The Supreme Court of South Carolina

In the Matter of Brian T. Frutig, Petitioner

Appellate Case No. 2015-000082

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 11, 2010, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 15, 2015, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Brian T. Frutig shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 23, 2015

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of Kristie Ann McAuley

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 in this regard on March 24, 2015, beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Susan Taylor Wall, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

January 21, 2015

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

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N O T I C E

In the Matter of Robert A. Gamble

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January 21, 2015

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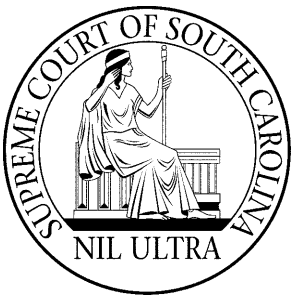

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 28, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Behrooz Taghivand, Plaintiff,

v.

Rite Aid Corporation, Eckerd Corporation, d/b/a Rite Aid, and Steve Smith, Defendants.

Appellate Case No. 2014-000073

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Richard M. Gergel, United States District Judge

Opinion No. 27485
Heard September 23, 2014 – Filed January 28, 2015

CERTIFIED QUESTION ANSWERED

Allan R. Holmes, Sr. and Timothy O. Lewis, both of Gibbs & Holmes, of Charleston, for Plaintiff.

Benjamin P. Glass and Luci L. Nelson, both of Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., of Charleston, for Defendants.

JUSTICE HEARN: This certified question from the federal district court asks us to delineate the parameters of the public policy exception to the doctrine of at-will employment. Specifically, this question requires us to consider whether the public policy exception is broad enough to permit a cause of action in tort for employees who are terminated for reporting a suspected crime, in this case, shoplifting. We hold it does not.

FACTUAL/PROCEDURAL HISTORY

The facts are drawn from the district court's certification order. Behrooz Taghivand was the manager of a Rite Aid store in a high crime area of North Charleston, South Carolina. While on duty, Taghivand observed a patron acting strangely and milling around the store with no apparent purpose. The patron stopped briefly in the section directly in front of the cashier, selected a few items, and made a purchase. After the patron checked out, the cashier told Taghivand that when the patron entered the store, he was carrying a bag that appeared to be empty but now had items in it.

Taghivand instructed the cashier to call the police. An officer arrived at the scene and gathered together the items the patron claimed he purchased from the store, and Taghivand confirmed these as belonging to the patron. The officer also searched the patron's bag, and found it contained only dirty clothes.

Taghivand was terminated effective that day, and was informed the incident was the reason for his termination. As a result, Taghivand filed this action against Rite Aid Corporation, Eckerd Corporation d/b/a Rite Aid, and Steve Smith in federal court for wrongful termination; the defendants moved to dismiss. After finding that South Carolina law was not clear on the issue raised by the motion to dismiss, the district court certified this question.

CERTIFIED QUESTION

Under the public policy exception to the at-will employment doctrine in South Carolina, does an at-will employee have a cause of action in tort for wrongful termination where (1) the employee, a store manager, reasonably suspects that criminal activity, specifically, shoplifting, has occurred on the employer's premises, (2) the employee, acting in good faith, reports the suspected

criminal activity to law enforcement, and (3) the employee is terminated in retaliation for reporting the suspected criminal activity to law enforcement?

LAW/ANALYSIS

Taghivand first argues that there are specific statutory and common law authorities which establish a clear mandate of public policy favoring the reporting of crimes, and second, that there is a general public policy favoring the reporting of crimes inherent in the functioning of this state's criminal justice system. We find neither of these arguments availing.

South Carolina has a strong policy favoring at-will employment. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999). As we have explained before, "the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development." *Id.* Accordingly, absent a contractual provision to the contrary, an employee may be terminated at any time for any reason or no reason, with or without cause. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011).

However, our adherence to the at-will employment doctrine is not without limits. Under the public policy exception, an employee who is terminated in violation of a clear public policy may pursue a cause of action in tort for wrongful termination. *Ludwig v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Courts have invoked the public policy exception in two instances: (1) where an employer requires an employee, as a condition of continued employment, to break the law, *see id.*, and (2) where an employer's termination is itself illegal, *see Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992). While we have made clear that the exception "is not limited to these situations," we have specifically recognized no others. *Barron,* 393 S.C. at 614, 713 S.E.2d at 637.

We exercise restraint when undertaking the amorphous inquiry of what constitutes public policy. As the United States Supreme Court has recognized, "public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, *only with the utmost circumspection*." *Patton v. United States*, 281 U.S. 276, 306 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970) (emphasis added). This

comports with our understanding that "[t]he primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925).

Taghivand points to three specific statutory and common law authorities which he argues establish the basis for a public policy exception to protect the good faith reporting of suspected crime: Section 16-9-340 of the South Carolina Code (2003), common law obstruction of justice, and Section 16-3-1505 of the South Carolina Code (2003). We disagree that any clear or articulable public policy emanates from these authorities.

