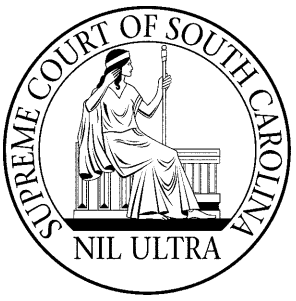

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 21, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

E. Chandler McNair, Respondent,

v.

Fairfield County, Appellant.

Appeal from Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4425
Submitted June 2, 2008 – Filed July 8, 2008

AFFIRMED

Clifford O. Koon and Paul D. de Holczer, of Columbia, for Appellant.

Thomas H. Pope, III, of Newberry, for Respondent.

HEARN, C.J.: This appeal arises out of Fairfield County's attempt to condemn private property owned by E. Chandler McNair. McNair filed a complaint challenging the County's right to condemn the property, and after receiving inadequate responses to his requests for discovery, McNair moved for sanctions. The trial court granted the motion, struck the County's answer, and dismissed the condemnation action with prejudice. The County appeals, and we affirm.

FACTS

In September of 2005, Fairfield County served a condemnation notice on McNair, informing him the County intended to condemn a tract of land he owned adjacent to the Fairfield County Airport. Purportedly, the taking was necessary to extend one of the runways at the airport so it could accommodate large, commercial airplanes. McNair challenged the condemnation, and in November of 2005, McNair sent the County discovery requests. On February 10, 2006, the County produced over 800 documents of discovery. Two weeks later, McNair filed a motion to compel, alleging the County failed to produce certain documents, had not coherently organized the documents it did produce, and had provided incomplete responses to his interrogatories.

The trial court issued an order on April 20, 2006, finding the County failed to respond to McNair's First Request for Production and that the County's responses to Plaintiff's First Set of Interrogatories was deficient. The court did not impose any sanctions but ordered the County to correct its discovery responses within fifteen days.

Despite this directive from the trial court, the County made no attempt to correct the deficiencies in its discovery responses. McNair's counsel wrote six letters requesting the County comply with the order, and finally moved for dismissal and/or sanctions against the County on October 16, 2006, six months after the order compelling discovery had been issued.

A hearing on the motion was convened on November 15, and upon the promise of the County's attorney to have the discovery problems resolved within a month, the hearing was continued until December. At the December hearing, with no progress made toward correcting the discovery issues, the County's attorney explained its noncompliance with the discovery order was because of a funding deadline imposed by the Federal Aviation Administration (the FAA). Apparently, the FAA intended to have substantial progress completed on the runway extension project by October of 2006, and because that had not occurred, the FAA was threatening to withdraw funding

for the project. With funding for the project in jeopardy, the County was wary of spending additional money to litigate the condemnation challenge. Counsel for the County urged the trial court to allow him to prepare a scheduling order rather than striking the answer. Counsel explained such an order would aid him in his negotiations with the FAA. The trial court warned it was inclined to strike the answer, but in hopes of resolving the problem amicably, granted the parties forty-five days "to reach some kind of an accord," and if they could not, to submit proposed orders within that time.

On the forty-fifth day after the December hearing, the trial court, having never received a proposed order from the County, issued an order striking the County's answer to the condemnation challenge and dismissing with prejudice the County's condemnation action. Four days later, on February 6, 2007, the County submitted a Rule 59(e), SCRCP, motion along with a proposed scheduling order. In its motion, the County asked the court to reconsider the order striking the County's answer in light of the belated scheduling order.

At the hearing on the County's motion, McNair presented a letter from the FAA dated February 5, 2007, which indicated the FAA intended to withdraw its funding for the Fairfield County Airport runway extension project unless the land acquisition portion of the project was completed within ninety days. The County admitted it would not be able to resolve the challenge action within the time parameters imposed by the FAA.[1]

The trial court found no basis for reconsidering its previous order. The court also noted its decision to strike the answer and dismiss the condemnation action would not have changed even if Fairfield County had timely submitted the proposed scheduling order. This appeal followed.

[1] Based upon memoranda submitted by counsel following this court's inquiry, this matter is not moot.

STANDARD OF REVIEW

Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred. Id.

LAW/ANALYSIS

Fairfield County argues the trial court erred by granting McNair's motion for sanctions and denying its Rule 59(e), SCRCP motion. We disagree.

Initially, the County argues the trial court abused its discretion by signing McNair's proposed order forty-six minutes before the close of business on the day the proposed orders were due, without first reviewing the County's proposed scheduling order. This argument has no merit for two reasons. First, the County failed to timely submit a scheduling order, so even if the trial court had waited until 5:00 p.m., it still would not have had the benefit of a proposed order from the County. Second, in the court's order denying the county's Rule 59(e) motion, the court took the scheduling order into consideration and adhered to its initial order. Because waiting until the close of business before issuing its order would not have made a difference, the trial court did not abuse its discretion by issuing its order before the time for presenting a proposed order had elapsed. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

McNair also argues the trial court abused its discretion because striking the County's answer was unreasonably harsh under the circumstances. We disagree.

As stated above, sanctions for discovery abuse are left to the sound discretion of the trial court. See Barnette, 355 S.C. at 593, 586 S.E.2d at 575. However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. See Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App. 1999).

After deciding to strike the County's answer, the trial court noted:

> [T]he defense still has not produced documents 7 ½ months after this Court passed an Order granting plaintiff's motion to compel. The delay caused by defendant is a further prejudice to plaintiff's right to have his claim heard. . . .
>
> The defendant is to blame for this unconscionable delay, and the defendant's conduct amounts to contempt. This Court has considered whether a sanction less than striking the Answer in this case would achieve justice, and this Court concludes not. . . .
>
> The defendant's conduct in refusing to provide that which it has been ordered to produce is a serious affront to the integrity of the judicial system. . . . The defendant's failure to make any attempt to comply with the court order compelling discovery is a blatant violation of Rule 37(b)(2), SCRCP.

In addition to the explicit findings above, we note the trial court warned the County during the December hearing it was inclined to strike the County's Answer. Despite this warning, the County failed to submit a proposed scheduling order within forty-five days. Furthermore, at the

reconsideration hearing, the County was no closer to resolving the funding issues than it had been a year before, when the order compelling discovery had been issued.

"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." Griffin Grading & Clearing, Inc., 334 S.C. at 199, 511 S.E.2d at 719. Here, the trial court considered the appropriate factors, and determined the County's willful disobedience of previous orders warranted the severe sanction of dismissal.

CONCLUSION

Although we recognize the penalty is harsh, we find the trial court did not abuse its discretion in striking the County's answer and dismissing the condemnation action. To the extent Fairfield County raises additional arguments in its brief,[2] we find they are not preserved for our review because they were never raised to or ruled upon by the trial court.

[2] Specifically, the following arguments were never raised to the trial court: (1) the order contained internal inconsistencies regarding the reason the County's conduct constituted discovery abuse; (2) the trial court abused its discretion by failing to hold a factual hearing before dismissing the condemnation action; (3) the trial court erred by failing to hold a hearing before concluding the County had no public purpose, benefit, or use in condemning the land; (4) the trial court abused its discretion in dismissing the condemnation action because this "arguably" forecloses the County from ever improving its County Airport; (5) the trial court abused its discretion by finding the County in contempt without holding a factual hearing; (6) the trial court's assumption that FAA funds would be withdrawn was not supported by competent evidence; and (7) the trial court's finding that the County refused to produce voluminous documents was not supported by competent evidence.

Accordingly, the order of the trial court is

AFFIRMED.[3]

KONDUROS, J., and GOOLSBY, A.J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mozingo & Wallace Architects, L.L.P., Respondent/Appellant,

v.

Patricia Grand, a South Carolina Limited Partnership, Appellant/Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Master In Equity

Opinion No. 4426
Heard February 12, 2008 – Filed July 15, 2008

AFFIRMED

Henrietta U. Golding and Christopher L. Williams, of Myrtle Beach, for Appellant-Respondent.

David B. Miller, of Myrtle Beach, for Respondent-Appellant.

HUFF, J.: This case involves cross-appeals in a mechanic's lien action. Patricia Grand argues the trial court erred in holding Mozingo & Wallace Architects complied with its obligations under the contract. Patricia Grand also asserts the trial court erred in holding Mozingo & Wallace was entitled to attorney's fees as the prevailing party and in failing to award it attorney's fees. Mozingo & Wallace argues the trial court erred in limiting its award of attorney's fees to the principal debt recited in the notice and certificate of mechanic's lien. We affirm.

FACTS

In October of 2001, S. Derrick Mozingo, Jr., principal architect with Mozingo & Wallace, met with George B. Buchanan, Jr. and Benji Norton of Patricia Grand to discuss renovations to a hotel now known as Monterey Bay. Buchanan expressed his admiration of two of Mozingo & Wallace's similar projects. He indicated he wanted a "South Florida" look for the hotel. Although Mozingo asked Buchanan what his budget was for the project, Buchanan did not have an answer for him.

The parties subsequently entered into a contract for Mozingo & Wallace to perform the schematic design work for the exterior of the building. Although Mozingo stated in the cover letter for the contract that the submittals and approvals would be ready no later than the third week of November, the parties did not meet until December 12. At that meeting Mozingo presented two designs for the project, a "Modern" theme and a "Mediterranean" theme. During the meeting Buchanan also requested Mozingo design a renovation of the lobby and laundry facility. In his follow-up letter dated December 13, 2001, Mozingo noted the parties had agreed to move forward on the development of the "Mediterranean" theme and the interior work. He explained Mozingo & Wallace would not be able to commence work on the exterior and interior projects until after the first of the year. In addition, he stated the work presented at the meeting completed the work under the original contract agreement. The next day Mozingo & Wallace sent Patricia Grand an invoice for the services to date. The work on the interior renovation was invoiced as an additional expense at the contractual hourly rates. Mozingo & Wallace also enclosed a contract for the

balance of the work on the interior and exterior renovations. The contract included a work schedule for the renovations. Patricia Grand never executed this contract.

