore, BOA employees had access to a helpline to assist with issues regarding BOA's policies and procedures.

BOA's Platform Manual defines a conservator as a "[c]ourt-appointed individual who: [c]ares for and/or manages the property and affairs of a minor or an incapacitated (physically or mentally) adult" and notes a conservator may also be referred to as a guardian or curator. A conservatorship account is defined as one "[e]stablished by a court-appointed guardian, conservator, or curator to manage the funds of a ward." The definitions of guardian, conservator, and curator and guardianship account, conservatorship account, and a curatorship are substantively similar. Opening a conservatorship account requires an original or certified copy of the court order appointing the conservator that contains the name of the conservator, the name of the ward, a signature of a court official, a certified seal or filing stamp, and a statement indicating the conservator is guardian over the estate or property of the ward. If the court order indicates an order of the court is required for withdrawals, "Court Restricted Account" must be included in the title of the account. When a court order contains restrictions, the personal banker is required to contact BOA Banking Group Support-Legal Support.

When a customer presents a check including a payee designation with a title such as guardian, conservator, or curator, BOA's Teller Operations Manual requires that the payee's authority be verified before the check is cashed. The endorsement must also include the payee's title. The Teller Operations Manual and the Platform Manual both include the warning that "When negotiating items, the best way to avoid fraud or a loss situation is to 'KNOW YOUR ENDORSER.'" Based on their training and experience, we find Yourko and Lawrence are chargeable with knowledge of BOA's policies and procedures for establishing a court restricted conservatorship account and negotiating checks.

The court order appointing Unrue and Travis Powell as co-conservators required Cody's funds to be deposited in a restricted account that required a court order for withdrawals. Unrue received eight checks from two insurance companies on behalf of Cody. Unrue presented seven checks to Yourko. Two checks designated "Karen and Travis Powell, Co-Cn For Minor Cody P." as the payee. (emphasis added). One check designated "T. Powell & K. Powell Co-Conservators For Cody P., A Minor" as payee. (emphasis added). Four checks designated "Karen Powell, As Conservator Of Cody P. A Minor" as payee. (emphasis added). Despite the payee designations, Yourko opened a CD account titled "Karen M. Unrue Guardian [Cody]" without requesting an original or certified copy of the court order appointing Unrue as conservator. Assuming Yourko misunderstood the conservator title on the checks, the Platform Manual provides that a guardian is a court appointed individual who cares for and manages the property of a minor or incapacitated adult. Further, establishing a guardianship account also required Yourko to request an original or certified copy of the court order appointing Unrue.

Unrue also presented one check to Lawrence that listed the payee as "Karen M. Powell, As Conservator For Cody P. A Minor." (emphasis added). Lawrence opened a Uniform Gift to Minors Act savings account titled "Karen M. Unrue – cust [Cody] UMGA [sic]" also without requesting an original or certified copy of the court order appointing Unrue as conservator.

Denning, BOA's designated representative, testified the payee designations were clear: "They were made out to conservators. There's

nothing that was misconstrued here. It's obvious who they were made out to." Denning also explained the payee designation on the checks indicated the existence of a court order: "[F]rom the beginning she had the checks and on the checks it told her who the conservator was and the minor. It stated that on the checks. When she got ready to open the account, these were court ordered. There were other documents that she needed to see." Furthermore, BOA's designated representative Reeves explained Yourko and Lawrence should have requested the court order when presented with checks payable to a payee with the title conservator. Finally, Hubbs, Powell's expert in banking and banking operations, explained the conservator payee designation should have alerted Yourko and Lawrence to the existence of court documents that BOA's policies and procedures required to open the accounts and negotiate the checks.

We find the evidence presented at trial was sufficient to warrant submitting the punitive damages issue to the jury. Considering the evidence in a light most favorable to Powell, a person of ordinary reason and prudence in Yourko's and Lawrence's position would have known he or she was opening the accounts without the safeguards mandated by the court order and in contravention to BOA's policies and procedures. Accordingly, the trial court properly denied BOA's motion for JNOV on this ground. [4]

B. Mitchell v. Fortis Analysis

Because the jury found Unrue's conduct was reasonably foreseeable in light of the attendant circumstances and Powell proved BOA's conduct was willful, wanton or reckless by clear and convincing evidence, we must

[4] BOA submits if we find Powell proved punitive damages by clear and convincing evidence, we should not find it liable for punitive damages under the facts of this case because it lacked complicity with the actions of its employees. In short, BOA asks us to adopt the complicity doctrine set forth in the Restatement (Second) of Torts § 909 (1965). We find this issue is unpreserved for our review because BOA failed to raise it in its motion for a directed verdict on punitive damages In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (finding only grounds raised in a directed verdict motion can be raised in a JNOV motion).

determine whether the jury's award of punitive damages was constitutionally proper using the test articulated by our supreme court in Mitchell v. Fortis Insurance Co., 385 S.C. 570, 686 S.E.2d 176 (2009). Applying the Mitchell test, we conclude that it is.

"Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). The trial court must review

> the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010) (citing Mitchell, 385 S.C. at 587-88, 686 S.E.2d at 185-86). This court conducts a de novo review in evaluating the constitutionality of a punitive damages award. Mitchell, 385 S.C. at 583, 686 S.E.2d at 183.

First, in examining the reprehensibility of defendant's conduct, we "should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." Id. at 587, 686 S.E.2d at 185. Considering these factors, we find BOA's conduct evinces a high degree of reprehensibility. Although, the harm Cody suffered was economic and not physical, the evidence established Cody was financially vulnerable. The

misappropriated funds were life insurance proceeds meant to compensate Cody for the loss of his father's support. Based upon Yourko's admission she knew Unrue was helping take care of Cody after his father was killed and the conservator designation on the payee line of the checks, BOA was aware of Cody's financial vulnerability. Furthermore, Cody is a special needs child who suffers from seizures and uses the funds to pay for medical expenses, school supplies, and necessities.

Despite Cody's financial vulnerability and BOA's awareness thereof, it failed to set up Cody's accounts with the proper safeguards to protect his funds. While BOA's conduct did not evince an indifference to or a reckless disregard for Cody's health or safety, it exposed Cody to the possibility he might not be able to afford his medical expenses. Although the harm Cody suffered was not the result of intentional malice, trickery, or deceit on BOA's part, we are surprised by the ease with which Unrue was able to circumvent BOA's safeguards and defeat the mandate of the court order requiring her to deposit Cody's funds in a restricted account. BOA blindly followed Unrue's request to open a CD and a UGMA account when presented with checks indicating the existence of court process and triggering its obligation to request a copy of the court order appointing Unrue. We are also surprised by BOA's failure to recognize the significance of the conservator designation on the payee line of the checks. For instance, both Yourko and Lawrence failed to recognize the significance of the conservator designation despite their training in BOA's policies and procedures. Neither requested a copy of the court order appointing Unrue. When Yourko handed the checks to the teller to process, the teller failed to verify Unrue's authority before cashing the checks. The teller also failed to require Unrue to endorse the checks with her title. Furthermore, per BOA's Platform Manual a CD is not an eligible product for a conservatorship or guardianship account. BOA's "operations area" that reviews the activity of the tellers and personal bankers for compliance with BOA's safeguards failed to catch the discrepancy between the conservator designation on the payee line of the checks and CD account Yourko opened. The operations area also allowed the checks to be negotiated without the proper endorsements. BOA's conduct involved repeated failures to employ the safeguards prescribed to protect Cody's funds. Accordingly, we conclude BOA's conduct was sufficiently reprehensible to support a punitive damages award.

Next, we examine the ratio between actual and punitive damages. Id. at 587-88, 686 S.E.2d at 185. While there is no concrete constitutional limit on the ratio between actual and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003). In determining the reasonableness of the ratio we may consider (1) the likelihood that the award will deter the defendant from like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. Mitchell, 385 S.C. at 588, 686 S.E.2d at 185. In short, this court "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Campbell, 538 U.S. at 426.

Here, the ratio of punitive to actual damages is 7.69 to 1, at the high end of the single-digit spectrum. However, it is probable that a $1.5 million punitive damages award will deter BOA from like conduct and encourage BOA to better train its employees and implement more effective safeguards to protect customer's funds. Furthermore, BOA has the ability to pay the punitive damage award. The net worth of its shareholder equity as of June 30, 2008, four months before trial, was $163 billion.

Furthermore, the award should be reasonably related to the harm likely to result from BOA's conduct. Here, the evidence established that correctly setting up a conservator account takes approximately one hour. Powell introduced evidence of BOA's weekly, daily, and hourly earnings. For instance, Dr. Wood, Powell's expert economist, testified BOA earned approximately $258 million per week, $36.9 million per day, and $1,538,250 per hour. During closing argument, Powell asked the jury to punish BOA for the harm caused by BOA's failure to properly protect Cody's funds by awarding punitive damages in the amount BOA earns in one hour—the amount of time it would have taken to set up Cody's accounts with the appropriate safeguards. Powell also argued a $1,538,250 award would send a message to BOA that it needed to ensure the appropriate safeguards are employed to protect their customers' funds. The jury awarded Powell 1,583,000 in punitive damages. The consistency between BOA's one hour earnings figure and the jury's punitive damages award leads us to the

conclusion that the punitive damages award is reasonably related to the harm Cody suffered as a result of BOA's failure to set up his accounts with the appropriate safeguards.

We are mindful that our supreme court recently questioned the "propriety of extrapolating financial data" regarding a defendant's per week, per day, and per hour income, revenue, and cash flow for determining a defendant's ability to pay. Branham v. Ford Motor Co., 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010). In Branham, the plaintiff introduced extrapolated per week, per day, and per hour figures of Ford's net worth, income, revenues, and cash flow. Id. at 239, 701 S.E.2d at 24. The Branham court noted this court has found no abuse of discretion in the admission of per day earnings, operating revenue, and net income. Id. at 240, 701 S.E.2d at 24; Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 170, 536 S.E.2d 380, 386 (Ct. App. 2000) (finding the trial court properly admitted evidence of the defendant's per day operating revenue and net income); Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 344, 450 S.E.2d 66, 74 (Ct. App. 1994) (finding the trial court did not abuse its discretion in admitting evidence of the defendant's per day earnings). However, although the court questioned whether Bryant and Orangeburg Sausage would pass constitutional muster after Campbell, it did not overrule either case. Branham, 390 S.C. at 239-40, 701 S.E.2d at 24-25. In light of the foregoing, we rely on such evidence here only in finding the jury's award of punitive damages was reasonably related to the harm Cody suffered.

