The Supreme Court of South Carolina

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N O T I C E

In the Matter of Cynthia E. Collie

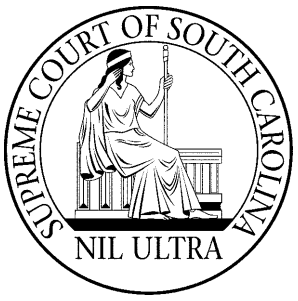
Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing via video conference in this regard on September 4, 2020, beginning at 11:00 am.

Any individual may appear before the Committee in support of, or in opposition to, the petition. If you wish to appear, you must submit your contact information (name, phone number and email address) to the address below in order to be included in the video conference.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
August 12, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 12, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

Ex Parte:

Builders Mutual Insurance Company and Nationwide Mutual Insurance Company, Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; WC Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60, Defendants,

Tri-County Roofing, Inc., Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter;

Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61, Third-Party Defendants.

And

Complete Building Corporation, Inc., Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete, Third-Party Defendants,

Of Whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc. are the Respondents.

Appellate Case No. 2019-000238

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 12, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Builders Mutual Insurance Company and Nationwide Mutual Insurance Company, Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; WC Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60, Defendants,

Tri-County Roofing, Inc., Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter;

Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61, Third-Party Defendants.

And

Complete Building Corporation, Inc., Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete, Third-Party Defendants,

Of Whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc. are the Respondents.

Appellate Case No. 2019-000238

Appeal from Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 27970
Heard February 11, 2020 – Filed May 13, 2020
Re-Filed August 12, 2020

AFFIRMED

John L. McCants, of Rogers Lewis Jackson Mann &

Quinn, LLC, of Columbia, for Appellant Builders Mutual Insurance Company; and J.R. Murphy and Timothy J. Newton, both of Murphy & Grantland, P.A., of Columbia, for Appellant Nationwide Mutual Insurance Company.

Justin O. Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love; Steven L. Smith, Zachary J. Closser, and Samuel M. Wheeler, all of Smith Closser Wheeler P.A., of Charleston, for Respondent Tri-County Roofing, Inc.; and James A. Atkins, of Clawson & Staubes, LLC of Charleston for Respondent WC Services, Inc.

Mark S. Barrow and Christy E. Mahon, both of Sweeny, Wingate & Barrow, P.A., of Columbia, and Steven M. Klepper, of Kramon & Graham, P.A., of Baltimore, Maryland, all for Amici Curiae Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company.

Frank L. Eppes, of Eppes & Plumblee, P.A., of Greenville, and Jesse A. Kirchner, Michael A. Timbes, and Thomas J. Rode, all of Thurmond Kirchner & Timbes, P.A., of Charleston, all for Amicus Curiae South Carolina Association for Justice.

JUSTICE KITTREDGE: In this case, several insurance companies (the Insurers) appeal the denial of their motions to intervene in a construction defect action between a property owners' association (the Association) and a number of construction contractors and subcontractors (the Insureds). The underlying construction defect action proceeded to trial, resulting in a verdict for the Association.

We find the Insurers were not entitled to intervene as a matter of right, and, further, the trial court did not abuse its discretion in denying them permissive intervention.

Nonetheless, as we will discuss further, the Insurers most assuredly have a right to a determination of which portions of the Association's damages are covered under the commercial general liability (CGL) policies between the Insurers and the Insureds. As such, we reaffirm our prior holdings allowing insurance companies to contest coverage in a subsequent declaratory judgment action.

I.

Palmetto Pointe at Peas Island (Palmetto Pointe) is a condominium development located in Charleston County near Folly Beach. Following Palmetto Pointe's construction, the Association became aware of damage to the buildings, which they attributed to the Insureds. As a result, the Association filed a construction defect action against the Insureds for negligence, breach of implied warranties, and unfair trade practices and sought $17.5 million in actual and consequential damages to repair or replace various components of the condominiums. The Insureds each had one or more applicable CGL policies with the Insurers, and, pursuant to the CGL policies, the Insurers provided independent counsel to the Insureds to defend them in the action, subject to a reservation of rights to later contest whether the damages awarded in the action were covered by the CGL policies. The Insurers were not made parties to the construction defect action and did not direct the Insureds' defense.

Approximately three years later, at the tail end of the discovery period, the Insurers individually motioned to intervene in the action "for the limited purpose of participating in the preparation of a special verdict form or a general verdict form accompanied by answers to interrogatories for [] submission to the jury during trial." The Insurers disavowed any desire to be formally named as a party to the action, citing the likely prejudice to themselves and their clients (the Insureds).[1] However, by motioning to intervene, the Insurers essentially sought to force the Association and the jury to itemize the damages against each Insured, which was not otherwise required. In doing so, the Insurers hoped to ensure the jury would

[1] *See, e.g.*, Rule 411, SCRE (prohibiting the admission of evidence tending to show a person was insured against liability); *Crocker v. Weathers*, 240 S.C. 412, 424, 126 S.E.2d 335, 340–41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it.").

determine which portions of the damages were covered by the applicable CGL policies, thus obviating the need for the subsequent declaratory judgment action.

The trial court denied the motions to intervene, and the Insurers appealed to the court of appeals. We subsequently certified the Insurers' appeals pursuant to Rule 204(b), SCACR.

II.

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emps. Ins. Co.* (*Ex parte GEICO*), 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law. *Id.* (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)). Moreover, the error of law must be so opposed to the trial court's sound discretion "as to amount to a deprivation of the legal rights of the party." *Id.* (citation omitted).

III.

The Insurers sought to intervene as a matter of right under Rule 24(a)(2), SCRCP. This Court has explained an entity seeking intervention as a matter of right under Rule 24(a)(2) must necessarily:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). With respect to the second element, we have compared having an interest in the action with constitutional standing, in that the intervenor must be a "real party in interest." *See Ex parte GEICO*, 373 S.C. at 138–39, 644 S.E.2d at 702–03 (describing a real party in interest as one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)));

see also Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984) (explaining the interest required for intervention as a matter of right must be "direct," "immediate," and "significantly protectable," rather than "remote or contingent" (citations omitted)). As our precedent makes clear, the Insurers are not "real parties in interest" to the construction defect action and, thus, cannot satisfy the four-part test espoused in *Berkeley Electric*. *See Ex parte GEICO*, 373 S.C. 136, 138–39, 644 S.E.2d at 701, 702–03.[2]

Because the Insurers have not shown they have a direct interest in the construction defect litigation for Rule 24(a)(2) purposes, we hold the Insurers have not met the requirements to intervene as a matter of right. *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714 (listing an interest in the action as one of four elements required for intervention as a matter of right). As a result, we affirm the trial court's denial of the Insurers' motions to intervene as a matter of right. *See Restor-A-Dent*, 725 F.2d at 876 ("We are frank to admit that we are also influenced here by practical considerations that seem significant. A refusal to find a right under Rule 24(a) still leaves open the possibility in an appropriate case of permissive intervention by an insurer under Rule 24(b) for the purpose sought here, while a contrary holding would open the door wider to such intervention regardless of any unfortunate effect on the course of the main action. Moreover, a variety of factors properly bear on whether the type of intervention sought here should be allowed, and the trial judge's determination should ordinarily be accorded great weight. Application of subsection (b) of Rule 24 rather than subsection (a) recognizes these considerations, in view of the explicit emphasis in the former on undue delay or prejudice in the main action . . . .").

IV.

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[2] A significant number of courts discussing intervention as a matter of right under similar factual scenarios found the insurance companies' interests were contingent, rather than direct, for similar reasons. *See, e.g.*, *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 766 (2d Cir. 1984); *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1194 (D.N.M. 1999); *Davila v. Arlasky*, 141 F.R.D. 68, 70–73 (N.D. Ill. 1991); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984); *Universal Underwriters Ins. Co. v. E. Cent. Ala. Ford-Mercury, Inc.*, 574 So. 2d 716, 723 (Ala. 1990) (citing *U.S. Fid. & Guar. Co. v. Adams*, 485 So. 2d 720, 721–22 (Ala. 1986)); *Donna C. v. Kalamaras*, 485 A.2d 222, 223 (Me. 1984).

Turning to permissive intervention, Rule 24(b), SCRCP, provides:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

An intervenor seeking permissive intervention must: (1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove his participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties. "A reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452 (5th Cir. 1984)).

The record is replete with facts rationally supporting the trial court's denial of the Insurers' motions for permissive intervention. We therefore conclude the Insurers have failed to prove the trial court abused its discretion. *See Ex parte GEICO*, 373 S.C. at 135, 644 S.E.2d at 701. In affirming the trial court, we need look no further than the third factor—the delay or prejudice to the original parties. There are facts in the record supporting the trial court's decision that the Insurers' intervention would (1) unnecessarily complicate the construction defect action, including altering the Association's burden of proof and possibly delaying the trial, and (2) create a conflict of interest for the Insureds' counsel, who were supplied to them by the Insurers.

A.

As to the complication of the construction defect action, we note that, absent the Insurers' intervention, the Association has no need to parse its damages into categories corresponding to the coverage provided in a CGL policy.[3] Rather, as

[3] Generally, a CGL policy does not cover the cost of repairing or removing faulty workmanship; however, the policy does cover the cost of repairing additional, consequential damage caused by the faulty workmanship, such as water intrusion caused by negligent construction. *See* S.C. Code Ann. § 38-61-70(B)(2) (2015); *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49–50,

one of the Insurers conceded, the Association could properly request and receive a general verdict against all of the Insureds. However, with the addition of special jury interrogatories and verdict forms, the Association—as the plaintiff, *with the burden of proof*—would have a heightened burden to itemize its damages into Insurer-defined categories which the Association may not have intended to present to the jury. The Association's counsel here specifically bemoaned this exact problem. According to counsel, at the time the Insurers motioned to intervene (three years into the action and at the end of discovery), the parties had conducted "in excess of 40 depositions wherein the question[s that would be] relevant to the special verdict [or] special interrogatory . . . weren't asked."

Further, in a subsequent declaratory judgment action, the Insureds and the Insurers have the collective burden to show which portions of the general verdict are covered under the CGL policies. *See Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (explaining the initial burden to prove that a loss is covered under an insurance policy is on the insured, and once the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage); *see also Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 642 n.5, 594 S.E.2d 455, 460 n.5 (2004) (stating that, when relevant, the insured bears the burden to prove an exception to the exclusion applies in order to restore coverage). Allowing the Insurers to intervene in the construction defect action in an attempt to segregate covered and non-covered damages would effectively place that burden of proof on the Association. Through the trial court's decision to leave all coverage issues to a subsequent declaratory judgment action, the burden of proof concerning the coverage dispute will remain with the Insureds and the Insurers respectively, where it properly belongs.

Likewise, even if the Insurers were permitted to intervene, it would only grant them the ability to *request* special jury interrogatories and verdict forms under Rule 49(a) and (b), SCRCP. However, it does not require the trial court *use* the requested documents at all, much less without modification. *See Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 n.16 (S.D. Ala. 2003); *Plough, Inc. v. Int'l Flavors & Fragrances, Inc.*, 96 F.R.D. 136, 137 (W.D. Tenn. 1982). Were the

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717 S.E.2d 589, 593–94 (2011) ("In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components [is covered under a CGL policy], but the defective construction would not [be covered].").

Insurers to object to the trial court's failure to submit the proposed interrogatories or to the way the interrogatories were framed by the court, they could appeal and grind the entire construction defect trial to a halt. *See Restor-A-Dent*, 725 F.2d at 877 (noting this complication, and stating, "While it is highly unlikely that such an appeal would be successful in view of a [trial] court's broad discretion in this context, nevertheless the possibility of this complication of the main action remains." (citation omitted)).

B.

Additionally, a number of attorneys in this case raised concerns over the conflict of interest inherent in allowing the Insurers to intervene.[4] One of the most common worries expressed by the attorneys was that if the trial court permitted a verdict form with special interrogatories, it would place the Insureds' counsel in the untenable position of essentially conceding liability so as to focus instead on damages. In particular, several counsel explained a special verdict form would force them to alter their presentation of evidence to shunt as much of the Association's damages as possible into covered, consequential damages (e.g., water intrusion *resulting from faulty workmanship*), thereby conceding the Insureds had, in fact, created faulty workmanship in the first place. The concerns over the possibility—and likelihood—of a conflict of interest in these types of situations are echoed by a number of courts across the country. *See, e.g.*, *Nat'l Fire Ins. Co. of Pitt., P.A. v. Bakker*, 917 F.2d 22 (4th Cir. 1990) (per curiam); *Restor-A-Dent*, 725 F.2d at 877; *Nieto*, 61 F. Supp. 2d at 1195 (noting the insured would not only have the burden of presenting a defense to the plaintiff's accusations, but were his insurance company allowed to intervene, he would also have the additional burden of having his insurance company interfere with his defense); *High Plains Coop. Ass'n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290–91 (D. Neb. 1991); *Wedco*, 102 F.R.D. at 43; *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 882–83 (Ind. Ct. App. 2006) (noting the insurance company's argument that its insured would not want to seek an allocated verdict because it "would automatically expose [the insured] to liability on" the non-covered damages portion of the allocated verdict); *Donna C.*, 485 A.2d at 225; *Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 363, 803 S.E.2d 288, 311 (2017) (Pleicones, A.J., dissenting) (opining it would be impossible for an insurance company to intervene in a construction

[4] In fact, all counsel provided by the Insurers to the Insureds refused to take positions on the motions to intervene for fear of a conflict of interest.

defect suit and assert a defense against coverage without creating an impermissible conflict of interest (citation omitted)); Christopher Lyle McIlwain, *Clear as Mud: An Insurer's Rights and Duties Where Coverage Under a Liability Policy is Questionable*, 27 Cumb. L. Rev. 31, 52–53 (1997) (explaining courts frequently deny permissive intervention because "requiring the jury to focus on certain issues may prejudice the prosecution or defense of the plaintiff's claim, and may force the insured to take steps to assure coverage of claims rather than defend all claims").