In a letter dated December 27, 2001, Buchannan wrote Mozingo that he had not approved the design and that approval would depend on obtaining acceptable cost parameters and permission from the city for the improvements. He listed six changes he felt should be considered. In a reply letter, Mozingo stated he had no problem with the requested changes but would need to review the items with Buchanan. At Buchanan's insistence, Mozingo submitted the schematics of the exterior renovation to a contractor for an estimate. The contractor, however, indicated there was not enough detailed information to provide a ballpark figure.

In a letter dated January 11, 2002, Buchanan expressed his concern that the projects were getting behind and it might not be feasible to complete them that spring. In response, Mozingo sent him schedules for the interior and exterior renovations. On January 15, Buchanan ordered Mozingo by fax to put on hold work on the exterior renovation and they would consider the job for the following winter. He also advised that he would hold off on a decision on the interior work until an opinion was obtained from the city regarding approval for the project. Mozingo responded that he was concerned by the tone of Buchannan's note. He explained he could have all submittals and approvals in place already but Buchanan had insisted on obtaining an estimate from a contractor before proceeding. In addition, Mozingo stated that he never thought that construction on the exterior renovation could be competed before the summer season but he believed the work would have very little impact on the hotel guests. However, he did assure Buchanan that the interior renovation could be accomplished before Memorial Day.

In a letter dated February 11, 2002, Buchanan expressed his dissatisfaction over the exterior and interior renovations. He stated he found both proposed plans for the exterior renovation to be impractical and that Mozingo had failed to deliver acceptable plans that could be completed during the slow months of January and February. In addition, he noted he

was unhappy with the delay with the interior renovation but wanted to continue on a fast-track basis. He proposed to renegotiate the contract for the projects, including evenly allocating the $25,000 already paid between the two projects. Mozingo took exception at the tone of the letter and terminated his services. He demanded full payment of the invoice for services to date. In return, Buchanan demanded a refund of $22,955.00.

Mozingo & Wallace filed a notice and certificate of Mechanic's lien listing $14,173.47 as the amount due. It subsequently brought this action seeking foreclosure of the lien, collection, and quantum meruit. Patricia Grand denied Mozingo & Wallace's entitlement to the relief sought and counterclaimed for breach of contract. The trial court found in favor of Mozingo & Wallace and awarded it $24,563.81 for architectural fees and interest accrued at the 18% rate set forth in the contract. In addition, the court awarded Mozingo & Wallace attorney's fees in the amount of $17,975.57. On Patricia Grand's motion to alter or amend, the court reduced the attorney fee award to $14,177.47, the amount stated in the notice and certificate of lien. Both Patricia Grand and Mozingo & Wallace appealed.

STANDARD OF REVIEW

An action to enforce a mechanic's lien is an action at law. Seckinger v. Vessel Excalibur, 326 S.C. 382, 386, 483 S.E.2d 775, 777 (Ct. App. 1997). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

1. Patricia Grand's appeal

Patricia Grand argues the trial court erred in finding Mozingo & Wallace complied with its obligations under the contract since it did not complete the scope of services required by the contract. We disagree.

A party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999). Patricia Grand first contends Mozingo & Wallace did not complete its preparation of the exterior design schematics as it never made the revisions requested by Patricia Grand. After Buchanan requested Mozingo make six revisions to the schematics, Mozingo agreed to make the changes. However, he admitted at trial that he never did in fact make the revisions. Mozingo explained all of the changes Buchanan requested involved simply deleting certain things or changing or painting certain items. He stated that he felt like all of the changes would be addressed or should be addressed in the second phase of the base contract. Patricia Grand, however, ordered Mozingo & Wallace to stop work on the exterior renovation before it could progress to the second phase. Thus, Patricia Grand's own acts prevented Mozingo & Wallace from completing the revision. See Moon v. Jordan, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (Ct. App. 1990) ("Generally, if a party by his contract charges himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by an act of God, the law, **or other party**.") (emphasis added).

Next Patricia Grand contends Mozingo & Wallace did not complete all the tasks required by the contract with respect to the Myrtle Beach Community Appearance Board (CAB). The contract's "Scope of Designated

Services" included CAB review submittals and approvals for the exterior project. Mozingo testified he was ready to take the schematics for the exterior renovation to CAB for review but he was never given the directive to do such because of the indecision with the project. He stated he needed both Patricia Grand's final approval of the conceptual design, as well as a current as-built survey from Patricia Grand before he could submit plans to CAB. He received neither. Thus, there is evidence in the record that Mozingo & Wallace's failure to complete this aspect of the contract was due to Patricia Grand's acts.

Finally, Patricia Grand asserts the conceptual design did not comply with relevant zoning ordinances. Certain decorative items in the design may have protruded over the set-back limits set forth in the ordinance. Mozingo testified that without a current as-built survey, which Patricia Grand never supplied, he was not exactly sure there would be a problem with the setbacks and he felt it was probably close to being within the allowed area. He stated if the decorative items did protrude past the setback lines by a few inches, Patricia Grand would need a variance. However, he stated he did not see obtaining a variance as a problem, just a process.

We find the record provides evidence that Mozingo & Wallace fulfilled its responsibilities under the contract or was prevented from doing so by Patricia Grand's own acts. Accordingly, we find no error in the trial court allowing Mozingo & Wallace to recover under the contract.

At oral argument, Patricia Grand asserted that under section 12.2.8 of the contract, it was entitled to equitable adjustment for the work Mozingo & Wallace failed to perform. This issue is not properly before this court. See South Carolina Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250, 551 S.E.2d 274, 278 (Ct. App. 2001) ("An appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief."); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.").

Patricia Grand argues the trial court erred in awarding Mozingo & Wallace attorney's fees because once Patricia Grand filed a surety bond, the

lien was terminated and Mozingo & Wallace could not prevail in an action to terminate the lien. This argument was never raised to or ruled on by the trial court. Accordingly, it is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Next Patricia Grand argues the trial court should have awarded it attorney's fees rather than Mozingo & Wallace because Mozingo & Wallace cannot be the prevailing party as it failed to complete the tasks it agreed to perform. As stated above, we find no error in the trial court's ruling that Mozingo & Wallace was entitled to recover under the contract. Therefore, we find no merit in Patricia Grand's argument regarding attorney's fees.

2. Mozingo & Wallace's appeal

Mozingo & Wallace argues the trial court erred in reducing the award of attorney's fees to the principal debt recited in the notice and certificate of mechanic's lien. We disagree.

The mechanic's lien statute provides the prevailing party may recover reasonable attorney's fees, "but the fee and the court costs may not exceed the amount of the lien." S.C. Code Ann. § 29-5-10 (a) (2007). "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Mid-State Auto Auction of Lexington v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Mun. Ass'n of S.C. v. AT & T Communications of S. States, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

We hold the legislature intended to limit the award of fees and costs to the amount set forth in the notice and certificate of mechanic's lien. This

limit on the amount of the award applies not only to a party prevailing in enforcing a lien but also to a party prevailing in defending the lien action. It would not be reasonable for a party enforcing the lien to be able to recover higher attorney's fees if it prevailed because it could add prejudgment interest to the lien award but limit a defending party if it prevailed to the debt stated in the notice and certificate of lien. Accordingly, we find the trial court properly reduced the amount of the attorney's fees awarded to the amount of the debt set forth in the notice and certificate of lien.

CONCLUSION

We hold the trial court did not err in allowing Mozingo & Wallace to recover under the contract. As the prevailing party, Mozingo & Wallace was entitled to attorney's fees. In addition, we hold the trial court correctly reduced the amount of the attorney's fees awarded to the amount of the debt stated in the notice and certificate of lien.

AFFIRMED.

KITTREDGE, JJ., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

M&M Group, Inc., Appellant,

v.

Suzette A. L. Holmes, Gregory M. Kopatch d/b/a Empire Business Brokers, Empire Business Brokerage, LLC, and Gregory M. Kopatch Individually, Respondents.

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

Opinion No. 4427
Submitted June 2, 2008 - Filed July 15, 2008

AFFIRMED

William J. Cutchin, of Mt. Pleasant, for Appellant.

Brian G. Burke, of Charleston, for Respondents.

THOMAS, J.: In this breach of contract action, M&M Group, Inc. appeals the trial court's grant of summary judgment to Suzette Holmes,

Gregory M. Kopatch[1] d/b/a Empire Business Brokers, Empire Business Brokerage, LLC, and Gregory M. Kopatch. We affirm.[2]

FACTS

M&M Group, Inc. ("M&M") was the owner of a carwash and lube business located in Mt. Pleasant. Wishing to sell the business and its assets, M&M signed an exclusive Listing Agreement with Gregory Kopatch (Kopatch), a commercial sales broker doing business as Empire Business Brokerage, L.L.C. (Brokerage). Pursuant to the Listing Agreement, the Brokerage would sell the business and M&M would then pay a commission to the Brokerage.

Kopatch identified Suzette Holmes ("Holmes") as a potential buyer, and on April 12, 2005, M&M and Holmes executed a sales contract ("Contract"). Under the terms of the Contract, M&M agreed to transfer its assets to Holmes in exchange for Holmes' payment of $675,000 to M&M. The first page of the Contract stated, "[w]hereas, the parties agree that Buyer's obligation to purchase the assets of the business and Seller's obligation to sell the assets is contingent upon Buyer's ability to secure commercial financing at prevailing interest rates." The Contract provided that Holmes was to secure $225,000 of the purchase price through commercial financing and M&M was to finance $250,000 with a sixty-month promissory note. The seven page Contract also set the closing date as May 22, 2005, and stated that time was of the essence.[3]

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[1] Initially we must note that summary judgment was granted solely to Holmes on M&M's breach of contract action. Although Holmes, Kopatch, and Empire Business Brokerage, L.L.C. are represented by the same attorney, the attorney made clear at the beginning of the hearing that Kopatch and the Brokerage were not parties to the Motion for Summary Judgment. As such, this appeal and opinion pertain only to the action against Holmes.

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

[3] "**19. TIME IS OF THE ESSENCE**. It is agreed by both Buyer and Seller that time is of the essence in all regards in connection with this Agreement." (emphasis in original).