Finally, we consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Mitchell, 385 S.C. at 588-89, 686 S.E.2d at 186. No authorized civil penalties are applicable here. An examination of cases with punitive to actual damages ratios at the high end of the single-digit spectrum reveals conduct by the defendant that is highly reprehensible. See, e.g., Austin, 387 S.C. at 55, 691 S.E.2d at 152 (upholding a punitive to actual damage ratio of 8.21 to 1 when defendant's misrepresentations regarding the physical condition of the vehicle purchased by the plaintiff evinced a reckless disregard for the health and safety of the plaintiff and the general public); Mitchell, 385 S.C. at 594, 686 S.E.2d at 188 (finding an punitive to actual damage ratio of 9.2 to 1 satisfied due process, even though plaintiff's harm

was economic, because defendant's actions exposed plaintiff to great risk of physical danger); James, 371 S.C. at 197, 638 S.E.2d at 672 (upholding a punitive to actual damage ratio of 6.82 to 1 when defendant's insurance adjuster made repeated false representations that led to the denial of plaintiff's insurance claim and plaintiff being sued by a third party who was bitten by plaintiff's dog); Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 143, 584 S.E.2d 120, 130 (Ct. App. 2003) (finding a 9.9 to 1 punitive to actual damage ratio was proper based upon defendant's tortious interference with contract); Lister v. Nations Bank of Del., N. Am., 329 S.C. 133, 152-53, 494 S.E.2d 449, 460 (Ct. App. 1997) (finding a 23 to 1 punitive to actual damages ratio was proper when the defendant's licensee made an unauthorized charge of $7,696.63 on plaintiff's credit card). We find BOA's conduct here is equally reprehensible to the conduct in the above cited cases and conclude the jury's award of punitive damages is in accord with punitive damage awards in comparable cases.

In short, BOA's failure to protect Cody's funds with the proper safeguards was highly reprehensible. Although the ratio between actual and punitive damages is at the high end of the single-digit spectrum, a review of comparable cases reveals conduct of a similar degree of reprehensibility to BOA's conduct here. The award is reasonable and proportionate to the harm Cody suffered and the general damages recovered. Finally, BOA has the ability to pay the punitive damage award, which represents less than one percent of its net worth. Based on our review of the guideposts outlined in Mitchell, we conclude the punitive damages award is constitutionally proper.

CONCLUSION

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

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melissa Crosby, Respondent,

v.

Prysmian Communications Cables and Systems USA, LLC, Appellants.

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

Opinion No. 4876
Heard November 3, 2011 – Filed August 24, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert L. Widener and Richard J. Morgan, both of Columbia, for Appellants.

Stephen Benjamin Samuels, of Columbia, for Respondent.

FEW, C.J.: The workers' compensation commission found that Melissa Crosby was injured in the course and scope of her employment with

Prysmian Communications Cables and Systems USA.[1] Prysmian fired her nineteen days after her injury. Crosby sued Prysmian for retaliatory discharge under section 41-1-80 of the South Carolina Code (Supp. 2010), claiming she was fired for filing a workers' compensation claim. In a motion for summary judgment, Crosby asked the circuit court to give preclusive effect to the commission's finding and grant summary judgment on Prysmian's affirmative defense that the workers' compensation claim was fraudulent. We affirm the circuit court's order granting partial summary judgment that the commission's finding is preclusive, and hold that Prysmian's affirmative defense fails as a matter of law. We also affirm the circuit court's order granting summary judgment on Prysmian's counterclaims. However, we reverse the circuit court's order granting partial summary judgment as to the causal connection between the filing of the workers' compensation claim and Crosby's firing. We remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

On September 22, 2004, Prysmian hired Crosby to operate machines that colored fiber optic cables. On January 6, 2005, Crosby made a claim for benefits under the Workers' Compensation Act by notifying her supervisor at Prysmian that she had injured her right knee on the job the day before. She formalized the claim on February 1, 2005, by filing and serving a Form 50 in which she alleged she "sustained an accidental injury to her right knee on 1-5-05."

In July 2005, the workers' compensation commission held a hearing on the claim. Crosby and Prysmian presented conflicting evidence as to whether she was injured on the job on January 5. Crosby testified that on January 5 while she was stringing up a fiber optic line on one machine, an alarm activated on another machine. She explained that she hyperextended her right knee as she rushed to the other machine to prevent the severance of the

[1] Prysmian Communications Cables and Systems USA is the successor to Pirelli Communications Cables and Systems North America. While this cause of action arose before Prysmian succeeded Pirelli, we will refer to Pirelli as Prysmian for the purposes of this opinion.

fiber optic line. Prysmian presented evidence that Crosby did not injure the knee on January 5. First, Crosby did not report any injury until the next day. Crosby admitted she hurt the same knee on January 2, 2005, but testified she iced the knee and it got better before January 5. Crosby testified that she did not report the January 5 injury immediately because she thought it would get better like it had on January 2. Prysmian also presented the testimony of coworkers who observed Crosby limping on her right leg as she arrived at work on January 5. Though Crosby admitted she was limping, she attributed the limp to blisters on her toes she got from dancing at a New Year's Eve party. The single commissioner found that Crosby "is a credible witness who sustained an injury to her right lower extremity by accident arising out of and in the course of her employment on January 5, 2005." The single commissioner's order was affirmed by an appellate panel. Prysmian did not appeal the appellate panel's decision and it became the final decision of the commission.

On January 25, 2005, Prysmian notified Crosby that she was fired. The letter Prysmian sent to her stated in part:

> Both [Prysmian] and its workers' compensation insurer, American International Group, Inc. ("AIG"), have investigated your claim, and determined that your claim lacks merit and, [Prysmian] believes, was filed with fraudulent intent. In this regard, [Prysmian] has obtained statements from several employees who acknowledge that you appeared visibly injured at the time you reported for work on January 5, 2005, which indicates that the injury which you allege occurred in the course and scope of your work on January 5, 2005, did not, in fact, occur during such time. Separately, AIG has conducted an investigation and notified [Prysmian] that it is denying your claim for workers' compensation benefits based on essentially the same evidence.
>
> As a result of AIG's determination and the statements obtained in the course of [Prysmian]'s investigation

> of your claim, [Prysmian] has decided to terminate your employment, effective immediately, for filing a false claim for workers' compensation benefits.

On December 21, 2005, Crosby filed a civil lawsuit against Prysmian for retaliatory discharge under section 41-1-80. Prysmian answered and asserted an affirmative defense that Crosby "was validly terminated for fraudulently filing a workers' compensation claim."[2] Prysmian also asserted counterclaims for breach of the duty of loyalty, gross negligence, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation. Crosby filed a motion for summary judgment claiming she "is entitled to an order dismissing [Prysmian's] counterclaims with prejudice and to an order finding [Prysmian] terminated [Crosby's] employment in retaliation for filing a workers' compensation claim as a matter of law." The circuit court granted Crosby's motion. Prysmian raises three issues on appeal. First, Prysmian claims the circuit court erred in giving preclusive effect to the factual finding of the commission that Crosby was injured in the course and scope of employment, and thereby granting partial summary judgment to Crosby as to Prysmian's affirmative defense that Crosby filed a fraudulent workers' compensation claim. Second, Prysmian claims the circuit court erred in granting partial summary judgment on the causal connection element of retaliatory discharge. Third, Prysmian claims the circuit court erred in granting summary judgment as to Prysmian's counterclaims.

[2] Prysmian's answer contains fourteen defenses, three affirmative defenses, and seven counterclaims. The quoted language is from the circuit court's order granting summary judgment, not from Prysmian's answer. The parties appear to agree that the affirmative defense for filing a fraudulent claim is contained in what Prysmian termed its "tenth defense, third affirmative defense, and third counterclaim" entitled "Statutory Defense pursuant to § 41-1-80."

II. Standard of Review

Rule 56(c), SCRCP, provides that the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Prysmian's first and third issues present questions of law. We decide questions of law with no deference to the lower court. Town of Summerville v. City of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The second issue, however, is one of fact. We must reverse the circuit court's order if we find even a scintilla of evidence to support Prysmian's position. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. Retaliatory Discharge Claim under Section 41-1-80

In order to recover for retaliatory discharge under section 41-1-80, a plaintiff must establish three elements: "1) institution of workers' compensation proceedings, 2) discharge or demotion, and 3) a causal connection between the first two elements." Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 97 (2000) (citing Hines v. United Parcel Serv., Inc., 736 F. Supp. 675, 677 (D.S.C. 1990)). The circuit court granted partial summary judgment finding that Crosby satisfied these elements, leaving only the question of damages for the jury. Prysmian concedes that Crosby satisfied the first and second elements. Prysmian's second issue on appeal challenges the circuit court's ruling as to the third element. We address this issue first, and the issue regarding the affirmative defense Prysmian asserted second.

a. The Causal Connection Element

The circuit court's order stated "the factual record indicates the filing of a workers' compensation claim amounted to the catalytic agent that resulted in the release of Plaintiff Crosby by her employer Defendant Prysmian. Thus, partial summary judgment as to the elements of § 41-1-80 is

appropriate."[3] We believe Prysmian presented a scintilla of evidence that the third element is not met, and therefore we are required to reverse.