We conclude there are facts in the record that support the trial court's decision that permissive intervention here would present conflict of interest concerns and likely cause undue delay and prejudice to the Association and the Insureds. Accordingly, we hold the trial court did not abuse its discretion in denying the Insurers' motions for permissive intervention. *See, e.g.*, *Restor-A-Dent*, 725 F.2d at 877 ("Under all of these circumstances, we cannot say that the district judge abused his discretion here [in denying the insurance company's motion for intervention].").[5]

V.

According to the Insurers, their motions to intervene were mandated by our decisions in *Auto Owners Insurance Co. v. Newman*[6] and *Harleysville Group Insurance v. Heritage Communities, Inc.*[7] We respectfully disagree, although the Insurers' position is understandable, especially with respect to *Newman*.

In *Newman*, a homeowner sued a construction contractor for the alleged defective construction of her home, and, following an arbitration proceeding, an arbitrator

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[5] Following the denial of the Insurers' motions to intervene, the trial court permitted the construction defect trial to go forward, despite the Insurers' pending appeals of those motions. The Insurers thus also raise a question to this Court as to whether the trial court erred in allowing the trial to proceed while the appeals were still pending. Because we have found the trial court did not abuse its discretion in denying the motions to intervene, the Insurers were not improperly excluded from participating in the construction defect trial. As a result, this issue is moot, and we do not address it.

[6] 385 S.C. 187, 684 S.E.2d 541 (2009).

[7] 420 S.C. 321, 803 S.E.2d 288 (2017).

issued an award in favor of the homeowner. 385 S.C. at 190, 684 S.E.2d at 542. In a subsequent declaratory judgment action between the contractor and its insurance company, the trial court found the CGL policy covered the damages awarded by the arbitrator. *Id.* at 190–92, 198, 684 S.E.2d at 543, 547. This Court affirmed in part and reversed in part, finding the CGL policy covered parts of the damages awarded by the arbitrator but did not cover other parts of the damages. *Id.* at 196, 198, 684 S.E.2d at 545–46, 546–47. However, the Court refused to review or parse the arbitrator's award, finding that arbitration awards are generally conclusive and will not be reviewed on the merits on appeal. *Id.* at 198, 684 S.E.2d at 547 (citing *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76–77, 488 S.E.2d 335, 337–38 (1997) (stating an appellate court must affirm an arbitration award so long as it is "barely colorable")).

It was not the intent in *Newman* to categorically foreclose a subsequent declaratory judgment action to resolve a coverage dispute. To the extent *Newman* may be read to foreclose an insurance company's subsequent declaratory judgment action to resolve the coverage dispute, we modify *Newman* accordingly. South Carolina has long recognized the efficacy of declaratory judgment actions in this context. *See, e.g.*, *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965).

Turning briefly to *Harleysville*, a condominium property owners' association sued a construction contractor for the alleged defective construction of the condominium complex, and a jury awarded a general verdict to the property owners' association. 420 S.C. at 329–31, 803 S.E.2d at 292–94. In the declaratory judgment action between the insurance company and the contractor, the Special Referee ordered the insurance company to pay the entirety of the general verdict, despite the fact that the verdict included some losses that explicitly were not covered under the CGL policy, because he found that "it would be improper and purely speculative to attempt to allocate the [] general verdict[] between covered and non-covered damages." *Id.* at 332, 803 S.E.2d at 294. Notably, in the alternative, the Special Referee found the insurance company's reservation of rights letter to the insured was inadequate and constituted an implied waiver of the insurer's right to contest coverage in the declaratory judgment action. *See id.* at 336, 338, 803 S.E.2d at 296, 297. It was this latter basis—the inadequate reservation of rights letter—that served as the basis of this Court's affirmance of the Special Referee. *See id.* at 336–44, 803 S.E.2d at 296–301 (describing the reservation letter as a "generic denial[] of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method)"). The Court concluded the reservation of rights letter was so lacking that

it was "insufficient to [actually] reserve [the insurance company's] right to contest coverage of actual damages," and, therefore, affirmed the Special Referee's decision. *Id.* at 343, 803 S.E.2d at 300. *Harleysville* neither mandates intervention in the underlying construction defect action nor forecloses a declaratory judgment action to resolve a coverage dispute.

VI.

The parties offer varying approaches on the specifics of how a subsequent declaratory judgment action should be tried. It appears a significant point of contention is the Insurers' concern that any coverage decisions in the declaratory judgment actions will be bound by factual determinations made in the construction defect action. This point has been addressed by this Court in *Sims v. Nationwide Mutual Insurance Co.*

In *Sims*, the Court explained that, generally, "where an insurance company has notice and [an] opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not." 247 S.C. at 84–85, 145 S.E.2d at 524. However, the Court reasoned that rule could not apply in situations where the insurance company had a conflict of interest with its insured, such as when the company claimed the acts being sued over were partially or wholly outside the scope of the applicable insurance policy. *Id.* at 85–89, 145 S.E.2d at 524–26 (explaining the underlying purpose of the general rule is to obviate the delay and expense of two trials upon the same issue between parties whose interests are identical; and when a conflict of interest causes the parties' interests to diverge, "the judgment against the [insured] does not decide issues as to the existence and extent of the duty to indemnify," such that "in a subsequent action the [insurance company] may show that the circumstances under which [it] was required to give indemnity do not exist" (quoting *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793, 799–801 (4th Cir. 1949) (citing the predecessor to the modern Restatement (Second) of Judgments § 58 (2020)))).

As further explained in section 58 of the Restatement (Second) of Judgments:

> [T]he indemnitor has a right to its day in court on whether the indemnitee's liability is within the scope of the indemnity obligation. . . .
>
> . . . [A]n indemnitor who has an independent duty to defend the

> indemnitee in effect has two legal capacities with regard to the indemnitee. In his capacity as insurer against the indemnitee's risk of being sued on claims that "might be found to be" within the indemnity obligation, the indemnitor has a responsibility to provide counsel and supporting assistance to defend the indemnitee without regard to the indemnitor's interests . . . . In his capacity as indemnitor, he has a responsibility to indemnify for such liability as may be within the indemnity obligation. *In the latter capacity, he should not be bound by determinations in an action in which he participated in the former capacity if there is a conflict of interest between the two*.

See Restatement (Second) of Judgments § 58 & cmt. a (emphasis added).

Sims is directly applicable to the parties' dispute here. As explained above, there is a conflict of interest between the Insurers and the Insureds as to the proper method of calculating damages vis-à-vis what portions of the Association's total damages are covered under the CGL policies. Thus, the Insureds and the Insurers are not precluded from introducing evidence as to which damages are covered (or excluded from coverage) by the CGL policies. *See, e.g.*, *Universal Underwriters Ins. Co.*, 574 So. 2d at 723 ("Nevertheless, nothing in our law would bar [the insurance company] from litigating the coverage issue in a declaratory judgment action after the resolution of the underlying cases in this matter."); *Donna C.*, 485 A.2d at 224. Having said that, the parties would be bound by the total amount of any jury verdict in the construction defect action. *See* Restatement (Second) of Judgments § 58(1) (explaining the parties in the declaratory judgment action may not dispute the "existence and extent" of the judgment in the first action).

The Insurers and amici voiced their concerns that, in a declaratory judgment action, courts may reject any efforts to allocate a general verdict into covered and non-covered damages because that allocation requires some degree of speculation as to what the jury may have intended when issuing its verdict. *Cf., e.g.*, *Harleysville*, 420 S.C. at 332, 803 S.E.2d at 294 (explaining the Special Referee found "it would be improper and purely speculative to attempt to allocate the [] general verdict[] between covered and non-covered damages"). We, too, are concerned about the possibility an insurance company may be unjustly forced to cover damages that are otherwise properly excluded under a CGL policy.[8]

[8] In fact, the insurance company in *Harleysville* attempted to use a percentage-based approach described more fully below, but the Special Referee rejected the

Given that the parties in the declaratory judgment action are bound by the total verdict in the construction defect action, how then do we attempt to fairly allocate covered damages and non-covered damages? This seems to be the biggest challenge to resolve. We begin by noting that we do not oppose the parties coming to an agreement on a framework for allocating damages, subject to the approval of the court. Failing an agreement of the parties, we set forth a default approach that shall serve as the framework for use in declaratory judgment actions for allocating covered and non-covered damages. This default framework is utilized in other jurisdictions, and it allows litigants in a declaratory judgment action to use percentages, rather than exact dollar amounts, to determine the amount of covered and non-covered damages in a general verdict.

In the declaratory judgment action, the record of the merits trial shall be the primary source of evidence concerning matters litigated in that trial, such as the extent of the damages. Additional evidence that is relevant to the coverage dispute determination may be presented in the declaratory judgment action, including expert testimony,[9] but the additional evidence should be narrowly tailored to matters that were not actually litigated in the first trial.[10] The trier of fact shall then

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evidence as "irrelevant and speculative." Because the *Harleysville* majority issued its decision on the basis of the insurance company's inadequate reservation of rights letter, the Court did not address this finding by the Special Referee. To avoid any future confusion, we reject the notion that, in a declaratory judgment action, it is "improper and purely speculative" to allocate a general verdict into covered and non-covered damages. *See Harleysville*, 420 S.C. at 332, 803 S.E.2d at 294.

[9] For example, in *Harleysville*, the insurance company proffered expert testimony from a general contractor who had prepared an estimate to completely repair the damaged condominium buildings. The expert segregated the portion of his estimate which constituted the cost to repair damages from water intrusion (covered damages) and determined what percentage of his total estimated damages that portion constituted. Finally, he took the percentage of the covered damages and multiplied it by the jury's verdict, arriving at an amount representing the approximate portion of the general verdict constituting the covered damages.

[10] For example, if the underlying merits trial results in a general verdict, the parties in the declaratory judgment action should be permitted to introduce evidence related to determining which portion of the damages are covered by the policy (or

make a determination allocating on a percentage basis what portion of the underlying verdict constitutes covered damages and what portion constitutes non-covered damages. *See, e.g.*, *Duke v. Hoch*, 468 F.2d 973, 984 (5th Cir. 1972) (explaining that on remand to allocate a general verdict, the "primary source of evidence will be, of course, the transcript of the merits trial, containing the evidence on which the jury based its verdict. The trial judge, as trier of fact, will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so. If it is impossible for the court to make a meaningful allocation based on only the transcript, [the judgment creditor, standing in the shoes of the insured,] should have the right to adduce additional evidence and [the insurance company] to present evidence in rebuttal."); *MedMarc Cas. Ins. Co.*, 199 S.W.3d at 60, 63 (describing in a declaratory judgment action the insureds' motion to allocate the general verdict in the underlying suit, and remanding the trial court's initial decision to allocate 25% of the jury verdict as covered damages because, while permissible to allocate by percentage, the trial court did not specify how it arrived at the 25% number); *Keltner*, 842 N.E.2d at 883 (noting the parties seemed to assume that if a general verdict was entered in the underlying action, there would be no later opportunity to distinguish between covered and non-covered damages, but holding that a supplemental proceeding in a declaratory judgment action "would offer an occasion for presenting evidence and argument regarding *a fair approximation* of the division of damages" (emphasis added)).

As we have acknowledged in this type of case in the past, perfect precision in allocating damages is not always achievable. Where perfect precision is not achievable, a fair approximation must suffice. *See Crossman*, 395 S.C. at 65–66, 717 S.E.2d at 602 (acknowledging that, after adopting a time-on-the-risk approach to progressive damage allocation, the time-on-the-risk "formula *is not a perfect estimate of the loss attributable to each insurer's time on the risk.* Rather, it is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default." (italic emphasis added) (emphasis in original omitted)). Our exhaustive research persuades us that the percentage-based approach will best achieve a fair

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policies).

allocation of damages.

VII.

For the foregoing reasons, we conclude the trial court did not abuse its discretion in denying the Insurers' motions to intervene and, therefore, affirm. In doing so, we also recognize that the Insurers have the right and ability to contest coverage of the jury verdict in a subsequent declaratory judgment action. In that action, the Insurers and the Insureds will be bound by the existence and extent of any jury verdict in favor of the Association in the construction defect action. However, they will not be bound as to any factual matters for which a conflict of interest existed, such as determining what portion of the total damages are covered by any applicable CGL policies.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jacob Leon Parrott, Respondent.