On May 9, 2005, Holmes' request for a loan was denied. No closing occurred on May 22, 2005, and the sales transaction was never consummated thereafter. An affidavit by M&M's President, Sean Mummert, states the Brokerage called him on May 22 and told him a proposed lender needed additional information from Holmes before it would approve her financing request. Mummert affirms he told the Brokerage he would grant Holmes an extension in order for her to obtain financing needed to complete the transaction. No further communication occurred until October 12, 2005, when M&M received a letter informing them the proposed transaction was voided when Holmes was unable to obtain financing. A bank turndown letter regarding the May 9th denial of Holmes' loan request was also attached to the October 12th letter.

On November 14, 2005, M&M filed a complaint alleging breach of contract against Holmes as well as breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act against Kopatch and the Brokerage. Holmes subsequently filed a Motion for Summary Judgment which was heard by the trial court on March 16, 2007. Ruling from the bench, the trial court granted Holmes' summary judgment motion. M&M now appeals.

STANDARD OF REVIEW

In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure. South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

LAW/ANALYSIS

I. Motion for Summary Judgment

M&M contends the trial court erred by granting Holmes summary judgment in light of the fact that Holmes' motion failed to state with particularity the grounds for summary judgment. We disagree.

Holmes' motion for summary judgment stated, "[t]he grounds for this motion shall be set forth in a Memorandum of Law to be timely filed with supporting documents and affidavits as required." No such memorandum was filed with the trial court or provided to M&M. At the summary judgment hearing, M&M objected to the hearing itself since Holmes failed to follow Rule 7(b)(1)[4] of the South Carolina Rules of Civil Procedure. However, M&M did not ask the trial court for any sort of relief or request the motion be dismissed or continued in order to better prepare for the motion. M&M simply objected to the hearing.[5] The trial court evidently assumed

[4] Rule 7(b)(1), SCRCP, provides, "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

[5] At the hearing M&M's counsel argued, "First I would like to object to this Motion hearing itself in that counsel failed to follow Rule 7(b)(1) of the South Carolina Rules of Civil Procedure… In the Motion itself there are no

M&M was making such a motion for a continuance and denied it. M&M now appeals claiming it was "unable to properly prepare for arguing the Motion for Summary Judgment."

M&M correctly asserts Holmes did not comply with the technical requirements of Rule 7(b)(1), SCRCP. However, M&M did not argue at the trial court that Holmes' failure to follow Rule 7(b)(1), SCRCP, prejudiced it or caused unfair surprise in any way. As such, we find M&M's current argument of prejudice is not preserved for our review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Were we to consider the merits of this argument, this Court would be forced to find M&M cannot make the requisite showing of prejudice necessary to reverse the trial court's denial of a continuance. The grant or denial of a continuance lies with the sound discretion of the trial court and such ruling will not be reversed absent a clear showing of abuse of discretion. State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989). "Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal." Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). M&M has demonstrated no such prejudice at either the trial court or this court.

II. Condition Precedent Located in a Recital

M&M contends the contingency in Paragraph 4 of the Contract is a recital and cannot be construed as a condition precedent. M&M further argues summary judgment was inappropriate because the placement of a

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grounds whatsoever given for this Motion. So I would like to object to it on that stance to start with." The trial court stated, "Okay. Well, that Motion is denied." M&M's counsel replied, "Thank you. …Secondly, your Honor, there are two reasons why counsel should fail on its Motion."

contingency in a recital clause creates a question of fact as to whether a condition precedent existed at all. We disagree.

Paragraph 4 of the Contract states, in full, "[w]hereas, the parties agree that Buyer's obligation to purchase the assets of the business and Seller's obligation to sell the assets is contingent upon Buyer's ability to secure commercial financing at prevailing interest rates." The Contract also contains a section entitled "Contingencies." Language similar to Paragraph 4 does not appear in the "Contingencies" section; however, the Contract itself states the headings do not define, limit, or describe the scope or intent of the Contract's provisions.[6]

Black's Law Dictionary defines "recital" as "[a]n account or description of some fact or thing; …[a] preliminary statement in a contract or deed explaining the background of the transaction or showing the existence of particular facts." (7th ed. 2000). Recitals also traditionally begin with the word "whereas." Black's Law Dictionary (8th ed. 2004). Although whereas clauses typically describe the background leading to a contract, the foremost rule of contract interpretation is that courts "must give effect to the intentions of the parties by looking to the language of the contract." Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (citing Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985)); see Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973) (holding the intention of an instrument is determined by its language, regardless of whether such language is in a whereas clause; language in a recital clearly set forth an agreement's purpose as a modification); Horry v. Frost, 10 Rich. Eq. 109, 1858 WL 3728 (Ct. App. Eq. 1858) ("A covenant may be as obligatory when expressed by way of recital as if expressed in the formal part of the agreement.").

[6] "**HEADINGS AND CONSTRUCTION.** The caption headings are used in this Agreement only as a matter of convenience and for reference and do not define, limit, or describe either the scope of this Agreement or the intent of any provision." (emphasis in original).

"To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) (citing Superior Auto. Ins., 261 S.C. at 263, 199 S.E.2d at 722); Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) ("If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect."). If practical, documents will be interpreted to give effect to all of their provisions. Ecclesiastes, 374 S.C. at 498, 649 S.E.2d at 502 (citations omitted); Brady v. Brady, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952).

The primary test of a contract's character is "the intention of the parties, such intention to be gathered from the whole scope and effect of the language used." Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (citations omitted). "In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered." Ellie, 358 S.C. at 94, 594 S.E.2d at 493. Parties are governed by their outward expressions and the court is not free to consider their secret intentions. Id. at 94, 594 S.C. at 494.

In the present case, Paragraph 4 clearly states, "the parties agree that Buyer's obligation to purchase the assets of the business and Seller's obligation to sell the assets is contingent upon Buyer's ability to secure commercial financing." (emphasis added). The use of the language "is contingent upon" is unequivocal and patently indicates the parties' respective obligations to buy and sell the business are contingent on Holmes' ability to secure financing. No other meaning could be deduced from such clear and commonly used language. "When a contract is clear and unambiguous, the construction of the contract is a question of law for the court." Moser, 334

S.C. at 430, 513 S.E.2d at 125 (citing Conner, 285 S.C. at 101, 328 S.E.2d at 336). Accordingly, we agree with the trial court that Paragraph 4 of the Contract contains a condition precedent. We will now discuss whether such condition was met.

III. Condition Precedent

M&M contends the trial court erred in awarding summary judgment on the basis of Holmes' inability to meet a condition precedent resulting in a void contract. We disagree.

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (citing Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). Here, the Contract contained a condition precedent[7] that Holmes' obligation to purchase the business was subject to her ability to secure commercial financing.

On May 9, 2005, Holmes' request for a loan was denied. At the summary judgment hearing, no evidence was presented regarding Holmes' ability to secure commercial financing, and no evidence was presented to show Holmes obtained financing by the Contract's closing date of May 22, 2005. "The failure of one to perform under a contract because of his inability to obtain financing from a third party on whom he relied to furnish the money will not excuse performance, in the absence of a contract provision in that regard." Worley, 317 S.C. at 209, 452 S.E.2d at 624 (citing 17A Am.Jur.2d Contracts § 680 (1991)). This Contract contained just such a provision relating to Holmes' ability to obtain financing.

[7] Black's Law Dictionary defines "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered." (8th ed. 2004).

In light of this Contract's language and the foregoing reasons, the order of the trial court granting summary judgment in favor of Holmes on M&M's causes of action is

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina, Respondent,

v.

Ricky Brannon, Appellant.

Appeal From Cherokee County
Roger L. Couch, Circuit Court Judge

Opinion No. 4428
Submitted June 1, 2008 – Filed July 18, 2008

REVERSED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Michelle Parsons, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Appellant Ricky Brannon was convicted of resisting arrest for fleeing on foot from police officers who yelled, "Stop, police." Citing a lack of direct and substantial circumstantial evidence, he argues the circuit court judge erred in denying his motion for a directed verdict. We agree.[1]

FACTUAL / PROCEDUAL BACKGROUND

Maria Raney, a resident of Westwood Apartments in Gaffney, awoke in the early morning hours of April 21, 2003. Upon looking out her window, she observed her car with its interior light illuminated and a man moving around inside. She called 911 and the operator asked her to stay on the line until police arrived. Rainey complied and informed the operator when she saw Gaffney Police Department Officers Michael Scruggs and Randy Quinn. Rainey testified the officers "came up and they hollered police and I saw them as [they] chased him."

With dispatch relaying information as it was supplied by Rainey, Officer Scruggs and Officer Quinn approached the apartment building with the headlights and sirens off. Once in proximity, the officers proceeded on foot and observed a figure standing outside a vehicle whose interior light was on. Rainey's observations, as conveyed by dispatch, informed them the suspect had moved on to another car, a Ford Explorer owned by a neighbor's mother. The officers saw only one figure in the parking lot by an Explorer. Scruggs explained "[a]t that time, we knew we had a crime being committed." Scruggs said the person looked up, apparently hearing them. Scruggs testified:

> Q: Now, when y'all came up, you say you identified yourself. Tell me exactly what you said.
>
> A: I think Officer Quinn told him just, said just stop police, or I believe that's what he said.
>
> Q: Okay. Stop police. Was anything else said to him?

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

A: No, sir, other than stop again because he was already running.

Q: All right. So all that was said to him was stop police and then stop again? He was never placed under arrest?

A: No, sir, not until we caught him.

Officer Quinn testified:

Q: Based upon information you had, did you believe the subject, at that time, was the individual breaking into motor vehicles?

A: Yes, sir.

Q: And what was your intention when the subject took off?

. . .

A: Our intention was to approach the subject and find out exactly what he was doing there at that time. We believe he was breaking into a motor vehicle and we placed him under arrest for that charge.

Brannon ran three hundred to three hundred fifty yards before being placed under arrest. The record does not indicate Brannon resisted the officers once caught. Scruggs explained:

Q: Why was he charged with resisting arrest?

A: For running on myself and Officer Quinn.