Section 16-9-340 reads in pertinent part: "It is unlawful for a person by threat or force to . . . intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness . . . in the discharge of his duty as such." § 16-9-340(A)(1). Taghivand's argument is that section 16-9-340 protects those involved in legal proceedings—potential witnesses included—from intimidation or interference that is connected with their role in the proceedings. As an extension, Taghivand argues that the public policy behind this statute should give rise to his cause of action for wrongful termination.

The fallacy underlying Taghivand's argument is that his employer terminated him *in response* to the reporting of a crime, not to influence or impede his further involvement in any proceeding related to that crime. The thrust of Taghivand's argument is not that section 16-9-340 applies to him as a potential witness in the reported shoplifting, but rather, that a broad public policy favoring the reporting of crimes can be derived from the legislature's decision to protect potential witnesses. We find the plain language of the statute does not support his assertions. Taghivand was not prevented by threat or force from participating in a legal proceeding; he was discharged for incorrectly reporting a crime. Without a more definite statement from the General Assembly that the reporting of crime should be protected, we refuse to read such a policy into this statute.[1]

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[1] This is the same reasoning applied in the authority from Maryland cited by Taghivand. Although Maryland's highest court found the public policy exception to apply where an employee was fired after reporting a suspected crime, the statute it relied upon, while similar to that which exists in South Carolina, also protects those people "reporting a crime or delinquent act." *Wholey v. Sears Roebuck*, 803

Taghivand also argues to the extent section 16-9-340 does not lay out a general public policy favoring the reporting of suspected crime, its common law equivalent does. He bases this assertion on the offense of obstruction of justice, which criminalizes doing "any act which prevents, obstructs, impedes, or hinders the administration of justice." *State v. Codgell*, 273 S.C. 563, 567, 257 S.E.2d 748, 750 (1979). However, he is not arguing his employer obstructed justice in this case; rather, his argument is that a broad public policy protecting those who report suspected crimes can be read from the common law of obstruction of justice. Accordingly, for the same reason as above, we find his argument unpersuasive.

As to section 16-3-1505, which is the legislative intent section of the Victim and Witness Service Act, Taghivand argues it lays out a general public policy favoring the reporting of suspected crimes. The relevant part of the section reads:

> In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants . . . .

§ 16-3-1505. As this Court has recognized, the primary purpose of the Victim and Witness Service Act is to ensure "victims are informed of their rights and any

---

A.2d 482, 498, 500 (Md. 2002). In fact, in an earlier case interpreting the Maryland statute *before* it was changed to apply to those who reported suspected crimes, the same court refused to recognize a public policy exception. *Adler v. Am. Standard Corp.*, 432 A.2d 464 (Md. 1981). The change in the statute by the legislature was the basis of the Maryland court's later decision, and we apply the same judicial restraint today.

alternative means that might be available to them if the criminal prosecution is unable to meet their needs." *Ex Parte Littlefield*, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000). Thus, while the legislative intent section indicates the General Assembly recognizes the importance of the people's civic duty to cooperate with law enforcement, there is no indication the General Assembly intended this concept to extend outside the context of the ongoing criminal proceeding at the heart of this statute. Accordingly, we also find this argument without merit.

Finally, we are unpersuaded by Taghivand's argument that there is a general mandate of public policy for the reporting of crimes inherent in the functioning of this state's criminal justice system. This argument is derived from the holding in the split decision of *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981). In *Palmateer*, a manager was terminated after reporting an employee to law enforcement for a violation of the criminal code. *Id.* at 877. Recognizing public policy to be an amorphous concept, the court determined that a matter "must strike at the heart of a citizen's social rights, duties, and responsibilities" to rise to the level of public policy. *Id.* at 878–79. Further, the court held "[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens," and thus although "[n]o specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime . . . public policy nevertheless favors citizen crime-fighters." *Id.* at 879–80.

In one of two *Palmateer* dissents, Justice Ryan stated that the question of public policy is first and foremost a matter of legislative concern. *Id.* at 881. His dissent criticized the majority for recognizing a public policy based not in any expression by the legislature, but rather in the vague concept of citizen crime fighting. *Id.* at 882. While his dissent found the reporting of suspected crime to be "praiseworthy," it concluded the decision of an employer to terminate an employee for this reason does not bring the behavior "within the area of any public policy that has been articulated by the legislature." *Id.* at 884. The dissent's reasoning has been adopted by other courts. *See Hayes v. Eateries, Inc.*, 905 P.2d 778, 786 (Okla. 1995) ("Although we believe most people, including members of this Court, would agree that, generally speaking, the reporting of crimes to appropriate law enforcement officials should be lauded and encouraged . . . we must decide in this case whether the reporting of this particular crime against this particular victim . . . is so imbued with a clear and compelling public policy such that a tort claim is stated if the employer discharges the employee for so reporting. In our view, such

reporting is not so protected."); *Wholey*, 803 A.2d at 498 ("[W]e decline to create a tort cause of action based *solely* on transcendental notions of that which is in the public interest, particularly when our own legislature has declined to make individual citizens criminally responsible for failing to investigate or report criminal activity.").