Appellate Case No. 2020-000892

Opinion No. 27989
Submitted June 19, 2020 – Filed August 12, 2020

DISBARRED

John S. Nichols, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Jacob Leon Parrott, of Myrtle Beach, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and disbar Respondent from the practice of law in this state, retroactive to June 5, 2018, the date of his arrest. The facts, as set forth in the Agreement, are as follows.

Facts

On June 5, 2018, Respondent was arrested and charged with indecent exposure, in violation of S.C. Code Ann. § 16-15-130, after he was observed exposing his genitals and masturbating. Respondent self-reported the arrest to ODC on June 19, 2018. On December 9, 2019, Respondent entered a plea pursuant to *North*

Carolina v. Alford, 400 U.S. 25 (1970), and was sentenced to three years' imprisonment, suspended to twelve months' probation and payment of $168.75 in court costs.

Respondent's previous disciplinary history includes two matters involving similar behavior. In 1997, Respondent received a four-month suspension citing the equivalent of Rules 8.4(b) (committing a criminal act that reflects adversely on an attorney's honesty, trustworthiness, or fitness as a lawyer in other respects) and 8.4(c) (committing a criminal act involving moral turpitude), RPC, Rule 407, SCACR. *In re Parrott*, 325 S.C. 162, 480 S.E.2d 722 (1997). This four-month suspension followed Respondent's entry of an *Alford* plea to a charge of simple assault and battery he received after pulling down a woman's bathing suit while she was sunbathing at Surfside Beach in May 1994. *Id.* at 163, 480 S.E.2d at 723 (noting Respondent tried to pull off another woman's bikini bottom while she was sunbathing at North Myrtle Beach in October 1989, but was not prosecuted for this offense; and Respondent had no prior connection with either woman, covered his face during both incidents, and retreated when the women "put up a struggle").

In 2017, the Court suspended Respondent, then fifty-six years old, for nine months after he was arrested and charged with voyeurism for using a cell phone to take photos up a woman's skirt in a grocery store and failed to inform ODC of his arrest within the required fifteen-day period. *In re Parrott*, 421 S.C. 105, 107, 804 S.E.2d 852, 853 (2017). In its 2017 order, the Court found Respondent's conduct violated Rules 8.3(a) (requiring an attorney to provide notice to ODC in writing within fifteen days of being arrested or charged by way of indictment, information, or complaint with a serious crime), and 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), RPC, Rule 407, SCACR. *In re Parrott*, 421 S.C. at 109, 804 S.E.2d at 854.

Law

Respondent admits his conduct violated Rule 8.4(b), RPC, Rule 407, SCACR (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). Respondent further admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 407, SCAR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants disbarment. Accordingly, we accept the Agreement and disbar Respondent from the practice of law in this state, retroactive to June 5, 2018. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct within thirty (30) days of the date of this opinion. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of Theo Walker Mitchell, Respondent.

Appellate Case No. 2020-000858

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. We grant the motion. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply, and will not be considered, for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen (15) days from the date of this order, Respondent shall file an affidavit with the Clerk of Court showing Respondent has complied with Rule 30, RLDE, Rule 413, SCACR, and also shall surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 10, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephany A. Connelly and James M. Connelly, Plaintiffs,

v.

The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn, and Freya Trezona, Defendants,

Of which Allstate Fire and Casualty Insurance Company, The Main Street America Group, and Old Dominion Insurance Company are the Appellants,

And

Stephany A. Connelly and James M. Connelly are the Respondents.

Appellate Case No. 2017-002234

Appeal From Richland County
Jocelyn Newman, Circuit Court Judge

Opinion No. 5755
Submitted June 1, 2020 – Filed August 12, 2020

AFFIRMED

Thomas Frank Dougall and Michal Kalwajtys, both of Dougall & Collins, of Elgin, for Appellants The Main

Street America Group and Old Dominion Insurance Company.

Alfred Johnston Cox and Ashley Berry Stratton, both of Gallivan, White & Boyd, PA of Columbia, for Appellant Allstate Fire and Casualty Insurance Company.

Theile Branham McVey and John D. Kassel, both of Kassel McVey, of Columbia, for Respondents.

THOMAS, J.: Stephany A. Connelly (Connelly) and James M. Connelly (collectively, Respondents) filed this declaratory judgment action against The Main Street America Group (MSA), Old Dominion Insurance Company (Old Dominion), Allstate Fire and Casualty Insurance Company (Allstate) (collectively, Insurers), Debbie Cohn, and Freya Trezona.[1] Insurers appeal the trial court's grant of summary judgment to Respondents. Insurers argue the trial court erred in (1) finding legal entitlement to recovery is not a condition precedent to recovery of uninsured motorist coverage; (2) finding the immunity granted by the Workers' Compensation Act transforms a fully insured vehicle into an uninsured vehicle; and (3) failing to effectuate legislative intent. We affirm.

I. STIPULATED FACTS

The parties filed a Joint Stipulation of Facts. Old Dominion issued an automobile liability insurance policy (Old Dominion Policy) to Cohn containing liability coverage and uninsured motorist (UM) coverage of $100,000 per person, $300,000 per accident.[2] Trezona is Cohn's daughter. Cohn and Trezona owned a 2012 Jeep, which was insured under the Old Dominion Policy. Allstate issued an automobile policy to Respondents with liability coverage and UM coverage of $250,000 per person and $500,000 per accident (Allstate Policy).

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[1] Cohn and Trezona were dismissed by consent.

[2] In Respondents' complaint, Respondents identify the policy as written by MSA and Old Dominion.

On February 24, 2015, Connelly was riding as a passenger in the Jeep driven by Trezona. For purposes of this declaratory judgment action only, the parties stipulated that Trezona's negligence caused an accident resulting in injuries and damages to Connelly.

Connelly and Trezona were co-employees, both working within the course and scope of their employment with Apple One Employment Agency at the time of the accident. Connelly began receiving benefits under the South Carolina Workers' Compensation Act (the Act). "Connelly is not legally entitled to recover damages from Trezona" because Trezona is immune from suit as a co-employee under the exclusivity provision of the Act.

Connelly made a claim for damages under the liability and UM coverage of the Old Dominion Policy. Old Dominion denied the claim, relying on Trezona's immunity under the Act. Connelly also made a claim under the UM coverage of the Allstate Policy. Allstate denied the claim on the grounds the vehicle was not uninsured at the time of the accident, and the Act provided Connelly's exclusive remedy.

II. OTHER FACTS

Respondents filed this declaratory judgment action. Insurers answered, denying liability and moving for summary judgment. Respondents also moved for summary judgment. The court heard arguments on the cross-motions for summary judgment. By order filed October 2, 2017, the court granted Respondents' motion for summary judgment and denied Insurers' motions for summary judgment. Insurers appeal.

III. STANDARD OF REVIEW

"Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues." *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004). The "determination of coverage under an insurance policy" is an action at law. *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Id.* However, "[w]hen an appeal

involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

IV. LAW/ANALYSIS

A. "Legally Entitled to Recover"

Insurers argue the trial court erred in finding legal entitlement to recovery is not a condition precedent to entitlement to UM coverage. We disagree.

The Allstate policy states as follows:

> **Insuring Agreements**
>
> If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, **we** will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:
>
> 1. **bodily injury** sustained by an insured person; and
> 2. **property damage.**

The Old Dominion Policy similarly states, "We will pay damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of: 1. "Bodily injury" . . . and 2. 'Property damage' . . . ."

The South Carolina UM statute provides that a UM policy must "pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . ." S.C. Code Ann. § 38-77-150 (A) (2015).

Insurers argue Connelly is precluded from coverage because "legally entitled to recover" requires Connelly to be able to maintain an action against Trezona and secure a judgment against her before receiving UM coverage. Because Trezona is immune from suit under the Act's exclusivity provision, and Connelly stipulated

she was not legally entitled to recover from Trezona, Insurers argue Connelly cannot recover under the UM provisions of the policies.

The trial court found "if the meaning of the statutory language ['legally entitled to recover'] is ambiguous and simply means the insured must demonstrate fault on the part of the uninsured driver[,] then the discussion is far from over." The court noted the language is not defined in either the statute or the insurance policies. The court also noted a "[r]eview of decisions from other jurisdictions addressing similar language and coming to different interpretations suggest[s] ambiguity of this statutory language."

The trial court acknowledged the jurisdictions "interpreting the 'legally entitled to recover language' as a fatal obstacle" to Connelly's ability to collect UM benefits. *See Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 30–31 (Iowa 2005) (holding an insured was not legally entitled to recover UM benefits because the injuries sustained were covered under the workers' compensation system); *State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318, 324 (Ky. 2010) (denying UM coverage for injuries resulting from a co-employee's negligent operation of a motor vehicle where the workers' compensation law granted immunity to the co-employee); *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So. 2d 23, 28 (Miss. 2003) (finding a claimant was not legally entitled to recover UM benefits from his personal insurer because he was not legally entitled to recover damages from his co-employee due to the exclusivity provision of the workers' compensation statute). However, the court also noted other jurisdictions that "have interpreted the same or similar language in a broader vein." *See Torres v. Kansas City Fire & Marine Ins. Co.*, 849 P.2d 407, 410 (Okla. 1993) (finding a claimant was entitled to UM coverage despite a negligent co-employee's immunity because the coverage was intended to compensate an insured for a loss for which the tortfeasor is unable to make full compensation, and the insurer assumed the risk); *Jenkins v. City of Elkins*, 738 S.E.2d 1, 11 (W.Va. 2012) (finding "[t]he lack of a statutory or policy definition for the phrase 'legally entitled to recover,' and the parties' conflicting interpretation of the same" rendered the phrase ambiguous); *id.* at 14 (construing "'legally entitled to recover' . . . to mean that an insured is entitled to uninsured coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages").

The West Virginia court in *Jenkins* summarized the issue as follows:

> The parties have pointed out that there is a split of authority on the meaning that should be attached to the phrase. Our research indicates that a slight majority of courts that have considered the issue have determined that the phrase "legally entitled to recover," or its equivalent, means that an insured is entitled to uninsured motorist coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages; the tortfeasor's immunity, for whatever reason, does not prevent coverage.

738 S.E.2d at 12. The court in *Jenkins* continued, stating as follows:

> [T]he existence of a tort immunity or other limitation on the insured's rights against the tortfeasor should not preclude claims under the uninsured motorist coverage on the ground that the insured would not be legally entitled to recover from the tortfeasor.
>
> First, the immunity only absolves the defendant from liability. Since the uninsured motorist insurance company has no relation to the tortfeasor and allowing an insured to recover uninsured motorist insurance benefits does not adversely affect any interest of the tortfeasor which the tort immunity protects, the tort immunity should have no effect on whether an insurance company providing first party, uninsured motorist insurance coverage for an individual is obligated to indemnify the insured.
>
> Second, . . . [t]he problem should be adjudicated by balancing the public policy interests. The uninsured motorist insurance statutes . . . reflect a strong public policy in favor of providing indemnification for persons who are injured by uninsured motorists. Whether the tortfeasor is immune from litigation is, therefore, usually a matter of relatively small importance in regard to the indemnification of an insured person by an insurer . . . .

> The important fact is that no compensation is available from the negligent tortfeasor.

Id. at 13−14 (alterations in original) (quoting Alan I. Widiss & Jeffrey E. Thomas, *Uninsured & Underinsured Motorist Insurance*, § 7.14, at 532 (2005)). Finally, the court in *Jenkins* rejected the reasoning of jurisdictions not permitting recovery as inconsistent with the public policy behind the uninsured motorist statute. *Id.* at 13−14.

Based in part on the differing interpretations of "legally entitled to recover," the trial court found our South Carolina statute is ambiguous as to the language "legally entitled to recover" and construed the language in a manner "consistent with the intent of the legislature . . . to protect against the peril of injury . . . by an uninsured motorist . . . ." The court concluded, "[i]nterpreting the statute to require that plaintiffs first secure a judgment . . . undermines the legislative intent." Thus, the court found "legally entitled to recover" required only "demonstrating fault and resulting damages," which Connelly satisfied as the parties stipulated to Trezona's fault and Connelly's damages.

We find no error in the trial court's application of statutory interpretation to the language "legally entitled to recover." In *Ferguson v. State Farm Mutual Automobile Insurance Co.*, our supreme court concluded coverage under a UM policy arose after the liability of the uninsured motorist had been established. 261 S.C. 96, 102, 198 S.E.2d 522, 525 (1973) ("It is our conclusion that the appellant's liability under the uninsured motorist endorsement is contractual in nature and arises after the liability of the uninsured motorist has been established . . . ."). The court in *Ferguson* did not suggest procurement of a judgment was necessary. *Id.* The uninsured motorist legislation "is remedial in nature and is entitled to a liberal construction to effectuate the purpose thereof." *Gunnels v. Am. Liberty Ins. Co.*, 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968). "[A]ny limiting language in an insurance contract which ha[s] the effect of providing less protection than made obligatory by the statutes is contrary to public policy and is of no force and effect." *Ferguson*, 261 S.C. at 100, 198 S.E.2d at 524. We agree with the court in *Jenkins* and find the phrase "legally entitled to recover" should be "construed to mean that an insured is entitled to uninsured coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages." *Jenkins*, 738 S.E.2d at 14.