After being found guilty, Brannon was sentenced to three years in prison for breaking into a motor vehicle, suspended upon the service of two years, and one year probation. He was additionally sentenced to one year in prison for resisting arrest. The sentences are concurrent.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, we are limited to determining whether the trial court abused its discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982); State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006), cert. denied, May 3, 2007.

LAW / ANALYSIS

I. Directed Verdict

Brannon contends the trial court erred in denying his motion for directed verdict on the resisting arrest charge.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Stanley, 365 S.C. 24, 41-42, 615 S.E.2d 455, 464 (Ct. App. 2005); State v. Padgett, 354 S.C. 268, 271, 580 S.E.2d 159, 161 (Ct. App. 2003). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citing State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003)); State v. Crawford, 362 S.C. 627, 633, 608 S.E.2d 886, 889 (Ct. App. 2005); Padgett, 354 S.C. at 271, 580 S.E.2d at 161. When reviewing a denial of a directed verdict, an appellate court views evidence and all reasonable inferences in the light most favorable to the State. Weston, 367 S.C. at 292, 625 S.E.2d at 648; State v. Zeigler, 364 S.C. 94, 101, 610

S.E.2d 859, 863 (Ct. App. 2005); State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; Cherry, 361 S.C. at 593, 606 S.E.2d at 478; McKnight, 352 S.C. at 642, 576 S.E.2d at 172; State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002); see also State v. Horton, 359 S.C. 555, 563, 598 S.E.2d 279, 284 (Ct. App. 2004) (noting judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence that reasonably tends to prove the defendant's guilt, or from which guilt may be fairly and logically deduced). The appellate court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the court's ruling. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002).

The trial court should grant a directed verdict when the evidence merely raises a suspicion that the defendant is guilty. State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984); State v. Horne, 324 S.C. 372, 379, 478 S.E.2d 289, 293 (Ct. App. 1996). " 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Cherry, 361 S.C. at 594, 606 S.E.2d at 478. However, a trial court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Id.

II. Rules of Statutory Construction

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.

McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The language must be read to harmonize with its subject matter and accord with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley

Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739; see also Shealy v. Doe, 370 S.C. 194, 199-200, 634 S.E.2d 45, 48 (Ct. App. 2006), cert. denied, Aug. 9, 2007.

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the

legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

"Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citing State v. Cutler 274, S.C. 376, 264 S.E.2d 420 (1980)); see also State v. Dingle, 376 S.C. 643, 649-50, 659 S.E.2d 101, 105 (2008); State v. Gordon, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003); Kerr v. State, 345 S.C. 183, 189, 547 S.E.2d 494, 497 (2001); Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991); State v. Graves, 269 S.C. 356, 360, 237 S.E.2d 584, 586 (1977) (Because statute at issue is penal in nature "we must approach it's interpretation by invoking the rule of strict statutory construction and resolve any uncertainty or ambiguity against the State and in favor of the respondent."); Lewis v. Gaddy, 254 S.C. 66, 71, 173 S.E.2d 376, 378 (1970).

III. Stops and Arrests

The Fourth Amendment of the United States Constitution—applicable to the states through the Fourteenth Amendment—guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amends. IV & XIV; State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005); see also Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1 (1968); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). The term "reasonable suspicion" requires a particularized and objective basis

that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411 (1981); State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997). In determining whether reasonable suspicion exists, the whole picture must be considered. United States v. Sokolow, 490 U.S. 1 (1989); State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999).

The test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Michigan v. Chesternut, 486 U.S. 567 (1988); United States v. Analla, 975 F.2d 119 (4th Cir.1992); see also United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998) ("The test ... [is] whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position 'would have felt free to decline the officer's requests or otherwise terminate the encounter.'") (citations omitted). So long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. United States v. Mendenhall, 446 U.S. 544 (1980). The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct taken as a whole. Chesternut, 486 U.S. at 573; State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002). Thus, exactly what constitutes a restraint on liberty sufficient to lead a reasonable person to conclude he is not free to leave varies with the setting in which the police conduct occurs. Id.

Reasonableness is measured in objective terms by examining the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33 (1996); Williams, 351 S.C. at 600, 571 S.E.2d at 708. As a result, the nature of the reasonableness inquiry is highly fact-specific. Id. Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the existence and nature of any prior seizure, whether there was a clear and expressed endpoint to any such prior detention, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether

the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact. Pichardo, 367 S.C. at 101, 623 S.E.2d at 849. See also United States v. Beck, 140 F.3d 1129 (8th Cir. 1998); Ferris v. State, 735 A.2d 491 (Md. 1999).

"If the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances." State v. Culbreath, 300 S.C. 232, 236, 387 S.E.2d 255, 257 (1990), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990). Even where the stop is deemed proper, "before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous." State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996). In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed. Terry, 392 U.S. at 27; State v. Smith, 329 S.C. 550, 556, 495 S.E.2d 798, 801 (Ct. App. 1998). The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Terry, 392 U.S. at 27; Smith, 329 S.C. at 556, 495 S.E.2d at 801.

"Reasonable suspicion is a lesser standard than probable cause and allows an officer to effectuate a stop when there is some objective manifestation of criminal activity involving the person stopped." State v. Padgett, 354 S.C. 268, 273, 580 S.E.2d 159, 162 (Ct. App. 2003); see also State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006); State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994). We discussed probable cause in the case of State v. Blassingame:

> The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992). "Probable cause is defined as a good faith belief that a

> person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." Id. at 4, 425 S.E.2d at 20. Probable cause may be found somewhere between suspicion and sufficient evidence to convict. Thompson v. Smith, 289 S.C. 334, 336-37, 345 S.E.2d 500, 502 (Ct. App. 1986), overruled in part on other grounds by Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990). In determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable, prudent and cautious men, not legal technicians, act. Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999).

State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540-541 (Ct. App. 1999).

IV. United States Supreme Court Analysis

In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court elucidated when encounters between police officers and citizens rise to the level of seizures and arrests. In Hodari D., two police officers were patrolling a high crime area when they observed several youths gathered around a parked car. As the officers approached in their unmarked police car, the group panicked and scattered. One member of the group, Hodari, fled the scene on foot and an officer chased after him. As Hodari ran, he looked to his rear and did not see his pursuer until directly before he was apprehended. Upon seeing the officer and moments prior to being tackled and handcuffed, Hodari tossed away a small rock which was later determined to be crack cocaine.

The issue in Hodari D. revolved around when a seizure occurs within the meaning of the Fourth Amendment. Hodari contended if he were seized at the time he discarded the drugs, this evidence is barred as the fruit of an illegal seizure since the officers lacked the reasonable suspicion required to stop him for questioning. However, the Court disagreed with this argument and determined Hodari was seized at the moment he was tackled, not during

the pursuit leading up to the tackle. Therefore, the cocaine discarded during the pursuit was not the product of an illegal seizure because a seizure had not yet taken place when it was abandoned. Id. at 629.

In reaching this conclusion, the Supreme Court expounded on what an arrest is under our Constitution:

> To constitute an arrest, however—the quintessential "seizure of the person" under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient. See, e.g., Whitebread v. Keyes, 85 Mass. 495, 501 (1862) ("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him"); 1 Restatement of Torts § 41, Comment h (1934). As one commentator has described it:
>
> > "There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished merely by touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, 'If the bailiff had touched him, that had been an arrest . . . .' " A. Cornelius, Search and Seizure, 163-164 (2d ed. 1930) (footnote omitted).
>
> To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to

say that that disclosure had been made during the course of an arrest. Cf. Thompson v. Whitman, 18 Wall. 457, 471, 21 L. Ed. 897 (1874) ("A seizure is a single act, and not a continuous fact").

. . .

Hodari contends (and we accept as true for purposes of this decision) that [the officer's] pursuit qualified as a "show of authority" calling upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. Nor can the result respondent wishes to achieve be produced—indirectly, as it were—by suggesting that [the officer's] uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.

> "Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or

> submission." Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940) (footnotes omitted).

Hodari D., 499 U.S. at 624-627.

The Court clearly defined an arrest for Fourth Amendment purposes as requiring the application of physical force or a submission to a show of authority. A suspect must yield to police demands or be physically restrained—if one of these elements is lacking, then an arrest has not been consummated. Hodari was not restrained, had not been physically touched, and did not submit to a show of authority at the time he discarded the drugs. Therefore, he had not yet been arrested until the point physical force was applied through the officer's tackle. Id. at 629 ("[A]ssuming that [the officer's] pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.")

In reaching the decision in Hodari D., the Supreme Court cited to another important case addressing when a seizure or arrest has occurred, Brower v. Inyo County, 489 U.S. 593 (1989). In Brower, a suspect in a stolen car fled from police pursuit during a lengthy high-speed chase. The chase ended when the suspect crashed into a police roadblock and was killed. His heirs challenged the roadblock as an unreasonable seizure contrary to Fourth Amendment protections, but the Ninth Circuit Court of Appeals found no seizure had taken place. The Supreme Court disagreed and, finding the roadblock was a seizure, remanded the case for additional consideration regarding reasonableness.

In making this determination, the Court explicated on when the seizure in the case actually transpired:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a

> governmental termination of freedom of movement *through means intentionally applied*.
>
> . . .
>
> The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means—his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

Id. at 596-597.

The roadblock was responsible for stopping the suspect's flight, not the show of authority from the flashing lights of the pursuing police vehicles. The Court's holding illustrates that a mere show of authority, without more, is not enough to constitute a seizure or arrest. As noted, had one of the pursuing officers attempted to ram the suspect's vehicle in order to stop it, this would have equated to a seizure. However, the pursuit was not enough in itself to terminate the freedom of movement of the suspect and did not rise to the level of a seizure without his submission to the pursuers' show of authority.

Following Hodari D., the Supreme Court further examined when a seizure or arrest occurs in County of Sacramento v. Lewis, 523 U.S. 833 (1998). In this case, police responded to a call about a fight in progress. As one of the officers returned to his patrol car, two boys uninvolved in the fight approached the scene on a motorcycle at a high rate of speed. The officer turned on his flashing lights, commanded the boys to stop, and repositioned his patrol car in an effort to block the motorcycle. Instead of stopping, the boys maneuvered around the police cars and sped away. Another officer chased after the boys at high speed. The chase ended when the motorcycle tipped over and its occupants were thrown off. The pursuing officer then

accidently struck and killed one of the boys while attempting to stop the patrol car.