We apply the "determinative factor" test to determine whether an employee has proven the third element of a retaliatory discharge claim under section 41-1-80. Hinton, 343 S.C. at 242, 540 S.E.2d at 97. "The determinative factor test requires the employee establish that [she] would not have been discharged 'but for' the filing of the workers' compensation claim." Id. (citing Wallace v. Milliken & Co., 305 S.C. 118, 121, 406 S.E.2d 358, 360 (1991)). In analyzing the facts of this case, we find it helpful to consider Wallace, in which the supreme court considered three different tests before adopting the determinative factor test. The court rejected, without discussion, the "substantial factor" test, which would require the plaintiff to prove "that filing of the claim constituted an important or significant motivating factor for discharge." 305 S.C. at 121, 406 S.E.2d at 359-60. The court also rejected the "sole factor" test, which would require the plaintiff to prove "the only motivating factor for discharge was filing of the claim." 305 S.C. at 120-21, 406 S.E.2d at 359-60. The court noted the sole factor test "does not achieve the goals of retaliatory discharge legislation, since there normally may exist some other factor that played some part in the discharge." 305 S.C. at 121, 406 S.E.2d at 360. The "determinative factor" test therefore contemplates that an employer might have "some other factor that played some part in the discharge," but it allows liability only if the plaintiff can prove she would not have been fired "but for" the filing of the workers' compensation claim. Id. In other words, under the determinative factor test, it is not enough to prove that she was fired in retaliation for the workers' compensation claim; she must also prove that she would not have been fired on some other basis or for some other reason.

[3] Prysmian argues that the language "indicates" in the circuit court's ruling shows it used the wrong standard for summary judgment. In light of our ruling on this issue, we do not specifically address this argument. However, our review of the circuit court's order leads us to believe the court was well aware that it could grant summary judgment only when "there is no genuine issue as to any material fact . . . ," Rule 56(c), SCRCP, and thus that it used the correct standard.

In this case, Prysmian's letter to Crosby is direct and unequivocal: "[Prysmian] has decided to terminate your employment, effective immediately, for filing a false claim for workers' compensation benefits." Moreover, Prysmian's Director of Human Resources, the man who wrote the letter, testified before the commission as follows:

> Q: Why was she terminated?
>
> A: For filing a false workers' comp claim. . . . It was our belief that she had filed a false claim and consequently she was terminated. . . . And she was terminated for our belief of filing a false workers' comp claim.

Therefore, Crosby has proven that she was fired in retaliation for filing the workers' compensation claim. However, Prysmian presented evidence to the circuit court that it had other reasons to fire Crosby. In particular, Prysmian offered evidence that at the time of her application for employment Crosby had been required to fill out a Medical Assessment Form, on which she answered "no" to the question "[h]ave you ever had . . . knee pain or 'trick knee.'" In her deposition in this case, Crosby admitted she injured the same knee only four months before while working at her previous job, that she had received medical treatment for the knee injury at a hospital, and that she took "inflammation medication" and wore an immobilizer brace. Under the "scintilla" standard of Hancock, the circuit court erred in granting summary judgment on the causal connection element. On remand, Crosby must prove that she would not have been fired because of her alleged misrepresentation on the Medical Assessment Form.

Prysmian contends it has other valid reasons it fired Crosby. However, those reasons relate directly to the workers' compensation claim. For example, Prysmian claims Crosby violated company policy by not reporting her January 5, 2005, injury "immediately." In this respect, Prysmian's

company policy[4] is in conflict with the Workers' Compensation Act, which provides that an employee shall give notice "immediately on the occurrence of an accident, or as soon thereafter as practicable." S.C. Code Ann. § 42-15-20 (1985). This section, which has been amended since Crosby was injured,[5] allows a maximum of ninety days in which to give notice, but even then permits benefits to be awarded if "reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." Id. While Prysmian may be free to terminate an employee for violating company policy, it may not assert such a violation as a basis to defend a retaliatory discharge claim under section 41-1-80 if the policy the employee violated conflicts with the Workers' Compensation Act. If an employer contends the employee violated the Act in this or in some other manner, it may assert that violation to the commission.

b. Collateral Estoppel

We next address the circuit court's ruling granting summary judgment as to the affirmative defense asserted by Prysmian. The circuit court stated:

> Defendant Prysmian offers, in defense, that [Crosby] was validly terminated for fraudulently filing a workers' compensation claim. The facts support a finding that Plaintiff Crosby's filing of a workers' compensation claim was in good faith. This Court notes the conclusions of law in the December 5, 2005 Order and Report of Commissioner J. Alan Bass of the South Carolina Workers Compensation [Commission]. ("2. Under § 42-1-160, claimant

[4] Prysmian's "Standards of Conduct" lists numerous "acts and behavior which are unacceptable," including: "Failure to immediately report any work related injury, illness, or accident."

[5] This section was amended in 2007. See S.C. Code Ann. § 42-15-20 (Supp. 2010).

> sustained injuries by accident arising out of and in the course of employment.").[6]

In Wallace, the supreme court recognized an affirmative defense to a section 41-1-80 claim for "violation of specific written company policies." 305 S.C. at 121, 406 S.E.2d at 360. Prysmian's "Standards of Conduct" provides that an employee may be terminated for "acts and behavior which are unacceptable," specifically including: "Filing false claims of injury or illness." Prysmian's appeal presents us with the question of whether a ruling by the workers' compensation commission that the claimant was injured in the course and scope of employment is preclusive as to the affirmative defense that the employee filed a "false claim of injury." We hold that it is.

The question of whether the ruling by the workers' compensation commission is preclusive is one of issue preclusion, or what has traditionally been called collateral estoppel. See In re Crews, 389 S.C. 322, 340, 698 S.E.2d 785, 794 (2010) (equating issue preclusion and collateral estoppel). "Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action." Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009). Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals. See Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." (citing Earle v. Aycock, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981))). However, not every factual determination by an administrative agency is entitled to preclusive effect. In Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), our supreme court held that the factual findings of the Employment Security Commission are not preclusive in a subsequent

[6] Prysmian also contends the language "support" shows the circuit court used the wrong standard for summary judgment. However, we decide this issue as one of law, and therefore we do not need to address the contention that the court used the wrong factual standard.

action for wrongful discharge. The Shelton court set forth the starting point for analyzing whether a particular agency's findings are preclusive:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question. . . . The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.

325 S.C. at 252, 481 S.E.2d at 708 (quoting Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984)).

In order to determine whether an agency's factual finding is preclusive, we must first determine whether the particular finding meets the traditional elements of collateral estoppel. We must then examine whether there is some countervailing consideration which necessitates relitigation.[7] A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782.

We find that all the elements are met when the commission determines that an injury was sustained in the course and scope of employment. The commission affords both the claimant and the employer a full and fair

[7] Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

opportunity to litigate the issue.[8] The parties are entitled to present witnesses and other evidence, make factual and legal arguments, and appeal a ruling they contend was made in error. The commission may not award benefits without actually litigating and directly determining the factual question of whether the claimant was injured in the course and scope of employment, and such a finding is necessary to support a judgment awarding benefits. See Ardis v. Combined Ins. Co., 380 S.C. 313, 320, 669 S.E.2d 628, 632 (Ct. App. 2008) ("To be compensable, an injury by accident must be one 'arising out of and in the course of employment.'" (quoting S.C. Code Ann § 42-1-160 (Supp. 2007))). In this case, the record before us reveals that the issue was hotly contested before the commission, and the commission made a specific finding that "claimant sustained injuries by accident arising out of and in the course of employment." Thus, Crosby has established the three elements of collateral estoppel.

Prysmian makes several specific arguments that countervailing considerations necessitate relitigation of the commission's finding. We find none of the arguments persuasive, and that no unfairness or injustice will result from the application of issue preclusion to this situation.[9] First,

---

[8] "The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action." Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008).

[9] In Shelton, the supreme court discussed the "countervailing considerations" that necessitated relitigation of the question that had been determined by the employment security commission. 325 S.C. at 252, 481 S.E.2d at 708. We find Shelton to be distinguishable because of the numerous differences between proceedings in the employment security commission and the workers' compensation commission. The Shelton court noted several points as to which Employment Security Commission hearings are inconsistent with the doctrine of collateral estoppel. 325 S.C. at 252-53, 481 S.E.2d at 708. Those points are not applicable to the workers' compensation commission. The court concluded "public policy dictates the findings made during an ESC hearing should not receive collateral estoppel effect." 325 S.C. at 252, 481 S.E.2d at 708.

Prysmian argues that the public policy of liberally construing the Workers' Compensation Act and resolving doubts in favor of coverage is a countervailing reason necessitating relitigation. We disagree. We believe the public policy cited by Prysmian actually favors protecting an injured worker from retaliation for filing a claim the commission finds to be work-related. See Horn v. Davis Elec. Constructors, Inc., 302 S.C. 484, 491, 395 S.E.2d 724, 728 (Ct. App. 1990) (applying "the policy of this state that injured employees be fully compensated for their work-related injuries" to a retaliatory discharge claim under section 41-1-80). Second, Prysmian argues that giving preclusive effect to the finding of the commission interferes with this court's scope of review in a retaliatory discharge case, which allows an appellate court to find facts according to its own view of the evidence. See Hinton, 343 S.C. at 242, 540 S.E.2d at 96 ("In reviewing a retaliatory discharge claim, the appellate court may find facts in accordance with its view of the preponderance of the evidence." (citing Wallace, 305 S.C. at 120, 406 S.E.2d at 359 (1991))). We disagree with this argument as well. Our scope of review requires us to independently evaluate evidence which has been presented to a circuit court in a retaliatory discharge trial, but it does not allow us to reconsider a factual finding of the commission after the question has been fully litigated.[10]

Prysmian makes two other arguments of countervailing considerations. First, Prysmian contends the General Assembly would have given the commission authority to decide retaliatory discharge claims or it would have

[10] Other states have similarly held that the findings of a workers' compensation commission may be given preclusive effect. See, e.g., Frederick v. Action Tire Co., 744 A.2d 762, 767 (Pa. Super. Ct. 1999) ("Pennsylvania appellate courts have consistently held findings in workers' compensation cases may bar relitigation of identical issues in collateral civil actions, even third party tort actions."); Westman v. Dessellier, 459 N.W.2d 545, 547 (N.D. 1990) ("The decisions of administrative agencies, including those of the [Workers' Compensation] Bureau, may be res judicata even though administrative agencies are not courts."); McKean v. Municipality of Anchorage, 783 P.2d 1169, 1171 (Alaska 1989) ("[I]t is well-settled that res judicata may be applied to decisions of workers' compensation boards.").

included such a provision in section 41-1-80 if it intended the commission's findings to be preclusive. Second, Prysmian argues that our holding makes unsuccessful workers' compensation claims preclusive, which would be contrary to the legislative intent of section 41-1-80. We find no merit in either argument. As to the second argument, our holding does not require that a finding by the commission that an injury is not work-related be given preclusive effect.