Given our deference to the General Assembly in matters of public policy, we decline to adopt the *Palmateer* majority's reasoning. Unquestionably, society benefits from citizen participation in the criminal justice system, and no one can reasonably dispute that reporting the commission of a crime is a commendable act. However, the question before us today is not whether this state applauds citizen participation in the criminal justice system, but whether this interest mandates an exception to the at-will employment doctrine.

Moreover, the public policy of this state finds expression in our longstanding adherence to at-will employment; any exception to this doctrine, which is itself firmly rooted in the public policy of this state, should emanate from the General Assembly, and from this Court only when the legislature has not spoken. Absent a more clear and articulable definition of policy from the General Assembly regarding those who report suspected crimes, we refuse to broaden the exception to the at-will employment doctrine today.

CONCLUSION

For the above stated reasons, we answer the certified question: no.

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

JUSTICE PLEICONES: I agree with the majority that we should answer the certified question "No." I write separately to express my belief that this Court has the authority to create a public policy exception to the common law at-will employment doctrine,[2] even in the absence of legislative action. *E.g., Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 752 (1992) (Court will not hesitate to change common law "when public policy is offended by outdated rules of law").

[2] *E.g. Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985) (court recognized exception to at-will employment doctrine where employee's retaliatory discharge violated clear public policy).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, L.L.C., William McKown, and Charles A. Christenson, Defendants,

of whom BADD, L.L.C. and William McKown are Respondents.

BADD, L.L.C. and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2013-000107

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27486
Heard December 10, 2014 – Filed January 28, 2015

REVERSED

Thomas Wm. McGee, III, C. Mitchell Brown, Allen Mattison Bogan, all of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Petitioner.

Richard R. Gleissner, of Gleissner Law Firm, L.L.C., of Columbia, for Respondents.

JUSTICE PLEICONES: In this mortgage foreclosure action, the Court granted Carolina First Bank's ("the Bank") petition for a writ of certiorari to review the Court of Appeals' decision in *Carolina First Bank v. BADD, L.L.C.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012), which held William McKown[1] is entitled to a jury trial. We disagree and therefore reverse the decision of the Court of Appeals.

Procedural History

BADD, L.L.C. ("BADD"), purchased three warehouse units in Myrtle Beach. To finance the transaction, BADD executed two promissory notes. A personal guaranty was also executed by McKown, who was a member of BADD. After BADD defaulted, the Bank brought this foreclosure action and included McKown as a party pursuant to S.C. Code Ann. § 29-3-660 (2007) based on his status as a guarantor.

In McKown's amended answer and counterclaim, he demanded a jury trial because the Bank sought a money judgment for the breach of a guaranty arrangement. McKown further sought an accounting and a determination that the guaranty agreement was unconscionable. McKown then asserted two counterclaims—(1) civil conspiracy and (2) breach of contract—both based on an alleged conspiracy

[1] While BADD also joined McKown in his demand for a jury trial, the Court of Appeals' decision turns on McKown's right to a jury trial. Therefore, we address the merits of that decision with respect to McKown.

between the Bank and William Rempher. Finally, McKown asserted third-party claims against Rempher.[2]

The Bank moved for an order of reference. The circuit granted the motion, referring the matter in its entirety to the master-in-equity.

The Court of Appeals reversed, holding McKown was entitled to a jury trial because the Bank's claim on the guaranty agreement was a separate and distinct legal claim.[3] *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 620.

We granted the Bank's petition for a writ of certiorari to review the Court of Appeals' decision.

Issue Presented

> Did the Court of Appeals err in finding McKown was entitled to a jury trial?

Standard of Review

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Court of Appeals' decision. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

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[2] There is no question these third-party claims are permissive and do not entitle McKown to a jury trial. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims are permissive and a party waives his right to a jury trial by asserting them in a foreclosure action).

[3] The Court of Appeals also found McKown was entitled to a jury trial based on his counterclaims, but that finding relied on the threshold holding that the Bank's action on the guaranty agreement was separate and distinct from the foreclosure action. *See Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 621.

Law/Analysis

The Court of Appeals held that when a lender exercises its statutory right to join a guarantor as a party to a foreclosure action in order to seek a deficiency judgment, the guarantor has a right to a jury trial. The Bank contends this was error. We agree.