Furthermore, we find support from this court's opinion in *Antley v. Nobel Insurance Co.*, 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002), *overruled in part on other grounds by Sweetser v. S.C. Dep't of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010).[3] Antley was injured while operating a truck owned by his employer in an accident caused by an unidentified driver in Georgia. *Antley*, 350 S.C. at 624, 567 S.E.2d at 873. Antley filed an action in Georgia seeking UM coverage under his personal automobile insurance policy. *Id.* Antley also claimed workers' compensation benefits. *Id.* at 624, 567 S.E.2d at 873−74. The insurer denied coverage, in part arguing Antley's exclusive remedy was provided for under the Act. *Id.* The trial court found Antley was not excluded from pursuing coverage under the UM provision of the policy. *Id.* at 624, 567 S.E.2d at 874. On appeal, this court rejected the insurer's argument, stating as follows:

> Our supreme court previously has rejected the same argument now advanced by [the insurer], finding that workers' compensation gives an employee "the right to swift and sure compensation," while an employer in turn "receives *immunity from tort actions* by the employee." *Wright v. Smallwood*, 308 S.C. 471, 475, 419 S.E.2d 219, 221 (1992) (quoting *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980)). In *Wright*, the court went on to reiterate that because UM coverage sounds in contract, not tort, "the exclusivity provision of [the Act] does not operate to bar [a] contractual claim for UM benefits." *Id.*

Id. at 626, 567 S.E.2d at 874 (third alteration in original). We likewise find support from the United States District Court interpreting South Carolina law in *Sanders v. Doe*, 831 F.Supp. 886 (S.D. Ga. 1993). The court in *Sanders* rejected a similar argument by the insurer that the plaintiff was barred from recovering UM benefits because of the exclusive remedy provision of the Act. *Sanders*, 831 F.Supp. at 890. The court found the following:

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[3] The court in *Sweetser* overruled *Antley* to the extent it did not permit an employer "to offset the employee's recovery under the automobile policy against the employee's compensation benefits . . . ." *Sweetser*, 390 S.C. at 637 n.5, 703 S.E.2d at 512 n.5.

> Workers' compensation laws shift the risk of work-related injury from the employee to the employer but compromise the employee's right to sue at common law. The employer's protection from suit by the injured employee, however, is not so broad to encompass any conceivable form of action. Rather, workers' compensation laws are intended to shield the employer, and any other statutorily-insulated entity, from liability in tort actions. Uninsured motorist coverage sounds in contract. Thus, [the Act] does not preclude Plaintiff's recovery of uninsured motorist benefits from [the insurer].

Id. at 891 (internal citation omitted). We find no error by the trial court in finding Connelly was not precluded from recovery of UM benefits.

To the extent Insurers separately rely on the failure to be served with pleadings of a tort action against Trezona by Connelly under section 38-77-150(B), we likewise find no error. As noted by the trial court, the language of section 39-77-150(B) does not address any requirement of filing suit against the at-fault driver. *See* §38-77-150(B) (2015) ("No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer . . . "). Respondents filed this declaratory judgment action, Insurers were served, and the parties stipulated to Trezona's negligence. We find Insurers were afforded the protection intended by section 38-77-150(B).

B. Uninsured Vehicle

Insurers argue the trial court erred in finding the immunity granted by the Act transformed Trezona's insured vehicle into an uninsured vehicle because they denied liability, not coverage. We disagree.

In the parties' Joint Stipulation of Facts, Insurers stipulated that "Trezona's negligence caused the accident and Connelly's resulting injuries and damages." The trial court noted the stipulation and found Insurers' arguments—that they did not deny coverage but denied liability and Trezona's vehicle was therefore an insured vehicle—were "foreclosed" because liability could not be denied given the

stipulations; thus, only coverage could be denied, and Insurers made coverage denials. Citing the statutory definition of an insured, the court next found Connelly was an "insured" under either policy. Connelly was a named insured under the Allstate Policy and she was occupying the Trezona vehicle as a passenger with permission of the owner, which made her an insured under the Old Dominion Policy; thus, Connelly was an insured under each policy.

The statutory definition of an insured is as follows:

> "Insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

S.C. Code Ann. § 38-77-30(7) (2015). We find no error in the trial court's finding that Connelly was an "insured" in this case. *See, e.g.*, *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 367, 529 S.E.2d 280, 282 (2000) (determining a "vehicle [fell] within the plain language of the [uninsured motorist] statute because [the insurer] successfully denied liability coverage"); *id.* at 368, 529 S.E.2d at 283 (finding the permissive user entitled to uninsured motorist coverage because she was injured by an uninsured motorist, the insurer successfully denied liability, and the vehicle became an uninsured motor vehicle). Pursuant to the stipulations, Insurers denied coverage rather than liability. *See Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) ("A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys."); *id.* ("Stipulations, of course, are binding upon those who make them."). Thus, due to the immunity provided by the exclusivity provision of the Workers' Compensation Act, the vehicle was, in effect, an uninsured vehicle, and Connelly is entitled to UM benefits.

C. Legislative Intent

Insurers finally argue the trial court erred in failing to effectuate the legislative intent of the Act and the UM statutes. We disagree.

The trial court recognized the "cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." The court also noted the purpose of the UM statutes, their remedial nature, and the legislative intent to benefit injured persons.

"The purpose of the uninsured motorist law is 'to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle.'" *Schmidt*, 339 S.C. at 368, 529 S.E.2d at 283 (quoting *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973)). "[T]he statute is remedial in nature, enacted for the benefit of the injured persons, and is to be liberally construed so that the purpose intended may be accomplished." *Nationwide Mut. Ins. Co. v. Smith*, 376 S.C. 60, 69, 654 S.E.2d 837, 841 (Ct. App. 2007). Our supreme court has distinguished between UM claims as contract actions, and the exclusivity provision of the Act, which bars tort claims. *See Wright v. Smallwood*, 308 S.C. 471, 473, 419 S.E.2d 219, 220 (1992) (explaining governmental immunity under the South Carolina Tort Claims Act did not bar a claim against the governmental entity for UM benefits because UM coverage sounds in contract rather than tort). We find no error by the trial court in its application of the rules of statutory construction in determining the legislative intent.

V. CONCLUSION

Based on the foregoing, the order on appeal is

AFFIRMED.[4]

LOCKEMY, C.J., and MCDONALD, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wayne's Automotive Center, Inc., Appellant/Respondent,

v.

South Carolina Department of Public Safety,
Respondent/Appellant.

Appellate Case No. 2017-002455

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Opinion No. 5756
Submitted May 1, 2020 – Filed August 12, 2020

AFFIRMED

Raymond E. Lark, Jr., of Austin & Rogers, P.A., of Columbia, for Appellant/Respondent.

Andrew F. Lindemann, of Lindemann, Davis & Hughes, P.A., of Columbia; and Marcus Keith Gore, of the South Carolina Department of Public Safety, of Blythewood, for Respondent/Appellant.

KONDUROS, J.: This cross-appeal arises from Wayne's Automotive Center, Inc.'s (Wayne's) sanction by the South Carolina Department of Public Safety (the Department) relating to a towing bill issued to a third-party, J.H.O.C., Inc. d/b/a Premier Transportation (Premier). The Administrative Law Court (ALC) reduced

the sanction issued by the Department from a 120-day suspension from the Department's wrecker rotation schedule to a 60-day suspension. Wayne's maintains the ALC erred in not vacating the suspension entirely. The Department contends the ALC erred in not upholding the 120-day suspension. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Department maintains a list of approved towing service providers to be called in the event of a vehicular accident. Wayne's applied to be included on the 2016 wrecker rotation list. Wayne's was approved. The 2016 Wrecker Rotation Fee Schedule (the Schedule) contains a fee of $436 per hour for Class C tows, which are defined as heavy duty tows for vehicles in excess of seventeen thousand pounds. *See* S.C. Code Ann. Regs. 38-600(E)(3) (2011). The Schedule does not set a fee for "special operations" related to a Class C tow jobs. Special operations might include accidents involving clean-up, transportation of cargo, repositioning the vehicle, and/or controlling traffic on the accident scene.[1] However, the Schedule indicates "a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job." Proof of these costs must be provided by including an itemized invoice or receipt from the provider with the towing bill.

On February 9, 2016, the South Carolina Highway Patrol placed a routine rotation call to Wayne's Aiken location for a Class C wrecker to tow an overturned tractor-trailer on the I-20 bridge over the Savannah River near the South Carolina/Georgia border. The tractor-trailer belonged to Premier and contained a large shipment of dog food for a customer, Tractor Supply. According to Wayne's owner, Jeff Corbett, between 2:00 a.m. and 4:30 a.m., Wayne's sent individuals to the scene and began to dispatch trucks and equipment including apparatuses for traffic control such as digital signs and cones.

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[1] S.C. Code Ann. Regs. 38-600(F)(2)(a)(2) (2011) ("Special operations are operations involving the process of uprighting an overturned vehicle or returning a vehicle to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle and/or the recovery of a load which has spilled, or the off-loading and reloading of a load from an overturned vehicle performed to right the vehicle.").

Robert Watson was retained by Sentry Insurance Company, Premier's insurer, to coordinate with Wayne's and manage the bill for the towing and related work. Jeff's wife, Sherry Corbett, is the office manager for Wayne's. She testified Premier wanted a bill immediately. Trish Felix, Wayne's chief dispatcher, hurriedly provided a bill consisting of three invoices on February 11 totaling $67,912.69. A second, single invoice with some additional information/corrections was created by Sherry on February 15 totaling $69,017.19. Via e-mail, Watson disputed numerous charges on the bill and demanded release of the cargo. On February 16, Wayne's revised its bill to $64,783.19. Watson eventually contacted Lieutenant Nicholas King, the wrecker coordinator for Troop 7—Aiken County—on February 19. After reviewing the bill, Lieutenant King spoke with Jeff and explained the problems he found with the bill. He also instructed Jeff he should release the cargo. According to Lieutenant King, Jeff indicated he would revise the bill and release the cargo.

When the cargo issue was not resolved, Lieutenant King spoke with Jeff again, and Jeff indicated, after consulting with others in the business, he would not follow Lieutenant King's recommendations as to the bill and would not release the cargo. On February 26, Wayne's issued Premier a final invoice for $48,633.19 which Premier agreed to pay. Premier paid the invoice by check dated Friday, March 4 at which time Wayne's advised Premier it could pick up the cargo. Premier retrieved the cargo on Monday, March 7.

Meanwhile, also on March 4, Lieutenant King reported Wayne's to Captain A.K. Grice, his troop commander, identifying charges on the bill he thought were unreasonable and recommending Wayne's be permanently removed from the wrecker rotation list. Lieutenant King's report referenced overcharging for certain laborers, double billing in some instances, and noted Wayne's had not released the cargo.

Pursuant to procedure, Captain Grice reviewed Lieutenant King's report and advised his supervisor, Captain C.B. Hughes, he also believed Wayne's committed numerous violations and should be removed from the wrecker rotation list. Captain Hughes took these recommendations under advisement, and determined Wayne's should be suspended from the wrecker rotation list for 120 days.[2]

[2] The record does not reveal any specific guidelines the Department should follow regarding the length of suspension for a particular violation or when removal from

Wayne's appealed that decision to Colonel Michael Oliver who affirmed the 120-day suspension. Wayne's appealed to the ALC and also filed a motion to stay the suspension.[3]

At the hearing before the ALC, the Department was found to bear the burden of proving by the preponderance of the evidence the sanction was warranted and therefore the proceeding constituted a de novo review of the Department's decision. Watson testified during the Department's case-in-chief and estimated the time taken for the recovery was much too long in his experience and Wayne's had refused to release the cargo to him. He also outlined other charges he felt were too high for equipment. Lieutenant King testified consistently with his aforementioned report. He indicated he was not a rate expert and the items he felt were unreasonably charged were based on "common sense."

In addition to being Wayne's office manager, Sherry testified she is also the majority owner of Spill Containment Incident Management (SCIM), which provided communication equipment and a truck with cleanup supplies to Wayne's at the accident scene. SCIM did not provide or include a separate invoice for work it performed on the accident. Additional labor was obtained from Vern's Wrecker and Recovery (Vern's), and a separate invoice for that work was likewise not included with the Wayne's invoice. Sherry testified equipment and labor from SClM and Vern's was marked up on Wayne's invoices from its actual cost to cover Wayne's liability, taxes, and insurance expenses. Furthermore, equipment invoices included an operator for heavy equipment even though such labor should be included in the base charge for the heavy equipment. Sherry also explained the invoices were adjusted as it learned some items were not needed at the scene as long as previously thought and air bags damaged in lifting the trailer could be repaired as opposed to replaced.

Jeff testified primarily as to the accident scene and indicated the operation was complex. He stated Watson did not necessarily understand everything involved

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the wrecker rotation list is warranted. General categories of sanctions are outlined in the Department's Wrecker Rotation Disciplinary Policy and appear to be at the discretion of the Department. They include oral reprimand, written reprimand, immediate suspension, suspension for cause, and removal.

[3] Wayne's served four days of the suspension, December 12-16, before the parties agreed to a temporary stay.

with the matter, particularly the recovery, repacking, transport, and storage of the dog food.