It is important to note that the circuit court's order granting summary judgment on this issue is not a determination that there is no evidence supporting Prysmian's contention that Crosby did not act in good faith. If that were so, this court would be looking for a scintilla of evidence to support Prysmian. See Hancock, 381 S.C. at 330, 673 S.E.2d at 803. Here, there is ample evidence to support Prysmian's position. However, that evidence has already been weighed and considered by a fact finder when the issue of compensability was tried by the worker's compensation commission. Under the doctrine of issue preclusion, Prysmian is precluded from relitigating the issue already determined by the commission.

Prysmian argues that the preclusive effect of the commission's finding goes only as far as the commission's actual ruling that Crosby was injured in the course and scope of employment. We agree. The preclusive effect of the commission's order in this case is limited to the question of whether Prysmian may successfully assert the affirmative defense that Crosby's workers' compensation claim was false or fraudulent, and does not go to any other issue. Because the preclusive effect of the commission's finding forecloses Prysmian from seeking to prove the claim was false or fraudulent, the circuit court was correct to grant summary judgment as to that defense.[11]

[11] Prysmian makes reference to other affirmative defenses. However, the circuit court ruled only on the defense that Crosby filed a false or fraudulent workers' compensation claim. Therefore, our ruling does not address any other defenses.

IV. Prysmian's Counterclaims

Prysmian asserted seven counterclaims to Crosby's retaliatory discharge claim. The trial judge granted summary judgment in favor of Crosby with regard to the counterclaims. Each of the alleged counterclaims arises exclusively out of one of the following two events: (1) Crosby's filing of the workers' compensation claim, or (2) Prysmian's decision to fire Crosby because she filed a false claim. Prysmian alleges damages resulting solely from one of those two events. An employer simply cannot recover damages against an employee for filing a good faith workers' compensation claim. We hold as a matter of law that an employer may not prevail in a retaliatory discharge action on a counterclaim for damages which arise only from the filing of a workers' compensation claim or the employer's decision to fire the plaintiff for filing the claim. Prysmian's counterclaims were properly dismissed because Prysmian alleged no actionable damages caused by Crosby's conduct.

V. Conclusion

We affirm the circuit court's order granting partial summary judgment to Crosby as to the affirmative defense that she filed a false workers' compensation claim and dismissing Prysmian's counterclaims. We reverse the circuit court's order granting summary judgment to Crosby as to the third element of her retaliatory discharge claim, and remand the case for trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT, J., concurring in part and dissenting in part in a separate opinion.

WILLIAMS, J., concurring in part and dissenting in part in a separate opinion.

SHORT, J., concurring in part and dissenting in part: I write separately because I would affirm the trial court. I concur with the majority opinion's affirmance of the trial court's grant of summary judgment on

Prysmian's counterclaims. I likewise concur with the majority opinion's affirmance of the trial court's grant of summary judgment based on collateral estoppel. However, unlike the majority, I would affirm the trial court's grant of summary judgment on the element of causation, which is the third element necessary to recover in a claim for retaliatory discharge. See Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 97 (2000) (listing the elements necessary to recover for retaliatory discharge: (1) institution of workers' compensation proceedings; (2) discharge or demotion; and (3) a causal connection between the first two elements).

I find Crosby met her burden of establishing entitlement to summary judgment on causation. After Prysmian's investigation of Crosby's claim, Van Kent, Prysmian's Director of Human Resources, issued a letter terminating Crosby's employment. The termination letter provided in pertinent part,

> As a result of AIG's determination and the statements obtained in the course of [Prysmian's] investigation of your claim, [Prysmian] has decided to terminate your employment, effective immediately, for filing a false claim for workers' compensation benefits.

Furthermore, Kent testified at the hearing before the single commissioner of the Workers' Compensation Commission that Crosby was terminated "[f]or filing a false workers' comp claim. . . . It was our belief that she had filed a false claim and consequently she was terminated." At his deposition, Kent also testified Crosby was fired for filing a false claim.

Based on the record, I find no factual issue as to the causation of Crosby's firing. Prysmian's mere allegation that Crosby's answers on a Medical Assessment Form regarding prior knee pain provided another reason to have fired Crosby is insufficient in my view to withstand summary judgment on this issue. Therefore, I would affirm the trial court's grant of summary judgment on the element of causation. See Dawkins v. Fields, 354 S.C. 58, 70-71, 580 S.E.2d 433, 439 (2003) (stating that a party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings).

Because I would affirm the trial court's order, I concur in part and dissent in part.

WILLIAMS, J., concurring in part and dissenting in part:

I concur with the majority in affirming the trial court's grant of summary judgment on Prysmian's counterclaims. However, I respectfully dissent with the portion of the majority's opinion that affirms the trial court's application of collateral estoppel in a retaliatory discharge action pursuant to section 41-1-80 and would concur in result only as to the majority's reversal of the grant of summary judgment due to the element of causation.

As to the issue of collateral estoppel, the majority concludes "[N]o unfairness or injustice will result from the application of issue preclusion to this situation." I respectfully disagree. The "countervailing considerations" presented in this case necessitate relitigation.

First, I note the dichotomy regarding the application of preclusion doctrines in the context of administrative tribunals between Bennett v. South Carolina Department of Corrections., 305 S.C. 310, 408 S.E.2d 230 (1991), and Shelton v. Oscar Mayer Foods, 325 S.C. 248, 481 S.E.2d 706 (1997).

In Bennett, Bennett filed a grievance complaint with the State Employee Grievance Committee (Grievance Committee) challenging his discharge from the South Carolina Department of Corrections (SCDC). Bennett, 305 S.C. at 311, 408 S.E.2d at 231. The Grievance Committee denied Bennett's complaint and Bennett failed to appeal. Id. Bennett then filed a retaliatory discharge claim pursuant to section 41-1-80. Id. The SCDC moved for summary judgment, claiming the Grievance Committee's decision precluded Bennett's retaliatory discharge claim under the doctrines of collateral estoppel and res judicata. Id. The trial court granted summary judgment in favor of SCDC on the grounds of collateral estoppel and res judicata and also held Bennett failed to exhaust his administrative remedies. Id. at 312, 408 S.E.2d at 231. On appeal, our supreme court affirmed the trial court and held:

> The doctrines of res judicata and collateral estoppel do not bar recovery under S.C. Code section 41-1-80 for state employees, but they do bar relitigation of issues which have been decided by or should have been presented to the State Grievance Committee. The statutory requirements that state employees bring their grievances before the State Grievance Committee and that they exhaust their administrative remedies before seeking judicial review do not bar the bringing of an action under S.C. Code § 41-1-80, but they do require that the Grievance Committee have the exclusive right to decide those issues subject only to an appeal for judicial review of their decisions.

Id. at 313, 408 S.E.2d at 231-32.

In Shelton, our supreme court addressed the issue of whether findings of fact made during a South Carolina Employment Security Commission (ESC) hearing were entitled to a preclusive effect under the doctrine of collateral estoppel. 325 S.C. 248, 481 S.E.2d 706. In Shelton, a security guard observed Shelton smoking marijuana in the company's parking lot, and as a result, Shelton was allegedly discharged without further investigation. Shelton, 325 S.C. at 250, 481 S.E.2d at 707. Shelton filed and received unemployment benefits after an ESC hearing officer found he was discharged without cause. Id. Shelton's former employer did not appeal the ESC's decision. Id.

Shelton initiated a wrongful termination action. Shelton, 325 S.C. at 250, 481 S.E.2d at 707. Based on the ESC's finding, Shelton moved for partial summary judgment, claiming his employer was collaterally estopped from litigating whether he was discharged for smoking marijuana. Id. The trial court denied Shelton's motion for partial summary judgment. Id. On appeal, this court initially reversed the trial court's ruling but ultimately affirmed after rehearing the matter. Id. at 250-51, 481 S.E.2d at 707. Our supreme court affirmed and held, "The purposes of the ESC are in conflict with the doctrine of collateral estoppel; therefore, public policy dictates the

findings made during an ESC hearing should not receive collateral estoppel effect." Id. at 252, 481 S.E.2d at 708.

In a footnote, our supreme court distinguished Bennett, and stated:

> Bennett dealt with the application of collateral estoppel to a proceeding before the State Employee Grievance Committee. Bennett filed a complaint with the grievance committee and the grievance committee ruled in favor of the employer. Instead of appealing this decision through the proper administrative channels, Bennett filed a civil suit alleging he was discharged in retaliation for filing a workers' compensation claim. This Court held the circuit court properly granted the employer's summary judgment motion because the issues in Bennett's civil claim were identical to the issues presented to and ruled upon by the grievance committee. Bennett had abandoned any opportunity for a ruling on these issues in his favor when he failed to appeal the grievance committee's findings. Bennett is distinguishable from the matter, *sub judice*. State employees must bring complaints before the grievance committee prior to seeking judicial review; therefore, the hearing before the grievance committee is necessarily more in the nature of a full evidentiary hearing. An ESC hearing only determines the narrow issue of whether an employee may receive unemployment benefits.

Bennett, 325 S.C. at 251, 481 S.E.2d at 708.

Next, our supreme court discussed the purpose of an ESC hearing is to expeditiously provide benefits for employees who became unemployed through no fault of their own, and the ESC's jurisdiction is limited to whether an employee is qualified to unemployment benefits. Id. at 252, 481 S.E.2d at 708. Thus, the supreme court opined collateral estoppel in the ESC context

would transform these hearings into a forum of lengthy civil litigation of claims relating to the employee's discharge. Id. Finally, the supreme court concluded employers generally do not intensely contest ESC hearings and stated:

> Employers normally are not compelled to intensely contest ESC hearings because the stakes are not great in such hearings. An ESC hearing only determines whether an employee was discharged for cause and thus disqualified from receiving unemployment benefits. A wrongful termination lawsuit determines whether the employer wrongfully discharged the employee and seeks to place blame on the employer. The damages available in a wrongful discharge lawsuit are much greater than unemployment benefits. Thus, an employer has more incentive to fully contest a civil suit.