I. Guarantor's Right To A Jury Trial When A Bank Seeks A Deficiency Judgment Pursuant to § 29-3-660.

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). "Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

McKown was joined as a party to the foreclosure action pursuant to S.C. Code Ann. § 29-3-660 (2007). Section 29-3-660 provides:

> In actions to foreclose mortgages . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and *the court may adjudge* payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

(Emphasis supplied). This statute is derived, in part, from the Act of 1791, which vests exclusive jurisdiction in courts of equity for foreclosure actions. *See, e.g.*, *Williams v. Beard*, 1. S.C. 309, 324 (1870) (discussing the Act of 1791 and the role it played in vesting courts of equity with jurisdiction to decide mortgage-related disputes). The power to render a deficiency judgment is included within the

jurisdiction of courts of equity. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978) (recognizing that a deficiency judgment is incidental to the relief sought in a foreclosure action and that the Act of 1791 integrated the two for purposes of characterizing the action as equitable); *see also* 27 S.C. Jur. *Mortgages* § 103 (1996) ("Mortgage foreclosures are partly in rem . . . and partly in personam . . . ; however, the strict distinction between such designations was abandoned by the Act of 1791. . . . The court's in personam jurisdiction to enter a deficiency judgment does not alter the equitable character of the [foreclosure] action.").

Here, it is clear the Bank included McKown as a party to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged. The Bank's action does not alter the equitable character of the action. *See Perpetual Bldg. & Loan Ass'n of Anderson*, 270 S.C. at 342, 242 S.E.2d at 409. Likewise, § 29-3-660 states, in part, that it is for the court to adjudge a deficiency. This statute, with its origins pre-dating the enactment of our Constitution, illustrates that a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment. *See also* 27 S.C. Jur. *Mortgages* § 103 (stating mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed). We therefore hold McKown is not entitled to a jury trial solely based on the Bank's inclusion of him as a party pursuant to § 29-3-660.

Accordingly, we reverse the Court of Appeals' holding that McKown was entitled to a jury trial solely based on the Bank's inclusion of McKown as a party to obtain a possible deficiency judgment. That holding conflicts with § 29-3-660, which confers upon *the court* the power to adjudge a deficiency.

Having determined McKown is not entitled to a jury trial for the reason relied on by the Court of Appeals, we address whether McKown is entitled to a jury trial based on his counterclaims. We do so in the interest of judicial economy as this issue was not addressed squarely by the Court of Appeals.

II. McKown's Right To A Jury Trial Based On His Civil Conspiracy And Breach of Contract Counterclaims.

The Bank argues the Court of Appeals erred because McKown's counterclaims, while legal, are permissive and thus, McKown waived his right to a jury trial by

asserting them in this equitable suit. We agree.

McKown is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory. *See* Rule 13(a), SCRCP. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note).

Given this framework, we determine whether McKown's legal counterclaims are compulsory.

a. Civil Conspiracy

McKown's civil conspiracy counterclaim is based on an alleged conspiracy between the Bank and Rempher. McKown contended that two years after the execution of the notes and guarantees, Rempher was substituted in Christensen's place as a member of BADD and began collecting rents from the income-producing warehouse units. Allegedly, Rempher had an ownership interest in other warehouse units not purchased by BADD and as a result, conspired with the Bank to induce BADD's default by directing potential tenants away from renting the properties. McKown further claimed Rempher intentionally failed to make payments on the note even though sufficient funds were available because Rempher wanted to purchase the three warehouse units at a below market value, foreclosure sale.

Here, the execution of the guaranty agreements was the "transaction or occurrence" that gave rise to McKown's inclusion in the Bank's foreclosure complaint. McKown's civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06; *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), *aff'd in part,*

vacated on other grounds, 320 S.C. 532, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). In other words, the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable. We therefore hold McKown waived his right to a jury trial by asserting the civil conspiracy counterclaim in a foreclosure action because the claim is permissive as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

b. Breach of Contract

The breach of contract claim is based on an allegation that Rempher agreed to obtain financing for the three units BADD mortgaged. The only allegation specific to the Bank is that the Bank breached its covenant of good faith and fair dealing implied in the note, mortgage, and guaranty agreements based on the Bank's purported conspiracy with Rempher. Again, the "transaction or occurrence" for the purpose of determining the compulsory character of McKown's counterclaim is the execution of the guaranty agreements. McKown's "breach of covenant of good faith and fair dealing" claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action. *Cf. Advance Int'l, Inc.*, 316 S.C. at 270–71, 449 S.E.2d at 582–83.

Conclusion

We reverse the Court of Appeals as McKown is not entitled to a jury trial solely because the Bank exercised its statutory right to join him as a party in the event of a deficiency judgment. We further hold McKown is not entitled to a jury trial based on his counterclaims, which, while legal, are permissive. McKown waived his right to a jury trial by asserting permissive counterclaims in an equitable action. Accordingly, the effect of our decision affirms the circuit court's decision, which referred this matter in its entirety to the master-in-equity.

The Court of Appeals decision is therefore

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jaquwn Brewer, Appellant.

Appellate Case No. 2012-208487

Appeal from Beaufort County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27487
Heard April 1, 2014 – Filed January 28, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James A. Brown, Jr., of Beaufort, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, Respondent.

JUSTICE KITTREDGE: Appellant Jaquwn Brewer was convicted of multiple charges in connection with the shooting of two individuals at a nightclub. This direct appeal concerns the admission of Brewer's unredacted audiotaped interrogation by the police. The admission of Brewer's interrogation was error.