In a due process analysis to determine police liability for the boy's death, the Court noted that no seizure had materialized during the pursuit of the motorcycle. Id. at 843 ("The Fourth Amendment covers only 'searches and seizures,' neither of which took place here." (quoting Brower, 489 U.S. at 597)). The Court cited to both Hodari D. and Brower in concluding that a police pursuit in an attempt to seize a suspect does not amount to an actual seizure under the Fourth Amendment. Lewis, 523 U.S. at 844. Because the boys did not pull over in response to the flashing lights and no intentional contact was made to effectuate a stop, no seizure resulted from the officer's conduct. Id. Furthermore, even though the officer struck one of the boys while trying to halt his vehicle, the Court determined a seizure did not occur because this contact was accidental. Id. ("[N]o Fourth Amendment seizure would take place when a 'pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,' but accidently stopped the suspect by crashing into him."). The case establishes police pursuit is not enough to constitute a seizure or arrest absent intentional physical contact or a submission to a show of authority.

More recently, the Supreme Court reaffirmed the holding from Hodari D. in Brendlin v. California, 551 U.S. ___, 127 S. Ct. 2400 (2007). In this case, police officers saw a car with expired registration tags. Before the officers pulled the car over, they had discovered through dispatch that a registration renewal was being processed and had noticed a temporary operating permit indicating it was legal to drive the vehicle through the end of the month. The officers decided to stop the vehicle in order to verify the permit matched the vehicle. There was nothing suspicious about the permit or the way it was affixed to the car at the time of the stop. After the vehicle was pulled over, one of the officers recognized the passenger, Brendlin, as a possible parole violator. As he verified this information, he saw Brendlin open and close the door of the car. The officer then approached the car, ordered Brendlin out at gunpoint, and placed him under arrest. In a search incident to this arrest, the officers found evidence related to the manufacture of methamphetamines.

The issue before the Court was whether the evidence collected was the fruit of an illegal seizure. The Court determined "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, ' 'by means of physical force or show of authority,' ' terminates or restrains his freedom of movement." Id., 127 S. Ct. at 2405 (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991) (quoting Terry v. Ohio, 392 U.S. 1, 19, n. 16 (1968))). Furthermore, "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." Brendlin, 127 S. Ct. at 2405. The Court held that a passenger is seized at the moment the car comes to a halt. Id., 127 S. Ct. at 2403. As soon as the driver pulled his car over in response to the police presence, a seizure of all occupants of the vehicle was completed. This case is important because it further clarifies a seizure occurs when an individual submits to a show of authority, including when that person is a passenger in a submitting vehicle. Id., 127 S. Ct. at 2403 ("Brendlin was seized from the moment [the driver's] car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest.").

From Hodari D. and the chain of cases that followed, two factors essential to an arrest have been identified: (1) physical contact intended to effect restraint or (2) submission to a show of authority. An arrest, the highest form of seizure possible under the Fourth Amendment, occurs when a police officer physically restrains a suspect or forces submission through a show of authority. Hodari D., 499 U.S. at 624. A seizure or arrest has not been effected when a suspect flees from an officer—whether the flight be on foot, in an automobile, or on a motorcycle—even if there has been a show of authority or command to stop without submission. See Lewis, 523 U.S. at 843-844; Hodari D., 499 U.S. at 626; Brower, 489 U.S. at 597. Without one of these factors, an arrest has not yet occurred. Embracing this proposition and the holdings in these United States Supreme Court cases, fleeing from an officer's command to stop does not yet rise to an arrest for Fourth Amendment purposes absent submission to the order.

In the case sub judice, Brannon's response to spotting the police was identical to the actions of Hodari in a similar situation. When Brannon saw officers approaching him, he turned and fled, just like Hodari did when he observed a police presence. Additionally, like the boys on the motorcycle in Lewis, Brannon chose to ignore the officer's commands to stop and continued his flight. In both Hodari D. and Lewis, the Supreme Court determined no arrest or seizure had occurred during these flights. See Lewis, 523 U.S. at 843; Hodari D., 499 U.S. at 629. Therefore, it appears consistent to conclude that no arrest occurred in the present case during the course of Brannon's flight. Looking to the factors for an arrest enunciated by the Supreme Court, Brannon had neither been physically touched for the purpose of restraint nor had he submitted to a show of authority at the time of his flight. Therefore, no arrest or seizure had occurred at the time of Brannon's alleged resistance.

V. Resisting Arrest under Section 16-9-320(A)

Brannon was convicted for a violation of South Carolina Code Section 16-9-320(A) which provides:

> It is unlawful for a person knowingly and wilfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned not more than one year, or both.

An "arrest" is defined by Black's Law Dictionary as "1. A seizure or forcible restraint. 2. The taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." Black's Law Dictionary 104 (7th ed. 1999).

Whether fleeing a police officer's simple demand to stop constitutes resisting arrest under Section 16-9-320(A) is a novel question. South

Carolina case law has recognized that an arrest is an ongoing process, finalized only when the defendant is properly confined. State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991). However, there is a paucity of law defining when an arrest begins.

In State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960), Williams was convicted of robbery, grand larceny and assault with a deadly weapon. While detained by a highway patrol officer investigating the possession of contraband liquor, Williams "suddenly caught him by the arm and after a struggle took his pistol from the holster." Id. at 256, 116 S.E.2d at 860. The supreme court discussed whether Williams was under arrest when he took the officer's weapon:

> So far as appellant is concerned, the only act of the patrolman prior to that time was to request him to get out of the car. This cannot be said as a matter of law to amount to an arrest. 'To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.' Jenkins v. United States, 10 Cir., 161 F.2d 99, 101 [1947]. It is not necessary 'that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty.' 4 Am. Jur., Arrest, Section 2. Also, see 6 C.J.S. Arrest § 1; Restatement, Torts, Section 112.

Williams, 237 S.C. at 257, 116 S.E.2d at 860-861.

In a case where two African American students were arrested for trespass and breach of the peace, and one of them was charged with resisting arrest, for sitting at a drug store's restaurant whose policy was to not serve African Americans, the supreme court considered whether a delay in responding to a police officer's instruction constituted resisting arrest. City of Columbia v. Bouie, 239 S.C. 570, 124 S.E.2d 332 (1962), overruled on other grounds, 378 U.S. 347 (1964). The court illuminated:

> [T]he evidence was in our opinion insufficient to warrant Bouie's conviction on the charge of resisting arrest. It is apparent from the testimony of the arresting officer that the only 'resistance' on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter 'had to pick him up out of the seat'. Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it. But we do not think that such momentary delay in responding to the officer's command as is shown by the testimony here amounted to 'resistance' within the intent of the law.

Id., 239 S.C. at 574, 124 S.E.2d at 333 (citations omitted).

In Fernandez v. State, 306 S.C. 264, 411 S.E.2d 426 (1991), Fernandez was standing in a group of people approached by police officers. Fernandez broke from the group and ran, carrying two packages. As the police pursued him, Fernandez dropped the two packages. The officers eventually caught and subdued Fernandez, and they returned to retrieve the packages he abandoned. One package contained $13,000 and the other crack cocaine. Id. at 266, 411 S.E.2d at 427.

The South Carolina Supreme Court upheld the admission into evidence of the contents of the packages Fernandez dropped:

> In California v. Hondari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), a case with remarkably similar facts to the present case, the United States Supreme Court held that the defendant was not seized for Fourth Amendment purposes until

> he submitted to the authorities. Id. 499 U.S. at [629], 111 S. Ct. at 1552, 10 L. Ed. 2d at 699. Further, defendant abandoned the evidence while he was running from the police. See Id. It follows that evidence abandoned by the defendant before he was seized by the police cannot be the basis for a violation of the Fourth Amendment's prohibition against unreasonable search and seizure. Id. We find no error in the admission of evidence so obtained.

Fernandez, 306 S.C. at 266-267, 411 S.E.2d at 427-428.

Section 16-9-320(A) requires that there be an "arrest being made" in order to support a conviction. The statute does not criminalize fleeing from officers attempting to conduct a Terry stop. There is no allegation Brannon "oppose[d] or resist[ed] a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process." His conviction was founded upon "resist[ing] an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer." By the clear, unambivalent language of the statute, a conviction for the offense can only stand if there was indeed an arrest being made. It follows that since there is no seizure for Fourth Amendment purposes when an individual flees approaching officers, there certainly cannot be an arrest.

VI. Other Jurisdictions' Resisting Arrest Statutes

Prior to a later amendment of its relevant statute, Missouri's criteria for sustaining a resisting arrest conviction shared with South Carolina Code Section 16-9-320(A) the requirement that an offender knowingly resists an arrest being made.

In State v. Long, 802 S.W.2d 573 (Mo. Ct. App. 1991), the Missouri Court of Appeals found a conviction for resisting arrest was not supported by sufficient evidence. At the time of trial, the Missouri statute declared, in pertinent part:

> 1. A person commits the crime of resisting . . . arrest if, knowing that a law enforcement officer is making an arrest,

> for the purpose of preventing the officer from effecting the arrest, he:
>
> (1) Resists the arrest of himself by . . . fleeing from such officer . . . .

Mo. Rev. Stat. § 575.150 (1986).

In Long, a police officer followed Long intending to stop him for an expired license plate. After Long began to accelerate his truck, the officer activated his lights and siren, pursued Long, and stopped after Long pulled into a driveway. Long exited his truck when the officer arrived. After being advised that he was being arrested for various charges including resisting arrest, Long offered no opposition.

At trial, the arresting officer testified when he saw the expired plate he intended to "stop the pickup and investigate . . . ." Long, 802 S.W.2d at 575. He said he formed the intent to place Long under arrest "when I determined he was actively fleeing from me." Id. Long moved for an acquittal arguing the state failed to prove (1) Long knew the officer was making an arrest and (2) the officer intended to arrest him prior to flight.