Id. at 253, 481 S.E.2d at 708.

Although, a workers' compensation hearing is more akin to a full evidentiary hearing, collateral estoppel is inapplicable to this case. Similar to the ESC context, our State's workers' compensation laws were enacted by our General Assembly to provide benefits to individuals. Specifically, the purpose of our workers' compensation scheme is to protect workers who have suffered injuries arising out of and in the course of their employment. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980) (stating our workers' compensation laws reflect a societal recognition to provide swift and sure compensation for injuries arising out of and in the course of employment); see also Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault."). This principle was aptly noted in Cokeley v. Robert Lee, Inc., 197 S.C. 157, 168, 14 S.E.2d 889, 893-894 (1941), in which our supreme court stated:

> Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society.

In addition to the public policy underpinnings of workers' compensation law, the claimant-friendly inferences drawn in the workers' compensation context will unduly bind the trial court in subsequent retaliatory discharge actions. It is axiomatic that workers' compensation laws are to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act and to avoid any incongruous or harsh results. See Cokeley, 197 S.C. at 169, 14 S.E.2d at 894; see also Pelfrey v. Oconee Cnty., 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945) ("Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt . . . of the propriety of such conclusion."). Applying collateral estoppel from the workers' compensation context to a retaliatory discharge action will bind the trial court to a liberal construction doctrine, which favors the inclusion of injured employees. Thus, an issue decided in a workers' compensation hearing, which must be construed in favor of the claimant, will result in the trial court being bound to apply this finding in a separate and distinct retaliatory discharge action. As a result, the application of collateral estoppel will significantly conflict with the trial court's purview in independently determining the merits of a retaliatory discharge claim pursuant to section 41-1-80.

Further, the workers' compensation commission is a forum of limited jurisdiction because it determines the compensability of an injury arising out of and in the course of employment. The imposition of collateral estoppel from a forum that only decides such a narrow issue will force employers and employees to fully litigate ancillary civil claims due to the majority's holding.

Therefore, I believe the workers' compensation commission is not the appropriate forum to determine whether a claimant filed a claim in good faith for purposes of section 41-1-80. This point is further underscored because a retaliatory discharge action under section 41-1-80 is not actionable in a workers' compensation proceeding. See Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 96 (2000) ("A retaliatory discharge claim is an equity action tried without a jury.").

Moreover, a workers' compensation proceeding determines whether a claimant has suffered a compensable claim arising out of and in the course of employment. On the other hand, a retaliatory discharge action determines whether the employer wrongfully discharged an employee for filing a workers' compensation claim in good faith. Similar to the reasoning expressed in Bennett, I believe due to the nature of the workers' compensation proceedings that applying collateral estoppel prevents the employer from having an opportunity to fully contest the retaliatory discharge action.

Accordingly, I would hold collateral estoppel from the workers' compensation context is inapplicable to a retaliatory discharge action under section 41-1-80.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Virginia McComb, Respondent,

v.

Ryan Conard, Appellant.

Appeal From Richland County
Kellum W. Allen, Family Court Judge

Opinion No. 4877
Heard December 8, 2010 – Filed August 24, 2011

AFFIRMED

Pope D. Johnson, III, of Columbia, for Appellant.

Bradford Neal Martin, of Greenville and Rebecca R. West, of Lexington, for Respondent.

Thomas M. Neal, III, of Columbia, for Guardian ad Litem.

KONDUROS, J.: Ryan Conard (Father) appeals the family court's decision regarding custody, a restraining order, and attorney's fees in this relocation case. We affirm.

FACTS

Father and Virginia McComb (Mother) met in 2001, when both were living in Columbia. At the time, Mother was nineteen years old and a student a Midlands Technical College. Father was about the same age and a student at the University of South Carolina. In August 2002, Mother discovered she was pregnant. On March 28, 2003, their daughter (Child) was born. Mother and Child lived with Mother's father (Grandfather). Mother and Father continued to date and eventually became engaged.

In December 2004, the parties ended their relationship due to several issues. Following Father's graduation from college, he moved to Rock Hill for a job in Charlotte in the summer of 2005. For much of the time after he moved, Father had custody of Child Thursday evening through Sunday morning by mutual agreement of the parties. Father would travel to Columbia when he had custody of Child and stay in a house he owned there.[1]

In the fall of 2006, Mother informed Father she wanted to move to Florida once she graduated from the University of South Carolina in May 2007. She intended to live with her mother and stepfather until she could get established there. Mother believed her employment opportunities in Florida exceeded those in Columbia because she was eligible to teach school in Florida but not South Carolina.

On December 20, 2006, Mother filed an action seeking sole custody of Child, child support, and attorney's fees. Father filed an answer and counterclaim contending it would not be in Child's best interest to move to Florida. He requested sole or joint custody, with Child remaining in South Carolina and both parties contributing to her support.

[1] Father's college roommate also lived in the house.

A few weeks before trial, Mother married Gurpreet Khalsa (Stepfather). At trial, Stepfather testified he is a financial advisor at Smith Barney in Orlando, Florida and prior to that he was a professional musician earning a substantial salary. He has owned a large home in an upper-middle class subdivision for almost ten years. Mother testified because she was qualified to teach in Florida but not in South Carolina, her beginning pay range in Florida would be far greater than her earning capacity in Columbia. Mother and Stepfather testified they intended for Child to attend a private school within walking distance of Stepfather's home. Stepfather also indicated Child had already made friends in the neighborhood. The Guardian ad Litem (GAL) recommended awarding Mother custody but qualified it as a "lukewarm recommendation." He based his recommendation on the fact that Mother had been Child's primary caregiver.

The family court granted the parties joint legal custody and permitted Mother to take Child with her to Florida to live with her and Stepfather. The family court found Father earned a gross monthly income of $6,108 a month from his employment and his interest on a trust. The family court also provided for Father to have visitation and pay child support. Additionally, the family court ordered Father pay attorney's fees of $20,995.02 to Mother's attorney. The family court also restrained the parties from having Child "on an overnight basis in the presence of an adult party of the opposite sex to whom the parties are not related by blood or marriage, or any individual with whom he or she is romantically involved."

Father filed a Rule 59(e), SCRCP, motion for reconsideration. Following a hearing, the family court orally ruled it was granting Father's motion. Mother filed a motion to reopen the hearing and vacate the oral order. Following another hearing, the family court issued an order denying Mother's motion to reopen but also denying Father's motion for reconsideration, thereby reversing its oral order. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d 650, 655 (2011). The appellate court generally defers to the factual findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor. Id. at 391, 709 S.E.2d at 655. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. Id.

LAW/ANALYSIS

I. Custody

Father argues the family court erred in giving Mother custody of Child for several reasons. Specifically, he contends the family court erred in considering the Latimer[2] factors instead of the best interests of Child. Additionally, he maintains the family court incorrectly applied the tender years doctrine because it has been abolished in South Carolina. Further, he contends the family court erred in failing to conclude it was in Child's best interest to remain in South Carolina. We disagree.

In a child custody case, the welfare of the child and what is in the child's best interest is the primary, paramount, and controlling consideration of the court. Davis v. Davis, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003).

> The family court considers several factors in determining the best interest of the child, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and

[2] Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004).

> the children); and the age, health, and sex of the children.

Patel v. Patel, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001). Although a parent's morality is a proper factor for consideration, it is only relevant if it either directly or indirectly affects the welfare of the child. Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975). "Custody of a child is not granted [to] a party as a reward or withheld as a punishment." Id.

"Cases involving the relocation of a custodial parent present some of the knottiest and most disturbing problems that our courts are called upon to resolve." Rice v. Rice, 335 S.C. 449, 453, 517 S.E.2d 220, 222 (Ct. App. 1999) (internal quotation marks omitted). In determining whether to allow a custodial parent to relocate with a minor child, our supreme court "has stated we are no longer to be guided by the presumption against relocation, and should instead focus on the children's best interests." Walrath v. Pope, 384 S.C. 101, 105, 681 S.E.2d 602, 605 (Ct. App. 2009) (citing Latimer, 360 S.C. at 381, 602 S.E.2d at 34-35). "[B]ecause '[f]orcing a person to live in a particular area encroaches upon the liberty of an individual to live in the place of his or her choice,' the court's authority to prohibit an out-of-state move 'should be exercised sparingly.'" Rice, 335 S.C. at 453-54, 517 S.E.2d at 222 (quoting VanName v. VanName, 308 S.C. 516, 519, 419 S.E.2d 373, 374 (Ct. App. 1992)) (second alteration by court). "[T]he question of whether relocation will be allowed requires a determination of whether the relocation is in the best interest of the children, the primary consideration in all child custody cases." Id. at 454, 517 S.E.2d at 222.

In Rice, this court found that although it was not "a true relocation case," cases involving the relocation of custodial parents were helpful in determining whether it was in the children's best interest to require them and their mother to move back to South Carolina. Id. at 456, 517 S.E.2d at 224. The court found, "one of the primary concerns in most true relocation cases—the need to maintain a relationship with the non-custodial parent—is

also of great importance in this case." Id. The court further noted "South Carolina case law provides little guidance as to how a court should determine whether an out-of-state move is in the best interest of the children." Id.

"[A] determination of the best interest of the children is an inherently case-specific and fact-specific inquiry." Id. at 458, 517 S.E.2d at 225. What Father refers to as the Latimer factors were summarized by this court in Walrath:

> [O]ur [s]upreme [c]ourt has acknowledged, without endorsing or specifically approving, factors other states consider when making this determination. For example, our [s]upreme [c]ourt stated the New York Court of Appeals looks at (1) each parent's reason for seeking or opposing the relocation; (2) the relationship between the children and each parent; (3) the impact of the relocation on the quality of the children's future contact with the non-custodial parent; (4) the economic, emotional, and educational enhancements of the move; and (5) the feasibility of preserving the children's relationship with the non-custodial parent through visitation arrangements. Additionally, our [s]upreme [c]ourt noted Pennsylvania courts require the following considerations in relocation cases: (1) the economic and other potential advantages of the move; (2) the likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a whim of the custodial parent; (3) the motives behind the parent's reasons for seeking or opposing the move; and (4) the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between the non-custodial parent and the children.