We nevertheless affirm Brewer's convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime, for the error was harmless with respect to these charges. We reverse the murder conviction and remand for a new trial.

I.

On May 23, 2009, a large group of people gathered at the Semper Fi Club (the Club) in Beaufort County, South Carolina, for a party. After midnight, as the party continued, law enforcement officers responded to a shooting at the Club. Two individuals were shot, one fatally. The investigation revealed that the first shooting occurred inside the Club and the second shooting occurred moments later in the Club parking lot.

A.
The First Shooting

Brewer and several of his companions were posing for photographs inside the Club. The photographer, Gary Bright, and several other attendees noticed that Brewer was posing with a handgun. A photograph introduced at trial confirmed that Brewer had a handgun in the front waistband of his pants. One of the organizers of the party, Deon Stevenson, was alerted, and he asked Brewer to take the gun out of the Club. Brewer responded by pulling out the handgun and pointing it at Stevenson's head, which others in the Club witnessed.

Immediately thereafter, Brewer shot his gun inside the Club, hitting Donald Parker, who was standing near the photo booth. There were numerous witnesses to the shooting of Parker. Parker survived the shooting. Brewer was charged with assault and battery with intent to kill and possession of a weapon during the commission of a violent crime as a result of shooting Parker.

B.
The Second Shooting

Patrons, including Brewer, fled the Club after the first shooting. Moments later, more shots were fired outside the Club in the parking lot by at least two individuals, including Brewer and Dominique Middleton. Henry Jones was

standing in the entrance to the Club dialing 911 when a stray shot from the parking lot struck and killed him. Brewer was charged with murder for the killing of Jones.

C.
The Investigation

Law enforcement recovered numerous shell casings. One was found on the floor inside the Club, one directly outside the exit, one near the road, and eight on the left side of the parking lot next to a red laser sight. The investigation revealed that the laser sight was part of Middleton's gun. Trace metals and gunshot residue were found on the pants Brewer was wearing. The physical evidence showed that the bullets recovered from the victims were likely fired from a .45 caliber, semi-automatic handgun. However, a comparison of the bullets was inconclusive, and the SLED firearms examiner could not determine whether the bullets were fired from the same handgun. Despite learning from many witnesses that there were at least two shooters in the Club parking lot, investigators pursued Brewer as the only suspect.[1]

In an interview at the Beaufort County Sheriff's Office, Brewer waived his *Miranda*[2] rights and agreed to speak with investigators. The recording of this interview, including the interrogators' hearsay-laden questions and comments, was played for the jury. The investigators informed Brewer that many witnesses observed him shoot both victims, which was true only with respect to the shooting of Parker inside the Club. Brewer denied involvement in either shooting, and approximately twenty minutes into the interview, Brewer told investigators that he wanted to end the interrogation. Yet the interrogation continued.[3] The

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[1] Investigators claimed they attempted to locate Middleton but were unsuccessful and quickly abandoned their efforts. Middleton was never charged in connection with the shootings.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] The impropriety of law enforcement continuing a custodial interrogation following the accused's exercise of his right to terminate the interrogation is not before us.

investigators employed various tactics to extend the interrogation, including bringing Brewer's mother into the room and repeatedly telling Brewer that he should "prove himself innocent" by turning in his handgun, all of which was audiotaped and played to the jury, over Brewer's objection.

We believe it is helpful to examine a sampling of the interrogation. Early on, Brewer stated multiple times he was "ready to go." Brewer reminded the officers that they said he could stop the questioning at any time. When Brewer continued to ask that the interrogation stop, an investigator answered, "No." Brewer finally stated, "Man, I don't wanna talk no more." The investigator responded that if Brewer were innocent, he could prove his innocence by producing his gun. The interrogation's mantra of demanding Brewer prove his innocence continued unabated,[4] even after Brewer repeatedly said, "I can't say no more."

Brewer moved, on the basis of hearsay, to have the investigators' statements redacted from the audiotaped recording of his interrogation. The trial court denied Brewer's request. Brewer was convicted on all charges. We certified his direct appeal to this Court pursuant to Rule 204(b), SCACR.

II.

"'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.'" *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). Here, the admission of the unredacted audiotaped interrogation was an abuse of discretion.

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[4] Examples include statements to the effect that, "If you didn't do anything, that gun will prove it," and "If that is not the gun that shot somebody, then we can prove it," as well as "If you didn't do anything, you should have that gun. This is it. Prove it. You can prove your innocence." Officers also stated, "Proving yourself innocent should be, you know, that would be my first priority," and "If you didn't shoot, that gun will prove it. That gun will absolutely, positively . . . I'm saying that gun will prove you are absolutely innocent," along with "Help me prove you innocent," and "You're the only one here that—and you just absolutely don't want to prove yourself innocent." The final statement by an investigator was, "The point of my story is you can help yourself. Why don't you?" As noted, Brewer's objection to this evidence was overruled.

A.