The court said the officer could not have formed the intent to arrest Long for the registration offense without first confirming Long was the owner as required by Missouri law. Long was additionally charged with not having a driver's license. This fact, discovered after Long stopped, could not have supplied an intent to arrest prior to the chase. The court held:

> [T]he sequence of events, viewed in the light most favorable to the judgment, was (a) the officer commenced pursuit of the defendant without any intent to arrest him, (b) the defendant fled from the officer, and (c) the officer formed an intent to arrest the defendant when he "determined [the defendant] was actively fleeing from me." There was no evidence at trial identifying the crime for which he intended to arrest the defendant. While we are sympathetic with the view that such a sequence of events might constitute a crime, we are convinced that the state failed to

> prove that the defendant violated § 575.150. The statute creates the crime of resisting arrest by flight; it does not create the crime of fleeing from a traffic stop where no arrest was intended until after flight commenced.

Id. at 577.

Missouri's amended statute now reads:

> 1. A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; . . . .

Mo. Rev. Stat. § 575.150 (2006).

In the case at bar, evidence was entered indicating Brannon was suspected of breaking and entering automobiles. However, Scruggs testified he wanted to stop Brannon and question him. Similar to Long, the intent to arrest was formulated after Brannon fled. While the Long court never reached the argument that the prosecution failed to prove Long knew the officer was making an arrest, a footnote suggested that a conviction could stand where the intent to arrest is formed during pursuit if a crime were committed in the officer's presence, or if he learned of an arrest warrant over the radio. Long, 802 S.W.2d at 577, n. 4.

The Texas Court of Criminal Appeals considered whether a person who fled from an officer intending an investigatory stop evaded arrest in Smith v. State, 739 S.W.2d 848 (Tex. Crim. App. 1987) (en banc). At the time of

Smith's conviction, Texas Penal Code Section 38.04 provided "a person commits the offense of evading arrest if he intentionally flees from a person he knows is a peace officer attempting to arrest him." "The gravamen of the offense is the evasion of an arrest, not the evasion of a police officer." Smith, 739 S.W.2d at 850 (quoting Jackson v. State, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986)). Section 38.04 currently states "[a] person commits an offense if he intentionally flees from a person he knows is a peace officer attempting to lawfully arrest *or detain* him." Tex. Penal Code Ann. § 38.04 (Vernon 2003) (emphasis added).

In Smith, an officer was dispatched to a club after a disturbance was reported. Without knowing what had occurred inside, the officer was met outside by three women who told him Smith had a gun. Smith, who was in the doorway, ran from the scene. After chasing Smith while yelling "Halt, Police!", Smith was apprehended. The officer determined Smith was intoxicated, and he was arrested for that offense. The court held Smith fled when the officer was trying to investigate to determine if the crime of unlawfully possessing a gun had occurred. "[Section] 38.04 . . . requires that before a violation of that statute can occur, when the individual flees from the officer, the officer must then be *attempting to arrest him.*" Smith, 739 S.W.2d at 853 (emphasis in original). The court concluded the state failed to prove Smith violated Section 38.04. "[F]leeing from a request for a Terry-type stop, while not behavior we condone in any way, does not constitute the crime of resisting arrest." Id. at 851.

The Appeals Court of Massachusetts considered whether a defendant's flight from officers who had not yet spoken with him supported a conviction for resisting arrest. Commonwealth v. Grant, 880 N.E.2d 820 (Mass. App. Ct. 2008). Police officers saw Grant's car traveling down a road and, knowing of an outstanding warrant, they began to follow. Before they could turn on their lights or sirens, Grant abruptly pulled over, leapt from the car, and fled on foot. He led the officers at a full sprint through several yards and was seen placing a gun inside a backyard grill. Eventually he ran in the direction of another responding officer who drew his gun and ordered Grant to "get on the ground." Grant instead changed direction and, after running into another officer who ordered him to the ground, Grant submitted. Id. at 823.

Grant was convicted of resisting arrest. On appeal he argued insufficient evidence supported his conviction. The court noted the relevant law declared:

> A defendant resists arrest if "he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another; by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another."

Id. at 823 (quoting Mass. Gen. Laws. Ann. ch. 268, § 32B(a)).

The court explained " 'the crime [of resisting arrest] is committed, if at all, at the time of the 'effecting' of an arrest.' " Id. (quoting Commonwealth v. Grandison, 741 N.E.2d 25 (Mass. 2001)). Under Massachusetts jurisprudence, an arrest is effected when there is (1) an actual or constructive seizure or detention of the person, (2) made with an intent to arrest, and (3) the person detained so understands. Id. "The standard for determining whether a defendant understood that he is being arrested is objective—whether a reasonable person in the defendant's circumstances would have so understood." Id.

In Grant, the court considered the timing of events critical to the analysis: "When [Grant] first fled, he had not been actually or constructively seized or detained. The police had not told him to stop, nor informed him that he was under arrest . . . . Although it was clear that he ran to avoid and evade the police, avoiding and evading the police was not the equivalent of resisting arrest, particularly when the police had not spoken to [Grant] before he ran away." Grant, 880 N.E.2d at 823-24. Concerning the first element of effecting an arrest, the court suggested that during the pursuit, the functional equivalent of a seizure may have arisen at some point. The police knew Grant had an outstanding warrant and testified they intended to arrest him. However, the Commonwealth had to prove that "a reasonable person in [Grant's] position would have understood that the seizure was to effect an

arrest." Id. at 824. The court found such evidence lacking: "Other than chasing the defendant, the officers did not communicate with him in any way until right before he submitted." Id. "During the defendant's flight from the police, there was no evidence to prove that he understood that the officers were effecting an arrest. He was simply running away from them." Id.

> Fleeing from, or even resisting, a stop or patfrisk does not constitute the crime of resisting arrest. Although the officers here were intending to effect an arrest, and not just stop or patfrisk, neither their words nor their actions had objectively communicated that intention to the defendant prior to, or during, the pursuit. We believe such communication is required to satisfy the requirement that a defendant understand he is being arrested.

Id. (internal citations omitted).

Likewise, the Court of Appeals of Ohio found evidence insufficient to support a resisting arrest conviction in State v. Raines, 706 N.E.2d 414 (Ohio App. 3d 1997). An officer observed Raines lean into a running parked car and then place something into his shoe. The officer, who was on bicycle patrol in a high crime area, approached Raines and told him to stop because he needed to speak with him, but Raines fled. With the officer commanding him to stop and telling him he was under arrest, Raines ran into an apartment building to hide. Id. at 415. He was apprehended shortly thereafter and charged with resisting arrest among other offenses.

Resisting arrest is codified at Ohio's Revised Code 2921.33(A) which states "no person recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."

> A lawful arrest is an element of this offense. Although the officer testified that he chased Raines and told Raines to stop because he was under arrest, this was not so. " '[A]n officer effects an arrest of a person whom he has authority to arrest by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.' "

Raines, 706 N.E.2d at 415 (quoting California v. Hodari D., 499 U.S. 621, 624 (1991)).

In a case distinguishing between "resisting" and "avoiding", a defendant convicted of resisting arrest under Arizona's statute argued his fleeing by motorcycle from pursuing officers did not constitute a violation as defined by statute. State v. Womack, 847 P.2d 609 (Ariz. Ct. App. 1993). The police attempted to pull Womack over for having no taillight, but Womack instead initiated a chase lasting several miles. Once stopped, the arrest was made without further incident. Arizona's resisting arrest statute expressed the offense:

> A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
>
> 1. Using or threatening to use physical force against the peace officer or another; or
>
> 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

Ariz. Rev. Stat. § 13-2508 (2001).

Charged under section A(2), Womack contended fleeing did not create a factual basis for the offense. The court first determined the intent of the statute was to prohibit "assaultive behavior directed toward an arresting officer, not an arrestee's efforts to put as much space between himself and the officer." Womack, 847 P.2d at 612. Additionally, they noted another Arizona statute more appropriately addressed and prohibited flight from a pursuing law enforcement vehicle. However, concerning flight in conjunction with the resisting arrest statute, the court inculcated:

[T]he defendant's flight was conduct which prevented, without the use of resistance, the effectuation of his arrest. In other words, such conduct constituted avoiding arrest, not resisting arrest. This interpretation of the statute flows from what we deem to be a common sense application of the ordinary meaning of the statutory language.

. . .

Because we label defendant's conduct as avoiding arrest rather than resisting arrest, we deem it appropriate to define those terms as we apply them herein. Webster's Ninth New Collegiate Dictionary 1003 (1988) defines "resist" as follows: "to exert force in opposition"; "to exert oneself so as to counteract or defeat," "to withstand the force or effect of." "Resistance" is defined similarly as "an opposing or retarding force." Id.

In defining "resist" as applied to the state's resisting arrest statute, the Appellate Division of the Circuit Court of Connecticut stated that "[t]he word ["resist"] is derived from the Latin, its etymological meaning being "to stand against" or "to withstand." It is the opposition of force to force…. *There must be actual opposition or resistance*, making necessary, under the circumstances, the use of force." State v. Avnayim, 24 Conn. Supp. 7, 185 A.2d 295, 298-99 (App. Ct. 1962) (emphasis added).

"Avoid" on the other hand, is defined as "to depart or withdraw from" or to "keep away from." Webster's Ninth New Collegiate College Dictionary 120 (1988). In analyzing defendant's conduct, it appears to us that "avoiding arrest" most accurately describes his actions as he fled from the officers. When an individual is the object of an attempt to effect his or her arrest, the individual may submit to the arrest, avoid the arrest, or resist the arrest. Only the latter conduct constitutes the statutory offense of resisting arrest.

Womack, 847 P.2d at 613. Applying this analysis to the present case, Brannon was not being placed under arrest. Instead, borrowing from the reasoning of the Arizona Court of Appeals, his running from the officers' command to "stop" amounts only to avoidance of the officers.

In the present case, the State argues other states have held that where officers intend to arrest an individual who then flees in anticipation, convictions of obstruction or resisting arrest without violence have been supported. For example, the State quotes from Wester v. State, 480 S.E.2d 921 (Ga. App. 1997):

> The evidence was sufficient to support Wester's conviction for misdemeanor obstruction of an officer . . . the record shows that Wester fled from officers after they identified themselves. " 'Under that evidence, the jury was authorized to infer that [Wester] knew that a police officer was attempting to perform his official duty . . . and to find that [Wester] deliberately took action to delay, hamper or impede the officer in the performance of his duty.' [Cit.]"