384 S.C. at 106, 681 S.E.2d at 605 (citations omitted).

Although this is not the typical relocation case in which a parent who has custody seeks to move with the child, the same analysis should apply. Therefore, the Latimer factors are relevant to this case. As our courts have often noted, the primary factor in child custody cases is always the best interests of the child. Mother has been Child's primary caregiver since her birth. Mother sought the move to Florida based on her belief that she would have better opportunities to obtain a job in her desired field. Further, her husband lives there and also has meaningful employment there. Mother also lived in Florida until the tenth grade and has family members and friends there, including her mother. Moreover, Father has the means to travel to Florida to continue seeing Child the same amount he did when she lived in Columbia. Mother has made Child available for phone calls and video conferencing and the GAL recommended Mother have custody. Accordingly, we find the family court did base its decision on the best interests of Child. Additionally, nothing indicates the family court relied on the tender years doctrine in making its decision. Based on the facts in this case, the family court did not err in allowing Child to move to Florida with Mother.

II. Attorney's Fees

Father maintains the family court erred in awarding Mother attorney's fees because she was not the prevailing party. We disagree.

The family court has discretion in deciding whether to award attorney's fees. Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989); see also Lewis v. Lewis, 392 S.C. 381, 394, 709 S.E.2d 650, 656 (2011) ("[T]he decision to award attorney fees [] rests within the sound discretion of the family court.). In deciding whether to award attorney's fees, the family court should consider (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living.

Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). In determining reasonable attorney's fees, the six factors the family court should consider are "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court did not err in awarding attorney's fees or in the amount of attorney's fees it awarded. It considered all of the appropriate factors and stated why those factors supported awarding Mother attorney's fees. The record contains evidence to support each of the family court's findings. In essence, although Mother did not receive sole custody, she prevailed on the issues. Mother sought to move with Child to Florida, child support, and attorney's fees and she received all of this. Further, Father has the ability to pay the fees. Because the evidence in the record supports the family court's findings as to attorney's fees, the family court was within its discretion in awarding attorney's fees and calculating the amount.

III. Oral Order

Father argues the family court erred in reversing its oral order granting the motion for reconsideration. We disagree.

"Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); see also Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 91-92, 515 S.E.2d 259, 260-61 (Ct. App. 1999). Because it was an oral ruling, the family court was fully within its rights to change its decision in the written order. Accordingly, this issue is without merit.

IV. Restraining Order

Father argues the family court erred in ordering the parties to restrain from having Child overnight in the presence of an adult of the opposite sex who was not related by marriage or blood to Child because neither party requested it and it is broad and nonspecific. We disagree.

"'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.'" Sherman v. Sherman, 307 S.C. 280, 282, 414 S.E.2d 809, 811 (Ct. App. 1992) (quoting Rule 15(b), SCRCP) (citing Rule 2(a), SCRFC).

Simply because neither party asked for the restraining order in its pleadings does not mean that the family court did not have the authority to order it. Issues were raised during trial as to adults of the opposite sex who were not related by marriage or blood to Child being present overnight around Child. Accordingly, the family court did not err in making such a restriction.

Additionally, Father's argument the restraining order is broad and nonspecific was not raised to the family court. "[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006)). "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Thus, this portion of Father's argument is not preserved for our review.

CONCLUSION

The family court did not err in giving Mother joint custody and allowing her to move to Florida with Child, awarding Mother attorney's fees, or issuing the restraining order. Therefore, the family court's decision is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

JASDIP Properties SC, LLC, Appellant,

v.

Estate of Stewart Richardson, Respondent.

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4878
Heard October 6, 2010 – Filed August 24, 2011

REVERSED AND REMANDED

W. Andrew Gowder, Jr., and Daniel S. McQueeney, Jr., both of Charleston, for Appellant.

Toni Lee Tack Pennington, of Pawleys Island, for Respondent.

KONDUROS, J.: This case arises from a contract for the sale of commercial property. Stewart Richardson[1] (Seller) rescinded the contract after JASDIP Properties SC, LLC (Buyer) was unable to close in a timely fashion. A jury determined neither party breached the contract and awarded no damages on that basis. Buyer appeals the trial court's subsequent denial of its unjust enrichment claim, which permitted Seller to retain $215,000 in earnest money and extension fees. We reverse and remand.

FACTS

On May 5, 2006, Buyer and Seller entered into a Commercial Purchase Agreement and Deposit Receipt (the Agreement) for the purchase of certain property (the Property) in Georgetown, South Carolina. At the time of the execution of the Agreement, Seller was leasing the Property to a corporation he owned, which was operating the Rebar Sports Bar on the property. The purchase price for the Property was to be $537,000. Buyer paid an initial deposit of $10,000. The balance was due at the closing on or before July 28, 2006. The Agreement provided: "If the BUYER shall default under this Agreement, the SELLER shall have the option of suing for damages or specific performance, including but not limited to, reasonable attorney's fees or rescinding this Agreement." Further, the Agreement stated, "In any action or proceeding involving a dispute between BUYER, SELLER, and/or Broker, arising out of the execution of the agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by a court of competent jurisdiction." The Agreement also provided the "[b]usiness [was] to remain open and operated by . . . Seller."[2]

Buyer wished to purchase the Property as part of a development plan involving adjacent properties in Georgetown. Buyer attempted to obtain approvals and permits for its plan, but due to problems obtaining them, the

---

[1] The Estate of Stewart Richardson was substituted as the appropriate party to the appeal after the parties informed this court at oral arguments of Richardson's death during the pendency of the appeal.

[2] Seller closed the business shortly before the original closing date.

parties executed an addendum to the Agreement on July 7, 2006. That addendum provided: "The Closing of [the Property] will be 30 Days from the original closing date of July 28th[,] 2006. The $10,000.00 earnest money check will be released to [Seller] no later than July 11th[,] 2006. All terms and conditions of contract, including due diligence period are extended for 30 days." On October 26, 2006, the parties executed another addendum that further extended the closing date. It stated:

> Closing to be on or before January 15, 2007. Buyer can close sooner if reasonable to do so. Buyer to pay an additional $25,000.00 deposit to be credited to purchase price. Further Buyer will pay a $7700.00 extension fee and will pay an additional extension fee of $2700 on December 1 and January 1 if closing has not occurred prior to those dates. Lastly on November 1, 2006[,] Buyer will pay $5000.00 fee to Prudential Source One. This amount will be credited against purchase price but deducted from commission due to Prudential Source One at closing from [S]eller[']s proceeds.

On January 23, 2007, the parties executed a third addendum. It provided, "Buyer to pay Seller $175,000.00 by Friday[,] January 16, 2007. Closing to be extended until March 26, 2007. Seller to grant Buyer an additional 30 day extension for the payment of an additionally [sic] $100,000 on or before March 26, 2007[.] All funds to be applied to purchase price." On January 23, 2007, several members of the Georgetown City Council and other residents of Georgetown filed a lawsuit against Buyer seeking to stop Buyer's development plan. Buyer notified Seller of the lawsuit and informed him that it intended to move forward with the purchase, but Seller did not respond. Buyer proposed a fourth addendum, which stated the closing date would be ten days after the pending litigation had ended, but Seller did not reply.

On April 10, 2007, Seller's attorney sent a letter to Buyer's attorney, stating: "The latest extension expired on March 26, 2007. Pursuant to paragraph 32 of the contract i[n] the event of default, the Seller has the option to rescind the contract and due to the fact the Buyers have notified the Seller that they cannot close, the Seller has elected to rescind the contract." The letter further stated, "In the event that you[r] client is serious about wanting to purchase the property another contract is going to have to be negotiated." The letter also stated that Seller had placed the Property for sale and it would "be sold to the first accepted contract." Buyer asked for the return of the money paid towards the purchase price, which Seller refused. Thereafter, Buyer brought suit against Seller (1) contending Seller would be unjustly enriched if allowed to keep the money paid despite the rescission of the Agreement and (2) requesting $210,000. The $210,000 was comprised of the $10,000 earnest money and $200,000 in later payments. Buyer alternatively asserted Seller converted these funds by failing to return them after the rescission of the Agreement. Buyer later filed an amended complaint requesting $205,000, providing the Agreement only permitted Seller to retain half of the $10,000 earnest money. Seller filed an answer and counterclaim requesting dismissal of Buyer's complaint and judgment against Buyer for actual damages incurred due to Buyer's "default(s) as contracted, to include reasonable attorney's fees and costs."

Following a trial on both parties' claims for breach of contract, the jury found neither party had breached. Buyer then requested a ruling by the trial court on its action for unjust enrichment. The trial court found Buyer to be a "sophisticated buyer" and noted the Agreement provided "Buyer . . . is aware that a local ordinance is in effect which regulates the rights and obligations to property owners." The court further determined Seller put forth significant evidence of damages: the monthly mortgage payments, the closure of his business, the fact that he had to battle the city to get his business back, and the ability to operate his business. The trial court stated "it doesn't shock [t]he Court's conscience to leave the parties where they find themselves." Accordingly, the trial court denied Buyer's claim for unjust enrichment. Buyer's appeal followed.

LAW/ANALYSIS

I. Unjust Enrichment

Buyer contends the trial court erred in denying it relief on its unjust enrichment cause of action. Buyer maintains all the evidence presented at trial as well as the jury's verdict supports that the Agreement was rescinded or abandoned. Accordingly, this requires restitution of $215,000 to Buyer, who had partially performed under the Agreement. We agree.

When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). "In actions at equity, this court can find facts in accordance with its view of the preponderance of the evidence." White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 124, 609 S.E.2d 811, 815 (Ct. App. 2005).

A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies. Franke Assocs. by Simmons v. Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988). In Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010), the supreme court affirmed the circuit court's decision to award damages under the theory of quantum meruit even though the circuit had found there was a contract between the parties. The supreme court found, "While the circuit court did find there was a contract between the two parties in this action, it never awarded damages because of a breach of that contract. Rather, the circuit court chose the theory of quantum meruit as an alternate remedy." Id. at 617 n.4, 703 S.E.2d at 225 n.4.