We acknowledge the propriety of law enforcement interrogation techniques, including misrepresenting the existence and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily. *See State v. Von Dohlen*, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996) ("Both this Court and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible." (citations omitted)). Such matters are typically examined *in camera* when the trial court is making a preliminary determination as to the admission of a confession. *See Jackson v. Denno*, 378 U.S. 368, 380 (1964) ("A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined."). But such evidence will rarely be proper for a jury's consideration.

During the interrogation, investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) ("Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" (quoting Rule 801(c), SCRE)). The suggestion that this evidence served a nonhearsay purpose is patently without merit. *See Ezell v. State*, 345 S.C. 312, 315, 548 S.E.2d 852, 853 (2001) (finding out-of-court statements on an audiotape identifying the defendant as a drug dealer were inadmissible hearsay); *see also Windhom v. State*, 729 S.E.2d 25, 29 (Ga. Ct. App. 2012) (holding that an officer's statement during an interrogation that the victim believed that Appellant had acted in concert with other criminals was inadmissible hearsay); *Smith v. State*, 721 N.E.2d 213, 216 (Ind. 1999) (rejecting the State's argument that during an interrogation police questions and comments designed to elicit responses from the defendant constituted nonhearsay).

Indeed, we find no support in the law for the State's argument that the interrogators' statements were admissible for purposes of context or for the effect the statements had on Brewer. *See United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("So to what issue *other* than truth might the testimony have been

relevant? . . . Allowing agents to narrate the course of their investigations, and thus spread before juries *damning information* that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and the hearsay rule." (second emphasis added)). The only effect these statements had on Brewer was to make him repeatedly deny shooting anyone. The meaning of these repeated denials is obvious and requires no explanatory context. The effort by the State to rescue the admission of this unmistakable hearsay must be rejected.

We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial. As recognized by the North Carolina Court of Appeals, however, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either "admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay." *State v. Miller*, 676 S.E.2d 546, 556 (N.C. Ct. App. 2009). To that end, "we would like to remind trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court." *Id*. (noting "the wholesale publication of a recording of a police interview to the jury, especially law enforcement's *investigatory questions*, might very well violate the proscriptions against admitting hearsay or Rule 403" and cautioning trial courts to be vigilant in redacting and excluding problematic portions of law enforcement's investigatory questions (emphasis added)).

Beyond the hearsay error, we wish to briefly comment on the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's *ad nauseam* insistence that Brewer prove his innocence has *no* place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. *See* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979) (noting that the Fourteenth Amendment requires that "the State prove every element of a criminal offense beyond a reasonable doubt").

We now turn to the State's alternative argument that any error was harmless in view of the overwhelming evidence of Brewer's guilt.

B.

The "[i]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *Jennings*, 394 S.C. at 478, 716 S.E.2d at 93 (citing *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010)). "Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors." *Id*. "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). For example, "[i]mproperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *Jennings*, 394 S.C. at 478, 716 S.E.2d at 93–94 (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). A careful review of the evidence convinces us the error was harmless in connection with the first shooting inside the Club, but not harmless concerning the second shooting in the parking lot of the Club.

The evidence of Brewer's guilt is overwhelming as to the shooting of Parker inside the Club. The State introduced a photograph showing the gun in Brewer's waistband. Corroboration is found in the testimony of the many witnesses who were inside the Club. For example, Bright, the photographer, saw Brewer draw his weapon and point it at Stevenson, one of the organizers of the party. Immediately thereafter, Bright heard gunshots. Several witnesses saw Brewer shooting inside the Club, all of whom testified and were subject to cross-examination. By all accounts, there was only one shooter inside the Club—Brewer. Accordingly, we find that the error in the admission of the interrogators' statements was harmless beyond a reasonable doubt as it relates to the assault and battery with intent to kill and weapon charges. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))); *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence." (citing *Blackburn*, 271 S.C. at 329, 247 S.E.2d at 337)).

The evidence regarding the second shooting stands in stark contrast, providing at best only a thin, circumstantial case against Brewer for Jones's murder. The shot that killed Jones came from the parking lot where Brewer and Middleton were both shooting their guns. Despite acknowledging that Middleton was shooting a handgun with a laser sight in the parking lot and that eight shell casings were recovered next to the laser sight,[5] the lead investigator testified that he "didn't identify any other suspects" aside from Brewer. Given the presence of at least two shooters in the parking lot, and the lack of direct evidence pointing conclusively to Brewer as the one who fired the fatal shot, we hold that the admission of the challenged statements cannot be deemed harmless.

III.

We hold it was error to admit the challenged statements. We conclude, however, that the error was harmless as it relates to the assault and battery with intent to kill and gun charges. Regarding the murder charge, we reverse and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

[5] Those shell casings were never tested for evidentiary value or sent to SLED for analysis.

JUSTICE PLEICONES: I respectfully dissent and would affirm both of appellant's convictions. I emphasize that my dissent is confined to the sole issue raised by appellant in his brief, which alleges error in the trial court's admission of certain hearsay statements.