Wayne's offered the testimony of Douglas Busbee, a long-time wrecker business owner/operator. Wayne's attempted to elicit testimony from Busbee regarding issues between towing companies and the Department and subsequent changes made to the 2017 rate schedule. However, the ALC limited Busbee's testimony to his opinion on whether Wayne's charges were reasonable. In that regard, Busbee testified the Department's assessment of the charges was unreasonable, and he testified as to what he generally billed for certain services in 2016.[4]

Finally, Martha Rochester testified on Wayne's behalf as an expert in towing and recovery charges and billing. She testified Wayne's rates for the accident and the amount of time to conduct the entire operation were reasonable. Rochester testified wrecker companies build in costs for being ready to serve when called and, as with any business, rates must cover employees' costs beyond salary such as insurance. She also stated the costs for cones was reasonable, and in her opinion, the dog food was commercial cargo as opposed to personal property. She acknowledged the $436-per-hour charge for heavy-duty equipment would include an operator although a dispatcher could send a second party out with a vehicle if necessary, which would be an additional labor cost.

The ALC determined Wayne's had double-billed some items and failed to present documents supporting the subcontracted labor and equipment costs from Vern's and SCIM in the final invoice issued to Premier. It determined the final invoice was the proper invoice for evaluation because Wayne's had taken corrective measures and made adjustments to its prior invoices. The ALC also determined the cargo constituted personal property that should be released. However, the ALC went on to consider the "knotty" issue presented to a towing company as to determining the owner of the cargo when its shipment is interrupted mid-transport as in this case. Based on all of the foregoing, the ALC determined Wayne's should

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[4] This included the following: $436 per hour for a heavy duty wrecker and operator; $350 per hour for a landoll; $85 per hour for labor; $125 per hour for mechanic labor; $150 per hour for a skid steer; $300 per hour for a truck/trailer; $200 per hour for a backhoe; $150 per hour for a forklift; $250 per hour for a service truck; and $125 per hour for tower lights.

be sanctioned with a suspension from the wrecker rotation list, but reduced the suspension to 60 days. This cross-appeal followed.

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2019) sets forth the standard of review for appeals from the ALC. It provides:

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

"Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011) (quoting *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)). "[A] judgment upon which reasonable men might differ will not be set aside." *Id*. at 309, 717 S.E.2d at 752.

LAW/ANALYSIS

Wayne's Appeal

I. Wayne's Suspension Should be Vacated in its Entirety

A. Settlement by Payment of Bill

Wayne's argues the payment of the final invoice by Premier ended any dispute between them, rendering the Department's investigation into the matter moot. We disagree.

"An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists." *Sloan v. Greenville County,* 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Id.* "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id*.

The Department is given statutory authority to discipline members of the wrecker rotation list for noncompliance with its requirements. Wayne's agreed to this when it joined the wrecker rotation list.[5] The issue before this court is not whether Wayne's must revise its bill to Premier, but whether the suspension imposed by the Department will be upheld. Because the ALC stayed the suspension, the issue is not moot and has implications for whether and for how long Wayne's will have to serve any suspension. Consequently, we find no merit to this argument by Wayne's and affirm the ALC's decision that the matter was not ended by Premier's payment of the disputed bill.

B. One Bill Versus Listing Subcontractor Costs

Next, Wayne's argues the ALC erred in concluding the Department correctly found Wayne's violated the billing requirements by failing to include the costs for renting additional equipment to perform the special operation from subcontractors or other companies. We disagree.

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[5] The 2016 Schedule was signed by a representative of the towing company and provides "I understand that any violation of the Wrecker Regulations may result in disciplinary action pursuant to S.C. Code of Regulations 38-600(D) and [the Department] Policy 200.19 Wrecker Rotation Disciplinary Policy."

Regulation 38-600(C)(15) of the South Carolina Code (2011) requires that tow services provide the client with one bill. It states:

> A wrecker service may secure assistance from another wrecker service when necessary to complete the recovery; however, this does not supersede paragraph 3 of this section nor does it permit wrecker services to accept a rotation call and dispatch the call to secondary wrecker services. Only one bill is to be submitted to the owner or operator for the work performed.

Id. The Schedule indicates subcontractor costs must be evidenced by an invoice. It provides:

> Although no Special Operations fee is set for Class C tows, a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job. Proof of these actual costs in the form of an itemized invoice or receipt from the third party providing such equipment or labor must accompany the tow bill.
>
> If services beyond those for which the wrecker was dispatched are performed (e.g., hazardous waste cleanup; transportation of vehicle, cargo, or occupants(s) to an agreed upon location other than the one required by the Regulation), those services must be billed on a separate invoice.

Wayne's contends these two provisions are contradictory and it should not be penalized for sending a bill without supporting documentation to Premier. We disagree.

"[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). Although the two provisions at issue are not statutes—one is a regulation related to tow billing and the other is a policy made

under the auspices of regulations and related to tow billing—they should be read to harmonize if possible. According to Lieutenant King, the Department interprets the regulation at issue to mean a tow customer should not receive multiple bills directly from the provider of the additional services. Rather, the fee-schedule requirement makes the lead towing company responsible for ensuring each additional labor or rental charge from another entity or for additional services is proven for the customer in the one bill it receives from the main tow company. This explanation would harmonize the regulation and fee provision in a reasonable manner and give them both effect. Consequently, although the two directives are not perfectly clear, Wayne's refusal to provide documentation, even after Lieutenant King's instructions to do so, provides substantial evidence to support the 60-day suspension.

C. Constitutional Right to Contract

Wayne's maintains allowing the Department to sanction Wayne's after Premier paid the final bill impaired its right to contract. We disagree.

"To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose." *Anonymous Taxpayer v. S.C. Dep't. of Revenue*, 377 S.C. 425, 433, 661 S.E.2d 73, 77 (2008). However, two points render the argument unpersuasive. First, Wayne's contract with Premier is a *fait accompli* and the imposition of a 60-day suspension, while punitive, did not impair its right to contract. Second, these rules and regulations were in place at the time Wayne's signed the agreement, so no "change" in the law occurred that could have impaired the contract. Again, this argument is without merit and we affirm the ALC.

II. Location of Accident—South Carolina or Georgia

Wayne's contends the ALC erred in finding the accident in question occurred in South Carolina. Wayne's alleges the accident occurred in Georgia and is subject to Georgia law or if not, is preempted by federal law as part of interstate commerce. We disagree.

The ALC concluded in its order that "[t]his case arises within a South Carolina regulatory scheme in which a South Carolina business participating in that

regulatory scheme was summoned by the South Carolina Highway Patrol to perform services subject to the administration of that regulatory scheme. Under these circumstances, South Carolina jurisdiction is proper."

The record demonstrates Wayne's is licensed to operate in both South Carolina and Georgia. A Georgia-only wrecker service, Chancey's, arrived at the accident scene but was sent away in favor of Wayne's. Wayne's was called by the Department and did the majority of the recovery on the South Carolina side of the accident.

In any event, Wayne's, by accepting the call from the Department, agreed to function under the guidelines set by it for membership on the wrecker rotation list. Parties can agree by contract to be governed by particular laws, rules, and regulations. *See Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 448-49, 814 S.E.2d 643, 652 (Ct. App. 2018) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."). Substantial evidence in the record supports the ALC's decision on this issue.

III. Advisory Committee

Next, Wayne's argues the ALC erred in concluding the failure of the Department to establish an advisory committee pursuant to Regulation 38-600(D) did not violate Wayne's due process rights. We disagree.

Regulation 38-600(D)(5) of the South Carolina Code (2011) provides:

> An advisory committee, consisting of experts in the towing and towing related industries, will be created to review, upon request by the Department, complaints specific to the terms and conditions of this regulation. The advisory committee will be limited to reviewing specific issues raised in a complaint or appeal and making recommendations regarding the validity of the complaint as well as a fair and reasonable resolution. Advisory committee recommendations will not supercede Department of Public Safety policy nor will the committee make recommendations regarding disciplinary action for Department of Public Safety employees.

Id.

In its order, the ALC found

> [Wayne's] complains that [the Department] violated the regulation by not creating this Advisory Committee. However, the review referenced could only occur "upon request by the Department." Furthermore, its review would be limited to "specific issues raised in a complaint or appeal," and its "recommendations regarding the validity of the complaint as well as a fair and reasonable resolution" cannot "[supersede the Department's] policy." Hence, while the Department may have erred in failing to create an Advisory Committee, it is not obligated to use the committee or to follow its recommendations.

While this is all true, section (E) of the Disciplinary Policy created by the Department indicates that when the patrol commander's decision is appealed, the patrol commander "shall request that the advisory committee review the appeal and make recommendations before making a final decision." This appears to make seeking input from the advisory committee mandatory. However, the following section (F) of the Disciplinary Policy indicates, in line with the regulation, that the patrol commander "*may* use the recommendations of the advisory committee as a basis for his decision." In sum, the advisory committee is just that, advisory, and does not confer any additional rights on the petitioner.

Even if the advisory committee creates additional due process rights for a petitioner, our courts have held a defect that deprives a party of a de novo review in an administrative law matter can be cured if the de novo review is subsequently commenced in another proceeding. *See Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) ("An adequate *de novo* review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body."). Because the ALC conducted a de novo review of this case, we conclude the ALC did not err in proceeding with the hearing.

IV. Inconsistent Order

Wayne's maintains the ALC's order is inconsistent. It argues the ALC's finding as to the cargo release issue that certain expenses on the invoice were reasonable is inapposite to the imposition of a 60-day suspension. We disagree.

The ALC reduced the 120-day suspension imposed by the Department. The reduction is consistent with the ALC's findings that generally favored Wayne's. Allowing 60 days of the suspension to remain in effect is consistent with the ALC's findings as to Wayne's double billing for certain labor charges and its failure to provide invoices for rented subcontractor equipment. Overall, substantial evidence supports the reduction but not elimination of the suspension. *See* S.C. Code Ann. § 1-23-60 (B) (noting the appellate court will not substitute its judgment for that of the ALC).[6]

The Department's Appeal

I. Release of Cargo

The Department argues the ALC erred in reducing Wayne's suspension when it concluded the cargo should have been released. We disagree.

Section 56-5-5635(F) of the South Carolina Code (2018) provides:

> After the vehicle is in the possession of the proprietor, owner, or operator of the towing company, storage facility, garage, or repair shop, the owner of the vehicle as demonstrated by providing a certificate of registration has one opportunity to remove from the vehicle any

[6] We conclude the remaining arguments raised by Wayne's are abandoned on appeal because they are either conclusory, not supported by cited authority, or otherwise vague. *See Potter v. Spartanburg Sch. Dist. 7,* 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."); *see also Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (noting "broad general statements of issues may be disregarded by this court," and the court should not have to "grope in the dark" to ascertain the precise points at issue), *abrogated on other grounds by Repko v. Cty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018).

> personal property not attached to the vehicle. The proprietor, owner, or operator of the towing company, storage facility, garage, or repair shop must release any personal property that does not belong to the owner of the vehicle to the owner of the personal property.

Although the ALC determined cargo falls within the parameters of "personal property," it also held Wayne's was in "legal limbo" because it could not ascertain the legal owner of the dog food and therefore prudently did not release the cargo. The record more likely reflects that Wayne's was holding the cargo hostage until payment of the bill as opposed to having reservations about ownership issues. An email from Sherry on February 16 indicated the cargo, tractor, and trailer would be released when the bill was paid. This was also her testimony at trial as well as Watson's understanding of the matter. While we do not necessarily agree that Wayne's motives in holding the cargo were as altruistic as the ALC suggests, the record demonstrates Wayne's failure to release the cargo immediately was not as clear cut as the Department suggests.

First, the record shows the initial demands for the cargo were made by Watson, who had not provided definitive evidence that he was acting on behalf of the owner of the cargo. He never made any specific references to whom the cargo should be released or on what basis. Watson admitted he had no direct engagement agreement with any of the parties. According to Captain Grice's Notice of Disciplinary Action, Tractor Supply was the owner of the cargo, not Premier, and therefore, the dog food should have been released to it immediately pursuant to statute. Sherry Corbett asked for verification from Travelers, Tractor Supply's insurer, that Watson was acting on its behalf and received such verification by email on February 19, around the time Premier engaged an attorney to get involved in the matter.

Furthermore, the statute at issue is subject to a certain amount of interpretation as thousands of pounds of dog food are not the type of personal property contemplated by the statutes and regulations. Sherry testified she did not understand the statute to include cargo, but items like medicine, cell phones, etc. *See* S.C. Code Ann. Regs. 38-600(C)(6) (2011) ("The wrecker service location shall have an agent present during business hours and at the request of the owner of the towed vehicle or his designee, the wrecker service must immediately release personal items such as medicines, medical equipment, keys, clothing, and tools of

the trade, child restraint systems and perishable items."). Rochester testified in her opinion, cargo would not fall within the same category as personal property. Lieutenant King indicated Jeff stated he would not release the cargo because he did not believe he was required to do so after consulting with others.