Id. at 923.

However, Georgia Code Section 16-10-24(a) does not require an arrest being made, but instead states in part:

> [A] person who knowingly and willfully obstructs or hinders any law enforcement officer *in the lawful discharge of his official duties* is guilty of a misdemeanor.

Ga. Code Ann. § 16-10-24(a) (emphasis added). Unlike South Carolina Code Section 16-9-320(A), Georgia's statute applies to a broader range of interactions with law enforcement officers. See, e.g., Davis v. State, 653 S.E.2d 358 (Ga. App. 2007) (defendant guilty of obstruction of an officer under § 16-10-24(a) for replacing barricade across a road after officer earlier removed barricade and told him not to reconstruct it); Wynn v. State, 511 S.E.2d 201 (Ga. App. 1999) (police officer questioning teen about open beer can in car was acting within the scope of his official duties).

Another example of a statute that operates to criminalize not only resisting arrest but flight from investigatory stops can be found in North Carolina General Statutes Section 14-223 which propounds:

> If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-223 (2005).

In State v. Lynch, 380 S.E.2d 397 (N.C. App. Ct. 1989), a defendant tried to run from and struggled with officers who were trying to determine his identity. He was charged with violation of Section 14-223, and the court clarified:

> The conduct proscribed under G.S. 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties . . . . [D]efendant's conviction may be based upon his conduct prior to the time his actual arrest.

Id. at 398.

South Carolina Code Section 16-9-320(A), plainly requires that an arrest is being made. To stretch the current statute to cover flight from an attempted investigatory stop would violate the rule that it is not the court's place to change the meaning of a clear and unambiguous statute. See City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.").

CONCLUSION

A priori, there must be an arrest before there can be a conviction of resisting arrest. The videlicet of the statutory offense of resisting arrest is the

existence of a lawful arrest. Prefatorily, a prosecution for resisting arrest fails if there is no arrest of the offender. The officers in the case at bar were in an investigatory phase when Brannon ran. No arrest was being made at the time of his flight as is required by Section 16-9-320(A). While the officers testified to their suspicions of a crime being committed, Scruggs admitted they initially wanted to question Brannon.

We understand the State's concerns should suspects be permitted to flee a scene. However, this court is indubitably constrained to apply the law as written. The statute does not extend to investigatory stops or detentions, and such inclusions cannot be implied by this court. The trial judge erred in denying Brannon's motion for a directed verdict on the resisting arrest charge.

Accordingly, the decision of the circuit court is

REVERSED.

SHORT, J., concurs.

KITTREDGE, J., dissents in a separate opinion.

KITTREDGE, J., dissenting: I respectfully dissent. Based on the record before us, I believe the trial court properly denied Ricky Brannon's directed verdict motion as to the resisting arrest charge. I vote to affirm.

During the early morning hours of April 21, 2003, Ricky Brannon went to the Westwood Apartments in Gaffney, South Carolina, for the purpose of breaking in vehicles. Maria Rainey, a resident of the apartment complex, looked outside and noticed that the interior light of her car was on. Brannon was inside Rainey's vehicle. Rainey called 911. Gaffney city police officers Michael Scruggs and Randy Quinn were dispatched to the Westwood Apartments.

The 911 dispatcher coordinated communications. Rainey informed the police dispatcher that Brannon had broken in another car, a Ford Explorer. Officers Scruggs and Quinn were alerted to the break-in of the Explorer as

they arrived. The officers parked a short distance away and quietly approached the crime in progress. As the uniformed officers rounded the corner to Building 800 of the apartment complex, they observed Brannon next to the Explorer—the door was open and the car's interior light was on. Brannon saw the uniformed officers and immediately bolted. The officers gave chase, shouting "stop, police!" Brannon continued to flee and disregarded the officers' commands to stop, but he was ultimately apprehended in front of Building 1100 of the complex, about 300 yards from where the pursuit began.

Brannon was convicted on all charges, yet the sole issue before us is whether, viewing the evidence in a light most favorable to the State, there was any evidence that Brannon's attempt to avoid police detention falls within our resisting arrest statute, section 16-9-320 of the South Carolina Code (2003). Based on the directed verdict grounds asserted in the trial court, together with the unchallenged jury charge, I would affirm the denial of the directed verdict motion.

The majority has expanded upon Brannon's directed verdict motion, as well as his final brief. I am not aware of any rule or procedure which allows this Court to expand an appellant's argument to justify a reversal of the trial court.

In moving for a directed verdict and arguing an arrest never took place, Brannon's counsel argued:

> I would move for a directed verdict on the resisting arrest count because both officers testified that they never told Mr. Brannon or said he or tried, attempted to place him under arrest until after they caught him. They just came up on him, stop police, he took off running, they ran after him. There was never any stop police, you're under arrest. In fact, one officer testified that he, they weren't going to place him under arrest until they were actually able to talk to him and determine what went on.
>
> So, I would move for a directed verdict on the resisting arrest based on the fact that he was never placed under arrest.

As counsel summarized his position, he told the trial court, "Now, if he says stop, you're under arrest, you have to stop at that point in time. You're resisting arrest if he says you're under arrest. But just stop by itself is not sufficient to give grounds for resisting arrest." This was the heart of counsel's closing argument to the jury: "Did they ever place him under arrest? Did they ever say stop, you're under arrest? No, just stop police."

The argument presented in the trial court forms no basis for the rationale of the majority in reversing. Indeed, the majority relies on an exhaustive Fourth Amendment "seizure" analysis that is nowhere to be found in the record or Appellant's final brief. The majority opinion even refutes Brannon's concession at trial that "[y]ou're resisting arrest if [the officer] says you're under arrest." Cf. State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860 (1960) (stating a formal declaration of arrest is not necessary to effectuate an arrest).

As for the jury charge, there was no definition or consideration of the statutory term "arrest." The only relevant term defined for the jury was "resist."[2] The trial court charged the jury: "Even peaceful nonviolent indirect obstruction of an arrest . . . is considered resisting arrest. If the means used are sufficient to prevent the officer from making an arrest, the defendant is guilty of resisting arrest." There was no exception to the charge. When viewing the particular facts of this case juxtaposed to the unchallenged jury instruction, there is certainly evidence that Brannon's fleeing and disobeying the officers' commands to stop amounted to resisting an arrest.

I would, therefore, adhere to general principles of issue preservation and the law of the case doctrine to affirm the denial of the motion for directed verdict.

If this Court were free to refine and recast Brannon's arguments in the trial court and on appeal, I would still lean to affirm. As I will explain below, the essence of my position is that: (1) per South Carolina Supreme Court

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[2] The jury was charged that "[r]esist means to oppose, strive against, or obstruct or obstruct by means to impede, hinder, or interfere with."

precedent, the term "arrest" in section 16-9-320 encompasses a process, not a single act; (2) under the common law, the process of an arrest does not necessarily require the application of actual force or manual touching of the body; and (3) under the particular facts and circumstances of this case, a reasonably prudent law enforcement officer had probable cause to arrest Brannon for the felony of breaking in a motor vehicle at the time of the initial encounter.

In light of the particular facts presented, I would construe the intent of the South Carolina General Assembly to include Brannon's conduct as resisting arrest under section 16-9-320(A), which states, "[i]t is unlawful for a person knowingly and wilfully . . . to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not."

The term "arrest" is not defined in section 16-9-320. I would begin an assessment of statutory construction of section 16-9-320 with South Carolina case law. In State v. Dowd, 306 S.C. 268, 269-70, 411 S.E.2d 428, 429 (1991) the supreme court held an arrest is an ongoing process and affirmed Dowd's conviction of resisting arrest by blocking the jail cell door with his arm and leg when officers attempted to place Dowd in his cell. In Dowd, our supreme court cited with approval the North Carolina case of State v. Leake, which holds that an "arrest also includes 'bringing the person personally within the custody and control of the law.'" State v. Leake, 181 S.E.2d 224, 226 (N.C. Ct. App. 1971) (quoting Hadley v. Tinnin, 86 S.E. 1017, 1019 (N.C. 1915)).

The novel question before us is identifying the initiation of the arrest process. I read our supreme court's decision in State v Williams, 237 S.C. 252, 116 S.E.2d 858 (1960) as recognizing that the concept of arrest is not a rigid and inflexible concept. The particular facts of each case are determinative.

The court in State v. Williams held that "'[t]o constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.'" 237 S.C. at 257, 116 S.E.2d at 860 (quoting Jenkins v.

United States, 161 F.2d 99, 101 (10th Cir. 1947)). The supreme court provided further guidance:

> It is not necessary "that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty."

State v. Williams, 237 S.C. at 257, 116 S.E.2d at 860-61 (quoting 4 Am. Jur. *Arrest* § 2 (Supp. 1960)).

State v. Williams analyzed the term "arrest" through a common law framework and that common law understanding of the term is entitled to weight. We are a common law state. "Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it." City of Columbia v. Bouie, 239 S.C. 570, 574, 124 S.E.2d 332, 333 (1962), rev'd on other grounds, 378 U.S. 347 (1964). In the absence of an express statutory definition, it is entirely reasonable for a South Carolina court to consider the common law meaning of the term "arrest" in discerning the legislative intent underlying section 16-9-320.

The posture of State v. Williams was an appeal from the denial of a directed verdict. The court held that, under the facts presented, it could not rule on the matter of arrest "as a matter of law." 237 S.C. at 257, 116 S.E.2d at 860. I would similarly decline to find error in this case in the trial court's refusal to direct a verdict. The above guideposts from State v. Williams—an arrest entails an actual or constructive seizure or detention of the person and does not always require application of force or manual touching, or a formal declaration of arrest—lead me to reject a rigid definition of arrest. As the

majority observes, "Brannon had neither been physically touched for the purpose of restraint nor had he submitted to a show of authority at the time of his flight." These factors highlighted by the majority do not in my judgment remove the issue from one of fact (properly resolved by the jury) to one of law.