"Restitution is a remedy designed to prevent unjust enrichment." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003); see also Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988) ("Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff."). "The

terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts." Ellis, 294 S.C. at 473, 366 S.E.2d at 14. "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks and citations omitted).

"Implied in law or quasi-contracts are not considered contracts at all, but are akin to restitution which permits recovery of that amount the defendant has been benefitted at the expense of the plaintiff in order to preclude unjust enrichment." Costa & Sons Constr. Co. v. Long, 306 S.C. 465, 468 n.1, 412 S.E.2d 450, 452 n.1 (Ct. App. 1991). "Absent an express contract, recovery under quantum meruit is based on quasi-contract." Earthscapes Unlimited, Inc., 390 S.C. at 616, 703 S.E.2d at 225. "This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment." Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (internal quotation marks and citations omitted).

"To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." Sauner, 354 S.C. at 409, 581 S.E.2d at 167; see also Earthscapes Unlimited, Inc., 390 S.C. at 616-17, 703 S.E.2d at 225 (providing the same requirements to recover under the doctrine of quantum meruit). "Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution." Ellis, 294 S.C. at 473, 366 S.E.2d at 14-15.

Buyer seeks the $175,000 and $25,000 payments as well as the $10,000 in earnest money and also the $5,000 that was to go towards the broker's fee. However, the Buyer raises its request for the $5,000 broker's fee for the first time on appeal. "[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to

and ruled upon by the trial court." Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010). Accordingly, its request for the broker's fee is not preserved for our review. Additionally, in its amended complaint, Buyer states that under the Agreement, Seller can only keep half of the $10,000 in earnest money and only requests a total of $205,000. An issue conceded in the trial court cannot be argued on appeal. Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). Therefore, Buyer is bound by that concession and entitled to $5,000 of the earnest money at most.

The $175,000 and $25,000 payments both explicitly stated that they were towards the purchase price. Additionally, Buyer paid $10,000 in an earnest money[3] deposit. The unappealed finding of the jury was that neither party breached the Agreement. An unchallenged ruling, right or wrong, is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). Based on the jury's finding that Buyer did not breach, we find Buyer is entitled to the money paid towards the purchase price as well as half of the earnest money under the theory of restitution.[4] Buyer met the requirements to recover under the theory of restitution: (1) Buyer paid Seller $205,000 towards the purchase price and the sale did not go through despite the fact that neither party breached; (2) Seller kept the $205,000 although he also retained the Property; and (3) Seller keeping the $205,000 is inequitable because the Seller still has the Property, the jury found neither party breached, and the evidence supports that Buyer intended to go forward with the purchase. Therefore, the trial court erred in failing to find for Buyer for its claim of unjust enrichment. Accordingly, we reverse the trial court's determination that Buyer was not entitled to restitution and award Buyer $205,000.

---

[3] Earnest money is "[a] deposit paid (often in escrow) by a prospective buyer (esp[ecially] of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." Black's Law Dictionary 584 (9th ed. 2009).

[4] Seller received $8,100 in extension fees that he would keep as well as the $5,000 as half of the earnest money.

II. Attorney's Fees

Buyer contends if this court reverses the trial court's decision on unjust enrichment, we should remand to the trial court to award attorney's fees and costs because the Agreement permits the prevailing party to recover them. We agree.

Generally, attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). The award of attorney's fees under a contract is left to the discretion of the trial court and will not be disturbed unless the court abused that discretion. Id.

Because the trial court found in favor of Seller, it never determined whether Buyer was entitled to attorney's fees. The Agreement provided for attorney's fees to the prevailing party if a dispute arose out of the execution of the Agreement or the sale. This cause of action did arise out of the sale of the Property and therefore was contemplated by the Agreement. Because the trial court has the discretion to award attorney's fees under a contract, we remand the case to allow it to determine whether fees should be awarded as to the unjust enrichment cause of action. This would include the trial court making a determination as to whether Buyer was the prevailing party.

CONCLUSION

We reverse the trial court's decision and award Buyer $205,000. Further, we remand the matter to the trial court to determine if attorney's fees should be awarded.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting:

I respectfully dissent and would affirm the trial court's denial of the request for restitution by Appellant JASDIP Properties SC, LLC (JASDIP).

I am reluctant to reverse the judgment of the trial court because JASDIP had an adequate remedy at law, which the jury rejected. Generally, equity is available when a party does not have an adequate remedy at law. See EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). "A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy." Id. The jury's verdict may be read in a different manner other than as a finding that neither party breached the contract. For example, the jury could have based its decision on whether damages were sufficiently proven. The judge charged the jury on all elements of a breach of contract cause of action, which includes the existence of a contract, breach, and damages. See Maro v. Lewis, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010) (noting in an action for breach of contract, the plaintiff has the burden of proving the existence of a contract, breach, and damages caused by the breach). Additionally, the verdict form contained a query instructing the jury to find for either the plaintiff or the defendant and used the terms "Breach of Contract claim," which encompasses all of the elements required to prove a cause of action for breach of contract. I find it noteworthy that the parties did not seek an additional interrogatory before the jury was excused as to whether the jury found for Respondent Stewart Richardson on JASDIP's claim based on the failure to prove breach or damages. If the jury resolved this question on the same damages component sought in equity, then JASDIP should not be entitled to an equitable remedy on its rejected legal claim. Therefore, I believe we may affirm on this basis. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

To the extent JASDIP has not argued on appeal that the inadequacy of a legal remedy justifies equitable relief, I nonetheless would affirm the trial court's decision to deny equitable relief based upon the record herein. To

recover for unjust enrichment based on restitution, "the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003). A non-gratuitous benefit is a benefit conferred either at the defendant's request or in circumstances where the plaintiff reasonably relied upon or ought to have understood that the plaintiff expected compensation and looked to the defendant for payment. Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532-33, 374 S.E.2d 507, 509 (Ct. App. 1988).

In denying JASDIP's request for restitution, the trial court noted the substantial evidence of damages Richardson claimed to have sustained as a result of the delay in closing on the property and that the delay was not caused by Richardson. Richardson testified about the mortgage payments he had to make as a result of JASDIP's failure to close on time. He also testified that he did not have any income as a result of closing the business to facilitate the sale of the property, and testified about his inability to reopen the business as a result of the change in zoning of the property. Richardson testified about damage that was done to his property during JASDIP's inspection, including ceilings and air conditioning ducts that had been torn out, which Richardson repaired at a cost of $42,000. Richardson incurred $15,524 in attorney's fees defending this action by JASDIP. Finally, Richardson testified regarding $320,174 in living and mortgage expenses he incurred after he closed his business and was unable to reopen the business because the property had been rezoned. Based on this testimony, JASDIP has not met its burden of showing that it would be inequitable for Richardson to retain the $215,000 JASDIP paid towards the purchase price of the property.

Since JASDIP has not met its burden of convincing this court that the trial court's equitable decision is erroneous, I would therefore affirm. See Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse

Adv. Sh. No. 16 at 41, 51) ("[A]n appellant is not relieved of his burden to demonstrate error in the [trial] court's findings of fact.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen Brad Wise, Appellant,

v.

Richard Wise d/b/a Wise Services and the South Carolina Uninsured Employers Fund, Respondents.

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4879
Heard November 4, 2010 – Filed August 24, 2011

AFFIRMED

Pope D. Johnson, of Columbia, for Appellant.

John G. Felder, of St. Matthews; Robert Merrell Cook, II, of Batesburg-Leesville, for Respondents.

KONDUROS, J.: Stephen Brad Wise (Claimant) appeals the circuit court's dismissal of his workers' compensation claim that arose from the same facts as a civil action he settled against a third party and a default judgment he obtained against his employer. He maintains the circuit court could not take judicial notice of the existence of his civil action when evidence of that claim did not appear in the appellate record. We affirm.

FACTS/PROCEDURAL HISTORY

This workers' compensation action arose out of an accident Claimant had on October 30, 2000, while working for Richard Wise d/b/a Wise Services (Employer).[1] Claimant was riding on top of a bank building that was being moved when he came into contact with a high voltage electrical line in Orangeburg, South Carolina and sustained severe burns as a result. On June 26, 2001, Claimant filed a Form 50 against Employer for medical and compensation benefits for his injuries. On July 13, 2001, Employer filed a Form 51, denying Claimant was an employee and asserting he was an independent contractor. Additionally, Employer contended it was not covered by the Workers' Compensation Act (the Act) because it does not have the requisite number of employees. Employer also maintained if Claimant was an employee, he was a casual employee and thus exempt under section 42-1-360 of the South Carolina Code. The South Carolina Uninsured Employers' Fund (the Fund) contended Claimant was not subject to the Act. It further asserted that if Claimant was a covered employee, his weekly wage should be figured at the minimum compensation of $75 per week because he failed to file a tax return for his wages from Employer.

On May 2, 2002, the single commissioner held a hearing on the matter. On October 18, 2002, five months after the single commissioner conducted the hearing but prior to its issuing the order, Claimant filed a tort action against Employer and the City of Orangeburg (the City). On November 26, 2003, the single commissioner issued an order denying the claim, finding Employer regularly employed only three employees and thus was exempt

[1] We note at the outset the procedural history of this case is difficult to follow.

from the Act and not required to provide workers' compensation insurance coverage. The single commissioner further found because Employer was exempt from coverage, the Fund had no responsibility to provide benefits to Claimant. Finally, the single commissioner found the Workers' Compensation Commission had no jurisdiction over the claim and dismissed it.

On December 8, 2003, Claimant filed a Form 30 appealing the single commissioner's order to the Appellate Panel. On January 4, 2004, Claimant obtained a default judgment in the amount of $900,000 in the tort action against Employer. Claimant and the City reached a settlement.