Based on the circumstances of this case, we find substantial evidence supports the ALC's decision to reduce Wayne's sanction in spite of its failure to release the cargo earlier. *See Rose v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 429 S.C. 136, 142, 838 S.E.2d 505, 509 (2020) ("In determining whether the ALC's decision was supported by substantial evidence, [appellate courts] need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." (quoting *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013))).

II. Evaluation of Corrected Bill

Next, the Department argues the ALC erred in evaluating the final invoice instead of the second invoice for infractions. We disagree.

The record establishes Premier's insurer requested a bill from Wayne's immediately following the accident. That first invoice was therefore hurriedly compiled and could have understandably contained errors. According to Rochester, an early bill like that should only be considered an estimate. The second invoice, issued only four days later, still contained numerous charges disputed by Watson and totaled $69,017.19. The final invoice that was paid by Premier totaled $48,633.19. The charges had been re-evaluated and adjusted based on new information learned as the bill was further reviewed. For example, the charge for airbags was initially higher when Wayne's thought they would require replacement. This reduced the bill by $8,000. Also, Wayne's discovered one of the heavy pieces of equipment was not on scene as long as previously thought. This reduced the bill further by $5,000. Wayne's specifically refused to make all the changes required by Lieutenant King or to release the cargo at his behest. This conduct suggests the changes Wayne's did make were legitimate corrections as opposed to an

acknowledgement by Wayne's that it had overbilled and made corrections only to evade reprimand by the Department.[7]

The Department's analogy to the utterance of a fraudulent check is misplaced. In this case, Wayne's was asked to rapidly prepare a detailed invoice regarding a complex special operation. Certain facts and circumstances changed or were spotted as errors and the entire situation began and concluded in less than a month. Under these circumstances, we conclude substantial evidence in the record supports the ALC's decision to evaluate the final bill for infractions. *See* S.C. Code Ann. § 1-23-610(B) (finding the appellate court must affirm the ALC when substantial evidence in the record supports its decision).

III. Charges for Communications Equipment/Supply Truck

Finally, the Department alleges the ALC erred in its findings regarding communications equipment and the supply truck used in the recovery. We disagree.

The ALC found the Department's reasonable charge analysis based on the purchase cost of the items was flawed. Wayne's expert testified the costs for equipment would include the availability of the truck, its maintenance, and restocking it with supplies as opposed to just the cost to purchase the vehicle. She also opined the charge of the communications equipment was reasonable and in line with what she had seen charged. Based on the foregoing, we find substantial evidence supports the ALC's ruling. *See* S.C. Code Ann. § 1-23-610(B) (finding the appellate court must affirm the ALC when its decision is supported by substantial evidence in the record). Accordingly we affirm these findings by the ALC.

CONCLUSION

On balance, some of the ALC's findings were more favorable to Wayne's and some were more favorable to the Department. Although reasonable persons might disagree on certain specific findings, substantial evidence supported them. Overall, the ALC's Solomonic decision to reduce the suspension by half is

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[7] Jeff specifically told Lieutenant King he would not make the changes he suggested and would face any resulting consequences.

supported by substantial evidence in the record and is one for which the court should not substitute its judgment. Therefore, the decision of the ALC is

AFFIRMED.[8]

WILLIAMS and HILL, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Kevin Grant, individually and in a representative capacity for all others similarly situated, Respondent,

v.

Jud Kuhn Chevrolet, Appellant.

Appellate Case No. 2017-001897

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5757
Submitted March 2, 2020 – Filed August 12, 2020

REVERSED

Harry Clayton Walker, Jr., Haynsworth Sinkler Boyd, PA, of Charleston, and Robert Lawrence Reibold, of Haynsworth Sinkler Boyd, PA, of Columbia, both for Appellant.

Lawrence Sidney Connor, IV, of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondent.

WILLIAMS, J.: In this action filed pursuant to the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the Dealers Act),[1] Jud Kuhn

[1] S.C. Code Ann. §§ 56-15-10 to -600 (2018 & Supp. 2019).

Chevrolet (Dealer) appeals the circuit court's order compelling class arbitration. On appeal, Dealer contends the arbitration clause is silent as to class arbitration, and thus, he argues the circuit court erred in inferring the parties' consent to class arbitration from the Dealers Act and the American Arbitration Association's (AAA's) Supplementary Rules for Class Arbitrations (the Supplementary Rules). We reverse.[2]

FACTS/PROCEDURAL HISTORY

Purchaser bought a Chevrolet Camaro from Dealer, and the parties signed a purchase agreement, which included a closing fee of $399. The purchase agreement also contained the following arbitration clause:

> **ARBITRATION REQUIRED BY THIS AGREEMENT.** The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the [AAA] under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the [AAA] shall be split evenly between the parties.

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[2] Neither party challenges the circuit court's finding that Marcus Kevin Grant's (Purchaser's) action is subject to arbitration; therefore, it is the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); *Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("There is no appeal from this ruling, and thus, it becomes the law of the case."). Accordingly, the only issue before this court is whether the circuit court erred in finding the parties consented to class arbitration.

> Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

Purchaser later filed a class action complaint against Dealer, alleging Dealer "negligently violated the Dealers Act" in numerous ways, including "charging a closing fee which does not represent closing costs actually incurred" by Dealer. Purchaser sought judgment against Dealer "for the amount of the closing fee for each class member, doubled pursuant to the Dealers Act, plus punitive damages up to three times the actual damages." Dealer timely answered, asserting Purchaser's claims were subject to mandatory arbitration, and subsequently moved to stay the case and compel bilateral arbitration. The circuit court held a hearing, but it declined to rule on the motion, allowing Dealer the opportunity to respond to Purchaser's motion in opposition to bilateral arbitration in which he requested the court either deny Dealer's motion to compel arbitration or, alternatively, grant the motion but permit class arbitration. Dealer filed an amended motion to compel bilateral arbitration. At the subsequent hearing, the circuit court granted Dealer's motion in part, holding it would compel arbitration; however, the court ordered the parties to submit briefs as to whether class or bilateral arbitration was proper.

Thereafter, the circuit court filed an order compelling class arbitration, finding "there is no conflict between the state's public policy of allowing class actions under the Dealers Act and the [Federal Arbitration Act's (FAA's)[3]] liberal policy favoring arbitration." The circuit court found that unlike in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[4] the arbitration clause contained in the purchase agreement at issue was *not* silent as to class arbitration. Specifically, the circuit court inferred the parties' consent to class arbitration because the purchase agreement is subject to the Dealers Act, which allows for class actions in arbitration disputes, and the arbitration clause specifically referenced the AAA, which contains the Supplementary Rules. This appeal followed.

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d

[3] 9 U.S.C. §§ 1 to 307 (2018).
[4] 559 U.S. 662 (2010).

597, 599 (Ct. App. 2012).

LAW/ANALYSIS

Dealer contends the arbitration clause is silent as to class arbitration, and thus, he argues the circuit court erred in inferring the parties' consent to class arbitration from the Dealers Act and the Supplementary Rules. We agree.

"The [FAA] requires courts to enforce covered arbitration agreements according to their terms." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019). "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). "While the interpretation of an arbitration agreement is generally a matter of state law, . . . , the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 681 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

"Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Id.* at 682 (quoting *Volt Info. Scis.*, 489 U.S. at 479). "From these principles, it follows that a party *may not be compelled* under the FAA to submit to class arbitration *unless* there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684 (first emphases added). "An implicit agreement to authorize class-action arbitration, however, is *not* a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 685 (emphasis added); *see also Lamps Plus*, 139 S. Ct. at 1417–18 (alterations in original) ("[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011))).

"Class arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration." *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018)); *see also id.* at

1416 ("[W]ith class arbitration[,] 'the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.'" (quoting *Epic Sys.*, 138 S. Ct. at 1623)). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. Therefore, "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684)). "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Id.* at 1417.

Based on a plain reading of the arbitration clause contained in the purchase agreement, we find the language is silent as to class arbitration as it only states "any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order . . . shall be settled by binding arbitration administered by the [AAA] under its Commercial Arbitration Rules." Further, nothing else in the purchase agreement indicates Dealer affirmatively consented to class arbitration as required by our precedent. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them."); *Stolt-Nielsen*, 559 U.S. at 684 ("[A] party *may not be compelled* under the FAA to submit to class arbitration *unless* there is a contractual basis for concluding that the party *agreed* to do so." (first emphases added)). Thus, we find the circuit court erred in inferring Dealer's consent to class arbitration from the Dealers Act and the Supplementary Rules.[5] *See Lamps Plus*, 139 S. Ct. at 1417–18 (alterations in original) ("[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." (quoting *Concepcion*, 563

[5] We also note the circuit court's reliance on the Supplementary Rules to infer the parties' consent to class arbitration was in error because Rule 3 of the Supplementary Rules states, "In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." American Arbitration Association, *Supplementary Rules for Class Arbitrations* 4 (2011).

U.S. at 348)); *Stolt-Nielsen*, 559 U.S. at 685 ("An implicit agreement to authorize class-action arbitration . . . is *not* a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." (emphasis added)); *Lamps Plus*, 139 S. Ct. at 1416 ("[C]ourts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" (quoting *Stolt-Nielsen*, 559 U.S. at 684)). Accordingly, we hold Purchaser's action is subject to bilateral arbitration, and the circuit court erred in issuing an order compelling class arbitration.[6]

CONCLUSION

Based on the foregoing, the circuit court's order compelling class arbitration is

REVERSED.[7]

KONDUROS and HILL, JJ., concur.

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[6] Dealer alternatively argues the circuit court erred in issuing its order compelling class arbitration because the arbitration clause contained in the purchase agreement unambiguously selects bilateral arbitration. Because our finding above is dispositive, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Deshanndon Markelle Franks, Appellant.

Appellate Case No. 2016-002244

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5758
Heard October 22, 2019 – Filed August 12, 2020

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

LOCKEMY, C.J.: On January 31, 2014, Atrayel Williams called 911 after she discovered the bodies of Nikesha James and Sammie Darryl Leake in the living room of James's mobile home. James had been shot in the chest, and Leake had

been shot in the head and neck. Police later identified Deshanndon Markelle Franks as a suspect, and he was indicted for and convicted of the murders of James and Leake.

Franks appeals his convictions and sentence of forty-five years' imprisonment for two counts of murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred by (1) qualifying the State's witness as an expert and (2) instructing the jury it could infer malice from the use of a deadly weapon. We conclude the trial court did not abuse its discretion in qualifying the State's witness as an expert, and any error in the court's jury charge was harmless beyond a reasonable doubt. For these reasons, we affirm Franks's convictions.

FACTS

At the outset of his jury trial, Franks moved to suppress his Verizon Wireless cell phone records, which contained cell site location information (CSLI), arguing they were the product of a warrantless search.[1] The trial court denied Franks's motions.

Laquesha Currenton, Leake's cousin and a close friend of James's,[2] testified she last spoke to James around 11:00 p.m. or 12:00 a.m. on January 30. Williams, another of James's close friends, testified she last spoke to James around 9:00 p.m. on the 30th and could not reach her when she called around 10:30 a.m. the next morning. That afternoon, Williams and Currenton drove to James's home in Cross Hill, where they found the bodies of James and Leake, and Williams called 911.

Lavashtia Pulley testified she saw Franks and a man named Tevin Hill (Tevin) at a liquor house called "Wash" earlier on the evening of January 30. She recalled she spoke to Franks around 11:00 p.m. and he seemed "hyped" and "pumped, amped, whatever." Pulley testified she had "never seen him like that" before. She explained that while they were talking, Franks pulled out a few things from his coat, including a gun, which he said was "a Ruger." She described the gun as "black ashy kind of like." Pulley stated Franks wore a tan "overall suit," "[l]ike a

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[1] Franks also moved to suppress a digital photograph obtained from his cell phone, a pair of brown overalls and an extended magazine found during a search of his home, and his written statement to law enforcement.

[2] Currenton noted that although others sometimes referred to Leake as James's uncle, they were not actually related.

hunting suit," that night. At trial, she identified a State's exhibit as the overalls she saw him wearing. Pulley stated she did not speak to Tevin or see him together with Franks. Pulley recalled she received a text message from Franks the next morning, but he did not mention the deaths of James or Leake.

Tamia Kinard, another friend of James's, testified she, her aunt, and her baby went to James's house around 8:00 p.m. on January 30, and Leake arrived sometime thereafter. Kinard explained her aunt left later in the evening, and Franks and Tevin came over to James's sometime afterwards. She estimated they arrived around 12:15 a.m. Kinard testified Franks had on a brown overall jumpsuit "like a hunting suit" that night and some type of red sweater over the jumpsuit. She recalled that when Franks arrived, he asked James "about something that she put on Facebook" and "asked her to come back in the bedroom to talk [to] him." Kinard stated they went into the bedroom and "had a discussion." She estimated they were in the bedroom for about ten or fifteen minutes and when they came out, "[t]hey w[ere] laughing and talking normal, like it wasn't a problem."

Around 1:00 a.m., Kinard asked Tevin to drive her home "because [Franks] was being loud" and her baby was asleep. When asked how Franks behaved that night, Kinard stated he was "hyper[, l]ike amp, you could say. He was just wild. Like he was talking loud[, h]e was jumping around like. He just wasn't acting normal." She stated that when she and Tevin left, Franks, James, and Leake were still present at James's home.