I acknowledge that a closer question is presented as to the intentions of the police officers, for State v. Williams instructs that in the absence of manual touching, "the intentions of the parties to the transaction are very important." 237 S.C. at 257, 116 S.E.2d at 860. Much is made of Officer Scruggs' testimony that he initially wanted to merely detain Brannon. Yet I believe the evidence, when viewed in a light most favorable to the State, permits an inference that Brannon was under "arrest." See Id. ("To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.").

The officers' testimony reveals the following: based on the information received from the 911 dispatcher coupled with their observations of Brannon next to the Ford Explorer (with its door opened and inside light on), a reasonably prudent police officer would have cause to believe that Brannon was committing the felony of breaking into a motor vehicle. In fact, Officer Scruggs so stated when he was questioned about his belief upon his first sighting of Brannon:

Q: Did you believe [Brannon] was the individual that was breaking into cars?

A: Yes, sir.

Moreover, when cross-examined about the timing of the custodial arrest, Officer Scruggs stated that Brannon was *placed* under arrest "after we caught him." The testimony of Officer Quinn is similar, for he described the chase, observing that "Brannon ran this path here and the 1100 building is here and he was arrested right here." Officer Quinn was additionally asked, "what was your intention when the subject took off?" He responded, "Our intention was to approach the subject and find out exactly what he was doing

there and at that time. We believe [sic] he was breaking into a motor vehicle and we placed him under arrest for that charge." Taking the officers' testimony as a whole, and construing it in a light most favorable to the State, I would find there was sufficient evidence of intent to arrest Brannon.[3]

It is the presence of probable cause to arrest for breaking in a motor vehicle (a class F felony) at the time of the initial encounter which lies at the core of my view that the process of arrest was underway when the officers caught Brannon in the act. Concerning probable cause, we are guided by Fourth Amendment jurisprudence. In this regard, an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996). The proper inquiry is an objective one, based on what would a reasonable police officer believe under the same circumstances. Id. at 810-13. In this case, a reasonably prudent officer would have probable cause to arrest Brannon at the initial encounter. Brannon's location and conduct exactly matched the witness's description, as Brannon was standing next to the Ford Explorer with an open door in the otherwise deserted parking lot late at night.

The question of intent from Brannon's perspective is clear. Brannon was breaking into vehicles in an apartment complex in the middle of the night. When he was surprised by the two uniformed police officers, he ran and tried to avoid arrest. Any reasonably prudent person in Brannon's position would not have the slightest doubt that the pursuing officers intended to place him in custody. See 5 Am. Jur. 2d *Arrest* § 4 (2007) ("Police detention constitutes an 'arrest' if a reasonable person in the suspect's position would understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest."). Without a doubt, Brannon was "conscious of [the] restraint of his liberty." State v. Williams, 237 S.C. at 257, 116 S.E.2d at 861.

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[3] This assessment is admittedly problematic, for the jury was never charged on the law of "arrest" under section 16-9-320. This difficulty highlights the soundness of issue preservation rules which are designed to ensure that the issues considered on appeal are the same ones raised in the trial court.

An arrest is defined as depriving a "person of his liberty by legal authority." Black's Law Dictionary 109 (6th ed. 1990). The definition continues to explain, "[a]ll that is required for an 'arrest' is some act by officer indicating his intention to detain or take person into custody and thereby subject that person to the actual control and will of the officer." Id. at 110. This comprehensive definition lines up with other authorities addressing the breadth and scope of the concept of arrest. See 6A CJS *Arrest* § 1 (2004) ("An arrest is the taking, seizing, or detaining the person of another by any act which indicates an intention to take him or her into custody and subject the person arrested to the actual control and will of the person making the arrest.").

I will respond briefly to other South Carolina cases cited by the majority. As an initial observation, neither the facts nor law of these cases warrants reversal of Brannon's conviction and sentence. The focus of Bouie was whether the defendant *resisted* arrest by a "momentary delay in responding to the officer's command." 239 S.C. at 574, 124 S.E.2d at 333. Bouie says nothing about the meaning of the term "arrest." Id. In Fernandez v. State, 306 S.C. 264, 265, 411, S.E.2d 426, 427 (1991), Fernandez was simply standing among a group of people. There was no reason to believe that Fernandez was engaged in any criminal activity. Id. Yet Fernandez ran as police officers approached, prompting the officers to pursue. Id. During the pursuit Fernandez discarded drugs. Id. The legal issue in Fernandez was determining at what point the defendant had been "seized" under the Fourth Amendment for purposes of ruling on his motion to suppress. Id. The meaning of the term "arrest" in section 16-9-320 played no role in Fernandez. Id.

I view the matter of legislative intent of the statutory term "arrest" under section 16-9-320 as a different proposition from the purely constitutional question of what constitutes a "seizure" under the Fourth Amendment. The concepts may often overlap, but I do not believe that an arrest under section 16-9-320 must be construed in exact parity with a Fourth Amendment seizure.

A Fourth Amendment seizure is always an *act*, never a process. See California v. Hodari, 499 U.S. 621, 629 (1991) (holding the subject was only

seized when he was tackled by an officer); Brower v. County of Inyo, 489 U.S. 593, 596-99 (1989) (stating a roadblock was a seizure as a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*") (emphasis in original)); Thompson v. Whitman, 85 U.S. 457, 471 (1873) (stating that, in a vessel seizure case, "[a] seizure is a single act, and not a continuous fact"); Black's Law Dictionary 1363 (7th ed. 1999) (defining seizure as "[t]he act of an instance of taking possession of a person or property by legal right or process"). Conversely, as State v. Dowd instructs, the term "arrest" in section 16-9-320 contemplates a process. 306 S.C. at 270, 411 S.E.2d at 429.

Moreover, even a limited Terry v. Ohio[4] detention based on articulable suspicion constitutes a seizure under the Fourth Amendment. See Brendlin v. California, 551 U.S. ____, 127 S. Ct. 2400, 2405 (2007) (holding that "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, ' "by means of physical force or show of authority," ' terminates or restrains his freedom of movement") (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991) (quoting Terry v. Ohio, 392 U.S. 1, 19, n.16 (1968))). Yet we all acknowledge that an individual fleeing from an attempted Terry v. Ohio detention would not constitute resisting arrest under section 16-9-320, for the element of arrest would be lacking. That scenario presents a Fourth Amendment seizure but not an arrest under section 16-9-320. I therefore conclude that it is inappropriate to equate a Fourth Amendment seizure with the term "arrest" in section 16-9-320.

The majority has done a laudable effort in citing to statutes and case law from other jurisdictions. I see no reason to rely so heavily on the law of other jurisdictions. I believe our jurisprudence is sufficient to resolve this appeal. And if my reliance on South Carolina law, with its common law antecedents, for discerning the meaning of the statutory term "arrest" is misplaced, I believe our supreme court should resolve the matter and its concomitant policy implications.

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[4] Terry v. Ohio, 392 U.S. 1 (1968).

I add one final observation that I believe supports my assessment of legislative intent of the term "arrest" in section 16-9-320. The Legislature created two separate offenses for resisting arrest. Brannon was convicted of violating subsection (A) of section 16-9-320, which makes it a one-year misdemeanor to merely resist arrest. The Legislature further enacted subsection (B) of section 16-9-320, which makes it a ten-year felony to assault an officer while resisting an arrest. Subsection (B) states:

> It is unlawful for a person to knowingly and wilfully . . . assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

Subsection (B) provides an enhanced penalty when a defendant assaults, beats, or wounds the arresting officer. It is in subsection (B) where we find the physicality component which is a feature of the majority opinion. Construing resisting arrest under the subsection (A) misdemeanor offense in line with the broad common law understanding of the term is a reasonable construction, and one that comports with the marked distinction given the separate offenses by the Legislature.

The majority's bright line approach of an actual, hands-on seizure would most assuredly facilitate application of section 16-9-320. Yet I believe such a formulaic approach would result in artificial distinctions not intended by the Legislature. Say, for example, a police officer has probable cause to arrest an individual and the suspect is aware of the officer's intent to arrest him. In one scenario, the officer approaches the suspect but the suspect flees as the officer's attempt to grab the suspect comes up inches short. In a second scenario, the same facts are present except the officer has a momentary grasp of the suspect before the suspect flees. Did the Legislature intend for the resisting arrest statute to apply in the second scenario but not the first? I think not. Moreover, a consideration of the facts of each case, as I propose, gives meaning to the holding in State v. Williams that an arrest

may occur without the application of actual force or manual touching of the body. 237 S.C. at 257, 116 S.E.2d at 860.

In sum, I vote to affirm and adhere to my view that the reasoning of the majority opinion includes arguments never advanced by Brannon at trial or in his brief. I would affirm on issue preservation principles and the law of the case doctrine. I do address the substance of the majority opinion, albeit with reservation because of the policy implications involved. In voting to affirm the denial of the directed verdict motion, I would apply our resisting arrest statute to a fleeing suspect only in very narrow circumstances. As emphasized above, under the particular facts of this case, when objectively viewed, it is the presence of probable cause to believe that Brannon was committing a felony that gives rise to the application of the misdemeanor offense of resisting arrest under subsection (A) of 16-9-320. I would hold that a person violates section 16-9-320(A) irrespective of the lack of physical contact: (1) when a law enforcement officer, from an objective standpoint, has probable cause to believe a person has committed a crime; and (2) the law enforcement officer through words or actions makes known his intent to arrest or otherwise detain the person; and (3) the person, from an objective standpoint, recognizes the presence of a law enforcement officer and understands the intent of the officer to arrest him; and (4) the person attempts to avoid the arrest by impeding, hindering, or obstructing the law enforcement officer, by means of fleeing from the officer or other method of resisting or opposing the arrest. This initial offense would terminate upon the full custodial arrest of the suspect or the suspension of the pursuit by the law enforcement officer.

Viewing the evidence and the reasonable inferences in a light most favorable to the State, I would find a jury question was presented as to the charge of resisting arrest under section 16-9-320(A). I would affirm the denial of the directed verdict motion.