In brief, appellant contends that the trial judge erred in admitting eight statements made by the detective during the course of appellant's more than hour long interrogation.[6] Appellant contends, and I agree, that these

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[6] These are the eight statements, including the time during the interrogation at which they were made, as reproduced in appellant's brief:

4:00-4:30	"Word is you have been identified as somebody who did some shooting yesterday." …. "There's a bunch of people identified you…" ….
5:25-5:39	"When we was at the Shriner's club on May 24, [witness name] and my boyfriend [unknown name] was about to take a picture and he [Appellant] was already taking his picture with his gun up and we asked him what he was doing with it in there and he pointed it at us and he pointed it and he just started shooting everywhere." (Investigator Fraser purportedly reading a statement provided by a witness.)
6:06-6:10	"There's a lot people that saw you do it."
7:11-7:21	"Well there's too many people that saw you shoot it. … Everybody's saying the same thing. They confronted you about having the gun in that picture and you started shooting."
9:58-10:13	"I've got statements from people that identify you as the shooter by name. … They called your name…They wrote it in the statements, straight up."

statements should have been excluded since they contain inadmissible hearsay. The vast majority of the eight objectionable statements relate to what the majority refers to as "The First Shooting," and I agree with the majority that the erroneous admission of these statements was harmless in light of the overwhelming evidence of appellant's criminal responsibility for the shooting of Donald Parker.

It appears the only portion of the eight passages that specifically relate to the Second Shooting, which occurred outside the club, is found in the last statement. That statement begins, "They're saying you came out of the club shooting. … They're saying you were shooting in the air. That's what they are saying. That's exactly what they are saying you did." The remainder of this statement relates back to the Parker shooting. In my opinion, while this statement should have been excluded, its admission was harmless since it only accused appellant of shooting in the air once he left the club, and there is no question that he did fire his gun in the parking lot.

12:04-12:08 "But people saw you. They know you. They called your name."

49:29 "All I have to go on is what the witnesses there said. That's it. I've got you with the gun. I've got them saying you are the one that shot.

53:10-55:18 "They're saying you came out of the club shooting. … They're saying you were shooting in the air. That's what they are saying. That's exactly what they are saying you did. … They're saying they confronted you. They are like 'What are you doing with the gun.' That's when you pulled out the gun and started shooting. … That's exactly what they are saying. … That's what they are saying. … You're thinking that there's only one person saying you did it. There's a bunch of people; they were there, they saw you and they called your name … They saw you with the gun."

Appellant seeks reversal solely on the basis of the trial court's refusal to strike these eight statements from evidence. While I agree these statements were inadmissible hearsay, I would affirm both of appellant's convictions as I find the appellant failed to establish prejudice warranting reversal. *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013).

JUSTICE BEATTY: I concur in part and dissent in part. I agree that admission of Brewer's interrogation was error. I also agree that the murder conviction should be reversed as a result of this error. However, I depart from the majority's conclusion that admission of the interrogation was harmless as it relates to the charges of ABWIK and possession of a firearm during the commission of a violent crime.

But for the solicitor's numerous instances of burden shifting, via the interrogation tape, I would agree that the error was harmless as to the latter charges. However, the jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In my view, this created a due process structural defect in the trial. Structural defects are not subject to a harmless-error analysis regardless of the evidence presented. *See State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) ("[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error. These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." (internal quotations omitted) (citing *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991)). Accordingly, I would reverse all of Brewer's convictions and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth Darrell Morris, II, Petitioner.

Appellate Case No. 2011-203786

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27488
Heard June 24, 2014 – Filed January 28, 2015

AFFIRMED

Johnny Gardner, of Johnny Gardner Law Group, P.A., of Conway, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia, and Kevin S. Brackett, of York, for Respondent.

JUSTICE HEARN: Kenneth Darrell Morris, II challenges the trial court's denial of his motion to suppress ecstasy and marijuana discovered during a traffic stop, arguing they were obtained as the fruits of an illegal search and seizure in violation of the Fourth Amendment. We disagree, finding the officers had both reasonable suspicion of criminal activity and probable cause to conduct a warrantless search of the entire vehicle. Accordingly, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

Morris was driving on Interstate 77 through York County with Brandon Nichols in a rental vehicle. Officer L.T. Vinesett, Jr. and Constable W.E. Scott observed Morris commit a traffic violation by following a truck too closely. The officers followed Morris as he exited the interstate and initiated a traffic stop as he pulled into a gas station.

Vinesett approached the passenger side of the vehicle and requested that Morris produce his driver's license and registration. Vinesett then asked Morris to exit the vehicle and accompany him to the police cruiser. As Vinesett ran Morris's license, he asked Morris several questions about where the two men were traveling from and what they did there. Morris told Vinesett they went "to see some girls" in Atlanta and were on their way back to North Carolina. Vinesett returned to the rental vehicle and spoke briefly with Nichols, who stated he and Morris were returning from Atlanta after going to see a cousin play basketball.