Kinard explained Tevin's route took them behind her uncle's, Milton Grant's, mobile home. Grant testified he lived about three houses down from James on John Grant Street. Grant recalled that that around 1:00 a.m., he was awakened by headlights shining through his bedroom window. He stated he could not fall back asleep, and around 3:00 a.m., he heard gunshots that sounded like they came from very close. Grant testified he jumped up and went to the window and saw someone come out of James's front door. He saw the person walk down the front steps, walk back up, turn the porch light off, close the door, and then continue walking up and down the steps before eventually disappearing. Grant stated the person "had something brown on."

Tevin testified that in January 2014, he lived at his grandmother's house on John Grant Street in Cross Hill. He stated that on the night of January 30, he met up with Franks around 8:00 p.m., and they went to "a liquor house" called "the Wash" or "Washes," where they stayed for about three hours. He remembered seeing

Pulley there, and he assumed she and Franks talked because he saw them walk outside together. Tevin testified Franks was wearing brown overalls that night and identified a State's exhibit as the same overalls he saw Franks wearing. He stated that around midnight he and Franks left and went to James's, which was "where everybody used to hangout." Tevin recalled that when they arrived, Franks was acting "kind of like loud. Kind of amp like." Tevin testified James, Leake, Kinard, and Kinard's baby were at James's when they arrived. He recalled Franks and James "went to the back of the house" to talk that night but he could not hear their discussion.

Tevin stated he drove Kinard home a short while later and Franks, James, and Leake all stayed behind. Tevin recalled he drove past Grant's home with his bright headlights on, which shined on Grant's home. He stated he arrived home around 2:00 or 3:00 a.m. after dropping Kinard off and sometime after that, Franks called and told him to come outside. Tevin explained he went outside and saw Franks walking up the road, away from James's house. Tevin stated Franks was "shaky" and "not normal" and said "stuff went bad." He testified Franks then asked him for a ride, stating he "had some females up the road like in Greenville" but once they neared Fountain Inn, Franks told Tevin to drive him to Rodrigus Scurry's house. Tevin testified they stayed at Scurry's until about 8:00 a.m. and then went back to Cross Hill. He recalled that during the car ride back, Franks said "we got to get the guns out the house or something," but Tevin did not know what he was talking about. Tevin stated he went home after dropping Franks off at his grandmother's home and a short time later, he heard police arrive at James's house. He received a call from his cousin, Deputy Rakeisha Hill, who asked him to come to the scene and bring Franks. He explained Franks "act[ed] like he didn't want to go" and then told Tevin what to tell the police. Tevin testified Franks told him to say Franks got in the car after he dropped Kinard off and then they drove to Greenville. Tevin explained he wrote this in his first statement to police, but it was a lie. He denied seeing Franks with a gun that night but stated he had seen him with a gun before that looked like the gun in the photo on Franks's phone. Tevin acknowledged he was also charged with murder and the State agreed to drop the murder charges if he cooperated in the disposition of Franks's case.

Scurry testified Franks called him around 3:00 a.m. on January 31 and said he was on his way home from Greenville but could not make it home because he had been drinking. He stated Franks called again around 4:00 a.m. when he and Tevin

arrived. Scurry testified he showed them where to sleep and went back to bed. He stated Franks contacted him the next day and asked if he had talked to the police.

Officer Bryant Cheek testified he responded to the scene on January 31. He noted he encountered Tevin, who was nearby, on his way to the scene. Officer Cheek explained he recognized Tevin from coaching basketball and spoke to him briefly before proceeding to the scene. Upon arriving at the scene, Officer Cheek interviewed bystanders who had gathered there. He stated Franks was asked to come to the scene after law enforcement learned he was at James's home the night of the shooting. Officer Cheek questioned Franks and took his statement. The trial court admitted the statement into evidence over Franks's objection. Franks stated he was at James's the night before with Kinard, Tevin, James, and Leake. Franks stated that after Tevin left to take Kinard home, he stayed and talked to James and Leake until he called Tevin. According to Franks, Tevin then picked him up "at the top of the driveway" and they drove to Greenville. Franks stated he "[c]alled a girl he was going to see" but when she did not answer, he called Scurry and spent the night at Scurry's in Fountain Inn.

Franks and Tevin turned over their phones to law enforcement, who obtained search warrants to extract the data from the phones. A digital photo of a handgun was retrieved from Franks's phone. Law enforcement also obtained Franks's cell phone records from Verizon Wireless and searched his grandmother's home, where they found a pair of brown overalls, a backpack, and an elongated magazine for a firearm. The trial court admitted this evidence over Franks's renewed objections.

A crime scene investigator with the South Carolina Law Enforcement Division (SLED) testified she observed indications that a struggle had occurred in the home, including a rug that was folded over on itself, coffee mugs and picture frames on floor, and couch cushions that were off the couch. Officers swabbed several surfaces for DNA and collected projectiles, fragments of projectiles, a drug pipe, and cartridge casings from the scene. Two of these cartridge casings were admitted into evidence, but no firearms were found. SLED analysts tested the DNA evidence collected at the scene but were unable to identify any DNA profiles other than those matching the victims' DNA. Franks's overalls were tested for gunshot residue, but none was found.

The forensic pathologist who conducted the victims' autopsies explained James suffered a gunshot to the chest, angled downward sharply, and Leake suffered

gunshots to the head and neck, both angled upwards. He determined homicide to be the manner of death as to both victims because the wounds could not have been self-inflicted. The forensic pathologist recovered a projectile from James's back and discovered a deformed projectile loose in Leake's clothing as well as some fragments in the body bag.

Ira Parnell, formerly of SLED, testified as an expert in firearm and tool mark identification. Parnell examined the projectiles recovered from James's body and Leake's clothing, as well as two fired projectiles collected from the scene. He opined all four fired bullets were fired by the same firearm and were 9 millimeter Ruger caliber bullets. Parnell testified Ruger was one of about eighty possible manufacturers that might have made a weapon that could have fired those bullets. He identified the magazine recovered from Franks's backpack as an "extended high capacity magazine which appeared to be consistent with a 9 millimeter caliber" and opined it would "very possibly" be compatible with a Ruger 9 millimeter. Parnell also concluded the handgun in the digital photo retrieved from Franks's phone appeared to be a 9 millimeter Ruger.

Sergeant Dan Kelley, of the Greenville County Sheriff's Office, testified he had twenty-seven years of law enforcement experience. He explained he reviewed phone records as part of his job. Sergeant Kelley testified that when his office received phone records, the data was in "huge voluminous amount[s]" and took "weeks [or] months to sort through." He stated his office began using a software called GeoTime to "help speed things up." Sergeant Kelley testified GeoTime worked in conjunction with another program called a "call records tool" to sort the data into an easy-to-see format. He stated he had worked with cell phone technology and records for about fifteen years, with GeoTime for three to four years, and had used GeoTime in about fifty cases. Additionally, he stated he watched several of GeoTime's seminars. The State offered Sergeant Kelley as "an expert witness in the use of GeoTime software and call records translation tools."

During voir dire, Franks questioned Sergeant Kelley about the GeoTime software. He testified it was a PC-based software but was uncertain if it was "certified" by Microsoft; however, he noted he most commonly received cell phone records in Excel format. In describing how GeoTime functioned, Sergeant Kelley explained, "It's a basic function that when you bring the data in[,] it sorts it so that you can see it." He stated GeoTime was "widely used" in the law enforcement field and was "rapidly [becoming] the industry standard." In questioning Sergeant Kelley,

Franks stated, "I will assume you're very good at the use of GeoTime. But . . . are you able to testify as to the algorithms, the functioning, how it works as far as the reliability of the software?" Sergeant Kelley stated he could testify regarding the use of the software and the data it translated but not the algorithms it used. When questioned whether he had done any testing to "manually calculate and verify GeoTime data," he explained the data in phone records included latitude and longitude coordinates and he had used the wireless provider's mapping system, "Esri's" mapping system,[3] and Google "to see where the points would line up with the data . . . and the points were accurate." Sergeant Kelley explained he performed this "cross-checking" on "just about every case," and in this case, he used Google to verify the points were the same. He stated GeoTime consolidated the information received from the phone company to show only the necessary data, which it placed into a visual format. Sergeant Kelley explained the records normally included the latitude and longitude of each call, the caller number, the calling party's number, text numbers, and phone numbers. He testified the data he relied on was billing data that contained location data as to "where the handset [wa]s at the time the call was made." Sergeant Kelley stated this "real time transmission" data was also referred to as "ping" data and it refers to the signal that goes out from a handset at the time a phone call is initiated, "hits the tower," and is received back to the handset. He stated this "ping" showed the phone company's "best estimate" of where the handset was at the time it communicated with the tower. Although he averred that the billing data was "very accurate," he acknowledged the precise accuracy of the towers and data was "for an expert from Verizon to testify to."

Franks objected, arguing the data contained in the Verizon records was unreliable. He stated, "[M]y argument is not so much with GeoTime. It is with the data [that is fed] into GeoTime." Franks argued that if no expert from Verizon testified as to the accuracy of the data, there was no way to determine its reliability.

The trial court noted the records were already in evidence and explained that its gatekeeping function in a Rule 702, SCRE, reliability analysis was to determine whether the methodology, in this case, GeoTime, was a reliable and trusted method of obtaining relevant data or information. However, the court found Franks's

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[3] Sergeant Kelley stated Esri was "the recognized industry leader." Esri is a company that builds geographic information system (GIS) mapping and analytics software.

objection concerned "the data provided from the phone company," which was "completely separate" and the court noted Franks only objected to the admission of the underlying data on search warrant grounds and not reliability grounds. The trial court noted Franks did not contest the underlying reliability of GeoTime, and it then allowed Sergeant Kelley to testify as an expert in the use of GeoTime and other call record translation tools.

Sergeant Kelley testified that when he received Franks's call records data from Verizon, he placed the data into the call records translation tool along with the "cell tower file," which showed all of the cell towers that "were in play" when the phone was used and thus provided "geolocation" information for the cellphone. He explained that the information was merged in the call records translation tool, the phone call data was matched with the cell tower data, and entered into GeoTime. He stated GeoTime then plotted the exact points from the data onto a map in date and time order and created a visualization showing where the handset was "in relation to space and time." These visualizations were admitted into evidence without objection. Sergeant Kelley testified these showed three calls made at different times, all in different locations, and nothing in that information indicated the handset was ever in Greenville during that time. He stated that on January 31, 2014, the information placed the handset on John Grant Street in Cross Hill at 2:53:52 a.m., again in the Cross Hill area at 3:06 a.m., and in Fountain Inn at 4:04:43 a.m. On cross-examination, Sergeant Kelley acknowledged he could not state the accuracy of the pinpoint down to the foot, and it was only Verizon's best estimate of where the handset was at the time.

The State rested, and Franks renewed all prior motions and objections, which the trial court denied. The State then delivered its closing argument, and before Franks made his closing argument, the trial court held an off-the-record sidebar discussion with counsel. Thereafter, the trial court informed the parties it intended to add the "inference of malice language from the use of a deadly weapon" to its jury instruction concerning malice. The trial court reasoned that under its reading of *Belcher*,[4] the instruction "would be appropriate in this case" because no evidence was presented that tended to reduce the homicide from murder to voluntary or involuntary homicide. The court noted, "I do understand [Franks's] objection to that that he made at sidebar. Despite that objection, the [c]ourt has included that

[4] *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), *overruled in part by State v. Burdette*, 427 S.C. 490, 504-05, 832 S.E.2d 575, 583 (2019).

language." Franks then proceeded with his closing argument, and the trial court charged the jury. The court's instruction included the following:

> [T]he [d]efendant is charged with two counts of murder. The State must prove beyond a reasonable doubt that the [d]efendant killed another person with malice aforethought. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice and to your satisfaction, this inference would simply be an evidentiary fact to be considered by you along with the other evidence in this case and you may give it the weight you think it should receive.
>
> I instruct you . . . that malice is defined as hatred, ill-will or hostility toward another person. It[i]s the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict injury, or under circumstances the law will infer an evil intent. Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the [d]efendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> I instruct you that malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner by which malice may be shown to exist. That[i]s either by direct evidence or by inference from the facts and circumstances—circumstances which are proven. Expressed malice is shown when a person speaks words which express hatred or ill-will to another person, or when the person prepare [sic] beforehand to do the act that was later accomplished. For example, laying in w[ai]t for a person or any other acts in preparation going to show that the deed was within the [d]efendant's mind with the expressed malice.

> Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. . . . The following are examples of instruments . . . which may be deadly weapons[:] . . . [a] pistol, shotgun, [or] rifle.

Thereafter, Franks again noted his "objection to the malice." The trial court adhered to its earlier ruling. After about seven hours of deliberation over the course of two days, the jury found Franks guilty of both murders and the weapons charge. The trial court sentenced him to concurrent terms of forty-five years' imprisonment for each of the murder charges and five years' imprisonment on the weapons charge. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court abuse its discretion by qualifying Sergeant Kelley as an expert pursuant to Rule 702, SCRE, to testify regarding location data associated with Franks's cell phone?