On June 22, 2004, the Fund filed a motion to dismiss the appeal or order new evidence taken before the single commissioner. The Fund contended Claimant had waived his right to appeal his claim by filing suit against Employer alleging his employment did not fall within the scope of the Act and prosecuting that action to a final judgment of $900,000. Additionally, the Fund maintained Claimant did not notify it or the Commission of his suit against the City as a third-party tortfeasor, which section 42-1-560(b) of the South Carolina Code requires, and as a result he elected his remedy and was barred from receiving any benefits under the Act. The Fund provided an affidavit, a copy of Claimant's summons and complaint against Employer and the City, the default judgment against Employer, and the order from February 24, 2004, dismissing the action against the City with prejudice. The Appellate Panel dismissed the workers' compensation action, finding (1) Claimant, Employer, or their attorneys did not notify the Commission or the Fund of the civil suit; (2) when Claimant filed his civil action on the same issues that were before the Commission, the matter was removed from the Commission's jurisdiction, and the Claimant alleged his employment did not fall within the parameters of the Act; and (3) accordingly, the matter is res judicata.

Claimant appealed to the circuit court, which reversed the order to dismiss, finding Regulation 67-215(B)(1) of the South Carolina Code of Regulations prohibited the Appellate Panel from addressing a motion to

dismiss. The circuit court remanded the action to the Full Commission for it to consider the Fund's motion to submit new evidence. The Full Commission then remanded the matter to the Appellate Panel, which granted the motion to submit additional evidence and remanded the action to the single commissioner to consider the new evidence. Claimant appealed the Appellate Panel's allowance of additional evidence to the circuit court, which reversed the Appellate Panel, finding the Appellate Panel's order was too summary to allow a meaningful review. On remand, the Full Commission issued an order granting the Fund's motion to submit additional evidence, finding the record contains no evidence contrary or similar to the new evidence; thus, the new evidence was not cumulative or impeaching. Accordingly, the Full Commission remanded the action to the single commissioner to determine whether Claimant had elected his remedy.

Claimant again appealed to the circuit court, asserting the evidence did not fit the meaning of newly discovered evidence under Regulation 67-707 of the South Carolina Code. The circuit court reversed, finding the evidence did not constitute newly discovered evidence under Regulation 67-707. The circuit court stated: "The evidence of facts sought to be admitted did not exist at the time of the hearing before the [s]ingle [c]ommissioner. . . . [T]he evidence sought to be admitted does not constitute after discovered evidence within the meaning of Regulation 67-707." (quoting State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) ("[A]fter discovered evidence refers to facts existing at time of trial of which . . . [the] aggrieved party was excusably ignorant.")). On remand, the Appellate Panel denied the Fund's motion to admit additional evidence pursuant to Regulation 67-707 and ordered Claimant's appeal as to whether Employer was subject to the Act be set for a hearing. Following the hearing, the Appellate Panel reversed the single commissioner, finding Employer had four employees in his employment, and thus, it was subject to the Act. The Fund appealed to the circuit court, which reversed the Appellate Panel, finding the action was "barred by the election of remedies of the [C]laimant by instituting and settling his tort claims without notice to and the consent of the [E]mployer and the [Fund]." The circuit court also found in the alternative, "pursuant to the election of jurisdiction provision of [s]ection 42-5-40 the Commission

was divested of jurisdiction over this claim and its order is vacated."[2] This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). This court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in workers' compensation decisions. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005). An appellate court can reverse or modify the Appellate Panel's decision only if the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005) (citations and internal quotation marks omitted).

LAW/ANALYSIS

Claimant argues the circuit court erred in considering the documents relating to the civil action because they were not part of the record. He further contends the circuit court erred in taking judicial notice of the civil action because the Fund never requested the Appellate Panel take notice of it or raise it as a ground on appeal. We disagree.

[2] The circuit court stated it had erred in its prior determination that the evidence of the existence of Claimant's tort action, default judgment, and settlement could not be admitted under Regulation 67-707.

I. Election of Remedies/Third-Party Action

When an employee's claim arises out of and in the course of his or her employment, the Act provides the exclusive remedy. See Sabb v. S.C. State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). "Every employer and employee . . . shall be presumed to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby." S.C. Code Ann. § 42-1-310 (Supp. 2010).

"When an employee and his or her employer accept the provisions of the Act, the employee's remedies under the Act exclude all other rights and remedies of the employee." Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999) (citing S.C. Code Ann. § 42-1-540 (1985)).

> THIS SECTION IS KNOWN AS THE EXCLUSIVE REMEDY PROVISION, AND IT shrouds an employer with immunity from any actions at law instituted by the employee. Such immunity is part of the broader quid pro quo arrangement imposed upon the employer and employee by the Act. The employee "receives the right to swift and sure compensation" in exchange for giving up the right to sue in tort; the employer receives such tort immunity in exchange for complying with those provisions of the Act that insure swift and sure compensation for the employee.

Id. at 326, 523 S.E.2d at 772. "The Act achieves such 'swift and sure compensation' by requiring the employer to secure the payment of compensation under [section 42-5-10 of the South Carolina Code (1985)]." Id. at 326, 523 S.E.2d at 773. Section 42-5-10 provides: "Every employer who accepts the compensation provisions of this Title shall secure the

payment of compensation to his employees in the manner provided in this chapter." An employer that fails to secure such compensation becomes liable either under the Act or in an action at law. Harrell, 337 S.C. at 327, 523 S.E.2d at 773 (citing S.C. Code Ann. § 42-5-40 (1985)). "[T]he Act prohibits an employee from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation." Id. at 329, 523 S.E.2d at 774.

A claimant has three remedies for job-related injuries:

> (1) To proceed solely against the employer thereby allowing the employer-carrier the opportunity to pursue reimbursement against the third party for its obligated payments.
>
> (2) To proceed solely against the third party tort feasor under [section] 42-1-550 by instituting and prosecuting an action at law; and
>
> (3) To proceed against both the employer-carrier and the third party tort feasor by complying with [section] 42-1-560.

Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 95-96, 651 S.E.2d 311, 313 (2007).

Section 42-1-560 of the South Carolina Code (1985) provides the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. It states: "Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the . . . Commission, the employer[,] and carrier upon a form prescribed by the . . . Commission." § 42-1-560(b). The statute clearly requires timely notice be given to all three entities: employer, carrier, and Commission. Callahan, 375 S.C. at 96, 651 S.E.2d at 314. "The object of [section] 42-1-560 is to effect an equitable adjustment of the rights of all the parties. It would defeat this objective to allow the employee to demand compensation from the employer

after having destroyed the employer's normal right to obtain reimbursement from the third party." Fisher v. S.C. Dep't. of Mental Retardation-Coastal Ctr., 277 S.C. 573, 575-76, 291 S.E.2d 200, 201 (1982) (citation and internal quotation marks omitted). "[T]he settlement of a third party claim without notice to the employer and carrier bars a workers' compensation action." Kimmer v. Murata of Am., Inc., 372 S.C. 39, 52, 640 S.E.2d 507, 513-14 (Ct. App. 2006). In Fisher, the supreme court held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of section 42-1-560, even though the carrier had actual knowledge of the third-party suit. Id.

This court has previously explained the reasoning behind a settlement serving as a bar to a workers' compensation action:

> As a result of the failure to notify of a third party claim, the employer-carrier loses a voice in the litigation and is clearly prejudiced. That voice encompasses the right to select one's own counsel, conduct one's own investigation, and direct the litigation. Notice makes it possible for the employer-carrier to offer the employee meaningful assistance in prosecuting the third party claim. With timely knowledge the employer-carrier gains the opportunity to lend support to an effort that could lead to the carrier's recovery of some or all of the compensation it might later be required to pay the injured employee under the Workers' Compensation Act. The statute's underlying purpose serves to protect the carrier's subrogation interests and prevents an employee's double recovery.

Kimmer, 372 S.C. at 51, 640 S.E.2d at 513 (citations omitted).

Case law makes clear that an employee cannot recover against an employer under both a workers' compensation action and a civil action.

Here, Claimant recovered $900,000 from Employer in the form of a default judgment. Further, because Claimant did not strictly comply with the notice provisions in filing suit against a third party, he is barred from recovering under the Act. However, we must determine if the evidence of the civil suit could be admitted as new evidence or the circuit court could take judicial notice of it.

II. Judicial Notice

"Notice may be taken of judicially cognizable facts" in administrative cases. S.C. Code Ann. § 1-23-330(4) (2005).

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (citations omitted). "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). "It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case." Id.

Claimant's argument as to judicial notice revolves around the fact that the Fund did not request the Appellate Panel take judicial notice of the suit or

raise judicial notice in its grounds on appeal to the circuit court. As Claimant's own case law states, an appellate court can take judicial notice of something that was not before the trial court if it is indisputable. The summons and complaint and default judgment show that Claimant did file an action and recover against Employer thus making that his exclusive remedy. Additionally, he filed suit and entered a settlement against a third party without providing any notice to the Fund or the Commission as required by statute, thus barring the workers' compensation action.

III. Additional Evidence

Additionally, the evidence of the civil claim could be admitted as new evidence under Regulation 67-707 of the South Carolina Code of Regulations (Supp. 2010), which provides the requirements for the admission of additional evidence in workers' compensation cases. Regulation 67-707 states:

> A. When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner.
>
> B. When a party seeks to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the Commission's Judicial Department.
>
> C. The moving party must establish the new evidence is of the same nature and character required for granting a new trial and show:
>
> > (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a

> different result had the evidence been procurable at the first hearing; and
>
> (2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

Claimant argues because the circuit court originally found it was not newly discovered evidence and the Fund did not appeal, it was the law of the case. However, an appeal of that ruling would have been interlocutory. See Leviner v. Sonoco Prods. Co., 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding an order by the circuit court remanding the matter to the single commissioner for further proceedings was not directly appealable). Therefore, the circuit court's original decision to not allow the evidence as newly discovered was not the law of the case.

The evidence of the civil claim meets the criteria in the Regulation for the admission of new evidence: (1) it is not cumulative or impeaching character and would have produced a different result if produced at the first hearing and (2) was not known and could not have been discovered at the time of the first hearing and was brought to the attention of the Commission immediately upon its discovery. Nothing requires that the facts be in existence at the time of the first hearing by the single commissioner.[3] Accordingly, the circuit court's decision is

[3] Claimant also argues the circuit court erred in failing to affirm the Appellate Panel's finding that Employer had four employees and thus was subject to the Act. We need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.