2. Did the trial court err by instructing the jury "inferred malice may arise when the deed is done with a deadly weapon"?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

I. Expert Witness

Franks argues the trial court abused its discretion by allowing Sergeant Kelley to testify as an expert witness because it failed to determine he was qualified in the particular area or that the testimony was reliable. Franks contends that pursuant to

State v. White,[5] *Watson v. Ford Motor Co.*,[6] and *State v. Council*,[7] the CSLI evidence and opinion testimony was inadmissible through Sergeant Kelley because the underlying evidence was unreliable. He asserts the testimony prejudiced him because it allowed the State to argue the records corroborated Tevin's "otherwise questionable testimony." We disagree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015). We will not reverse the trial court's decision to admit expert testimony "absent a prejudicial abuse of discretion." *White*, 382 S.C. at 269, 676 S.E.2d at 686. "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Chavis*, 412 S.C. at 106, 771 S.E.2d at 338. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. As part of its gatekeeping duties pursuant to Rule 702, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. The trial court must then "evaluate the substance of the testimony and determine whether it is reliable." *Id.* "Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686.

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[5] 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (holding trial courts have a gatekeeping role pursuant to Rule 702, SCRE, and the court must assess the threshold foundational requirements of qualifications and reliability before admitting expert testimony).

[6] 389 S.C. 434, 446-47 699 S.E.2d 169, 175 (2010) ("[O]nly after the trial court has found that expert testimony is necessary . . . , the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.").

[7] 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (setting forth four factors the trial court should consider in admitting scientific evidence under Rule 702, SCRE).

> [Our supreme court has] listed several factors that the trial court should consider when determining whether scientific expert evidence is reliable:
>
> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Watson, 389 S.C. at 449-50, 699 S.E.2d at 177 (footnote omitted) (quoting *Council*, 335 S.C. at 17, 515 S.E.2d at 517); *see also id.* at 450 n.3, 699 S.E.2d at 177 n.3 (noting "[t]he test for reliability [of] expert testimony does not lend itself to a one-size-fits-all approach" but reasoning that when an expert's testimony was based on "scientific principles and theories," the *Council* factors were "applicable and relevant to the reliability determination").

> Courts are often presented with challenges on both fronts[:]qualifications and reliability. The party offering [an] expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to *qualifications*, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, *but only after making a threshold determination for purposes of admissibility*.

White, 382 S.C. at 273-74, 676 S.E.2d at 688 (emphases added).

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding*, 326 S.C. at 252-53, 487 S.E.2d at 598 (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)); *see also Fields*, 376 S.C. at 555, 658 S.E.2d at 85 ("A person may be qualified as an expert based upon 'knowledge, skill, experience, training, or education.'" (quoting Rule 702, SCRE)). "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Maybank*, 416 S.C. at 567, 787 S.E.2d at 511 (quoting *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004)).

We conclude the trial court did not abuse its discretion in finding Sergeant Kelley was qualified to testify as an expert in the use of GeoTime and other call records translation tools. First, the evidence shows he was qualified to testify about the applicable subject matter: GeoTime and call records translations. Sergeant Kelley testified he had fifteen years' experience working with call records and cell phone technology, observed several seminars about GeoTime, and used GeoTime in approximately fifty cases over the course of three or four years. This testimony supports the trial court's conclusion that Sergeant Kelley had the relevant experience, training, and skill to testify concerning GeoTime and other call records translation tools. *See Fields*, 376 S.C. at 555, 658 S.E.2d at 85 ("A person may be qualified as an expert based upon 'knowledge, skill, experience, training, or education.'" (quoting Rule 702, SCRE)).

Second, we find the trial court did not abuse its discretion in finding the substance of his testimony reliable over Franks's objection to the reliability of the underlying data. Here, Franks's argument at trial and on appeal concerns the reliability not of GeoTime, but of the underlying data. However, he did not object to the data on this basis during the suppression hearing or at the time the Verizon call records were introduced into evidence. Rather, his only objection to the records was based on his argument they were unlawfully obtained without a warrant, a ruling he does not challenge on appeal. Because the underlying data—the Verizon records—had already been admitted into evidence when the State offered Sergeant Kelley as an expert, Franks waived his challenge to the reliability of the data by failing to object at the time the State introduced the data. *See State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("Unless an objection is made at the time the evidence is

offered and a final ruling made, the issue is not preserved for review."); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[T]o preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."); *id.* ("Furthermore, a party may not argue one ground at trial and an alternate ground on appeal."). Therefore, we find Franks's objection to the reliability of the underlying data is unpreserved.

Even assuming the issue is preserved, the trial court did not abuse its discretion by finding the substance of the testimony was reliable. Sergeant Kelley explained the records normally included the latitude and longitude of each call, the caller number, the calling party's number, text numbers, and phone numbers. Although he could not testify to the precise accuracy of the location data down to the foot, he testified it was Verizon's best estimate of where the handset was at the time. Sergeant Kelley testified about his use of the GeoTime software to sort the information contained within the Verizon records, which included CSLI, and then display that information in a map format. We find the foregoing supports the trial court's finding the substance of the testimony was sufficiently reliable.

Further, as to any objection to the reliability of CSLI methodology, we find no error in the trial court's decision to admit the testimony. In reaching this conclusion, we emphasize this court recently "join[ed] the many other jurisdictions that have deemed CSLI reliable enough to pass the Rule 702 gate." *State v. Warner*, 430 S.C. 76, 89, 842 S.E.2d 361, 367 (Ct. App. 2020), *petition for cert. filed*, No. 2020-000930 (S.C. Sup. Ct. July 20, 2020). Here, Sergeant Kelley described the general science of geolocation based on CSLI. He explained that at the time a phone call is initiated, the cellular signal from the handset "hits the tower" is received back to the handset and then demonstrates the wireless provider's best estimate as to where the handset was at the time it communicated with the tower. Based on the foregoing, we find the trial court did not err by finding Sergeant Kelley's testimony concerning CSLI evidence and methodology was reliable. We therefore find the trial court did not abuse its discretion by admitting Sergeant Kelley's expert testimony.[8]

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[8] We need not reach the issue of prejudice because we have found no error. Nevertheless, we question whether Sergeant Kelley's testimony prejudiced Franks because it showed where he *was not* as opposed to where he was. In other words, it was not used to place him at the crime scene but to show he never travelled to

II. Jury Instruction

Franks argues the trial court erred by instructing the jury it could infer malice from the use of a deadly weapon because evidence was presented that would reduce, mitigate, excuse, or justify the homicide. He asserts the instruction could not have been harmless because the State presented no evidence of motive, the evidence as to the identity of the shooter was purely circumstantial, and the jury deliberated for two days before reaching a verdict. In addition, he contends the record contained evidence that a third party was the shooter. We agree but find the error was harmless.

The State first argues Franks failed to preserve this issue for appellate review. It next argues that pursuant to *Belcher*,[9] the instruction was not erroneous because no evidence was presented that would "'reduce, mitigate, excuse, or justify a homicide' committed by use of a deadly weapon."

Recently, in *Burdette*, our supreme court extended *Belcher* and held, "*Regardless of the evidence presented at trial*, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon." 427 S.C. at 504-05, 832 S.E.2d at 583 (emphasis added). The court explained,

> When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in

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Greenville after he left James's residence. Further, it was cumulative to Tevin's testimony that he drove Franks to Fountain Inn and not to Greenville. *See State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence.").

[9] 385 S.C. at 612, 685 S.E.2d at 810 (holding "whe[n] evidence is presented that would reduce, mitigate, excuse or justify a homicide . . . caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon" and clarifying "[t]he permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law whe[n] the only issue presented to the jury is whether the defendant has committed murder"), *overruled in part by Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583.

> evidence, elevated those facts, and emphasized them to the jury.

Id. at 502, 832 S.E.2d at 582. Thus, the court concluded an "instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." *Id.* at 503, 832 S.E.2d at 582. The court stated this ruling was to be effective in those cases pending on direct review "so long as the issue is preserved." *Id.* at 505, 832 S.E.2d at 583.

To preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). "Generally, this [c]ourt will not consider issues not raised to or ruled upon by the trial [court]." *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). Exact phrasing of the relevant legal doctrine is not necessary to preserve an issue when "it is clear from the argument presented in the record that the motion was made on this ground." *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001).

The *Burdette* opinion was not filed until after the parties here filed their briefs. In advance of oral argument, this court requested the parties file memoranda addressing its impact on this appeal. Franks argued that pursuant to the holding in *Burdette*, the instruction was erroneous regardless of whether there was any evidence to reduce, mitigate, excuse, or justify the homicide. The State reiterated its preservation argument and argued any error was harmless. We find Franks preserved the issue for appellate review. Franks objected during an off-the-record sidebar after which the trial court acknowledged his objection but stated it would include the inference of malice language in its charge. The trial court referenced *Belcher* and reasoned the inference of malice instruction was appropriate "because there[wa]s no evidence tending to reduce the homicide to a voluntary or an involuntary homicide." After the trial court charged the jury, Franks renewed his objection "to the malice," which the court again overruled, referencing its earlier ruling. The State acknowledged Franks objected to the inferred malice instruction

"for the reasons . . . [he gave] at the unrecorded sidebar." We find Franks timely objected and the trial court ruled on the objection. Although Franks did not place his specific grounds for objection on the record, we can infer from the trial court's ruling that Franks argued that pursuant to *Belcher* an inferred malice charge was improper when evidence is presented that would tend to reduce, mitigate, justify, or excuse the homicide. This is the same argument Franks raised on appeal. Further, we acknowledge the record does not show Franks argued that the charge would be inappropriate regardless of the evidence. However, because we find Franks objected to the instruction based on *Belcher*, and *Burdette* subsequently extended *Belcher*, we find it was sufficient that Franks objected to the malice instruction and the court ruled on the objection. *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("It cannot be said that [the a]ppellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, 'whe[n] the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'" (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d, 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part))), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019). We therefore reach the merits of Franks's argument.

Pursuant to *Burdette*, we find the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon. *See Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583. Nevertheless, under the circumstances of this case, we find the error was harmless beyond a reasonable doubt.

"[E]rroneous jury instructions[] are subject to harmless error analysis." *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809); *see also State v. Brooks*, 428 S.C. 618, 627, 837 S.E.2d 236, 241 (Ct. App. 2019) ("Most trial errors, even those [that] violate a defendant's constitutional rights, are subject to harmless-error analysis." (alteration in original) (quoting *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013))). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). Further, to determine whether an error in giving the instruction was harmless, we must consider the jury charge as a whole. *Burdette*, 427 S.C. at 498,

832 S.E.2d at 580. "We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218. "[O]ur inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* "[W]hether or not the error was harmless is a fact-intensive inquiry." *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435.

Considering the trial court's instruction as a whole and the facts the jury heard, we find the erroneous instruction did not contribute to the verdict rendered. *See Kerr*, 330 S.C. at 144-45, 498 S.E.2d at 218 ("[T]o find the error harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."). Here, the record contains no evidence the erroneous instruction confused or misled the jury. Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the "intentional doing of a wrongful act without just cause or excuse[] and with an intent to inflict an injury" and that malice could be inferred from conduct showing a total disregard for human life. The trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse, or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence concerning the shooter's intent was presented. Furthermore, the jury submitted three questions to the trial court during deliberations and none of these concerned malice. Although we are mindful that the instruction is now improper regardless of the evidence presented at trial, as Franks points out, his defense focused on discrediting the State's theory that he was the shooter and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling. We acknowledge malice is an element of murder, meaning the State has the burden of proving that element beyond a reasonable doubt. Nevertheless, because the pivotal question before the jury in this case was whether Franks was the shooter and no evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the instruction was not misleading or confusing. Accordingly, we find, beyond a reasonable doubt, the erroneous instruction did not contribute to the verdict and does not require reversal.

Further, notwithstanding no evidence of an actual motive was presented and the evidence against Franks was circumstantial, there was overwhelming evidence of

malice apart from the mere use of a deadly weapon. The victims were shot while they were inside of their home, the crime scene investigator testified the appearance of the room where they were found suggested a struggle had taken place, and there was no evidence either victim had been armed. Several witnesses testified concerning Franks's state of mind on the night of the shootings. Pulley, Tevin, and Kinard all testified he was "loud" and "hyped" or "amped." Kinard recalled Franks confronting James earlier that night about something James had posted on social media, although according to Kinard, the tension appeared to have resolved a short time later. According to Tevin and Kinard, Franks was the only person who stayed behind with James and Leake, and Tevin testified that when Franks found him later that night, Franks said "stuff went bad." Tevin stated Franks then asked him to drive him to Greenville, but while they were on the way, Franks asked him to go to Scurry's house in Fountain Inn instead. He recalled that during the car ride back the next morning, Franks said, "[w]e got to get the guns out the house." Tevin explained Franks told him to lie to police by telling them that after he dropped Kinard off, he picked up Franks and they drove to Greenville. Based on the foregoing, we find the evidence of malice was overwhelming such that the erroneous inference of malice instruction was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we conclude the trial court did not abuse its discretion by admitting Sergeant Kelley's expert testimony and the erroneous jury instruction was harmless beyond a reasonable doubt. Therefore, Franks's convictions are

AFFIRMED.

KONDUROS and HILL, JJ., concur.