Vinesett radioed Officer Gibson of the York County Police Department for a K-9 unit. While waiting for the K-9 unit to arrive, Scott conducted a consensual search of Morris, which yielded no contraband. After stating repeatedly that he had to use the restroom, Morris was escorted to the restroom by Scott.

Nichols also asked to use the restroom. He exited the vehicle and consented to a search of his person by Vinesett, which yielded no contraband. Vinesett told Nichols he would have to wait to use the restroom until Morris returned. Vinesett asked Nichols if he smoked marijuana earlier in the day and said he swore he smelled marijuana when Nichols exited the vehicle. Nichols stated the smell was from a Black & Mild cigar and that he did not smoke marijuana. A few minutes later, Gibson arrived to perform a K-9 search of the vehicle with Justice, a trained drug detection dog.

Vinesett and Gibson asked Nichols for his consent to search the vehicle, which Nichols refused, stating there was no contraband. Gibson then escorted Justice around the exterior of the vehicle twice; however, Justice did not alert at any point. Vinesett then conducted a search of the vehicle, beginning with the interior and proceeding to the trunk. Although he did not find any contraband in the passenger compartment, Vinesett discovered a plastic bag in the trunk containing 393 ecstasy pills concealed within a small gift bag. Following the discovery of ecstasy, Morris and Nichols were placed under arrest. During a more thorough search after the arrests, officers discovered a plastic bag containing a half a pound of marijuana underneath the spare tire.

Morris was indicted on charges of trafficking ecstasy and possession of marijuana with intent to distribute. Prior to trial, Morris moved to suppress the drugs as the fruit of an illegal search and seizure. At the hearing, Vinesett testified he is a member of the York County Highway Interdiction Team (HIT Team). He stated that as part of his HIT training, he has attended several national training sessions on highway interdiction and drug enforcement. When questioned about the stop, Vinesett noted he smelled an odor of marijuana when he first approached the vehicle and spoke to Morris and Nichols. He stated he also observed several hollowed out Phillies Blunt[1] cigars in the center console of the vehicle, and loose blunt tobacco scattered over the frontal interior of the vehicle. He testified that although the smell of marijuana was the biggest indicator of criminal activity, other indicators of drug trafficking were present, including the inconsistent stories about traveling to Atlanta, the fact the vehicle was rented, and the presence of several consumed cans of Red Bull. When asked about the K-9 search, Vinesett conceded this was a fair indicator that no drugs were present, but stated Justice failed to keep his nose on the vehicle as he usually did during a search and instead frequently stopped to shake the water off, explaining he assumed Justice did not like being out in the rain.

Ultimately, the trial court denied Morris' motion, finding the officers had reasonable suspicion of criminal activity based on Vinesett's testimony that he

[1] Phillies Blunts are an inexpensive brand of cigar. Vinesett testified that people "hollow [the blunt] out and place the marijuana in there, so if you did see them riding down the road smoking anything, it would look like they were just smoking a [Phillies] blunt."

smelled marijuana and the presence of hollowed out blunts.[2] In addition, the court stated there was no requirement that a stop cease because the police dog failed to alert, and at a length of roughly thirteen minutes, the traffic stop was not excessively long, nor unreasonably extended. Finally, the trial court found the officers had probable cause to search the vehicle, but did not articulate the specific reasoning for this finding.

Morris was convicted of trafficking ecstasy and simple possession of marijuana. The court sentenced Morris to thirty years' imprisonment and fined him $50,000.00 for the ecstasy charge. It additionally sentenced him to a year imprisonment for the marijuana charge, to run concurrently. Morris appealed his conviction to the court of appeals which affirmed in *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011). We granted certiorari.

ISSUES PRESENTED

I. Did the court of appeals err in affirming the trial court's finding that the officers had reasonable suspicion of criminal activity to extend the length of the traffic stop?

II. Did the court of appeals err in affirming the trial court's finding that the officers had probable cause to conduct a full search of the entire vehicle?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). "The appellate court will reverse only when there is clear error." *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004).

LAW/ANALYSIS

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A traffic stop and

[2] The court analogized the hollowed out blunts to finding a crack pipe within a vehicle.

the detention of persons during such a stop constitutes a seizure. *State v. Maybank*, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002).

I. REASONABLE SUSPICION

Morris argues the trial court erred in finding the officers had reasonable suspicion to extend the scope of the traffic stop in violation of his Fourth Amendment rights. In addition, he argues the officers illegally prolonged the duration of the traffic stop. We disagree.

In carrying out a routine traffic stop, law enforcement may request a driver's license and vehicle registration, run a computer check, and issue a citation; however, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). To determine whether reasonable suspicion exists, an officer, by a totality of the circumstances, must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion does not entail a set of legal rules, but "entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004).

Vinesett testified to the presence of several facts which from his experience and training, indicated drug trafficking. Vinesett stated that when he approached the passenger side of the vehicle, he detected the odor of marijuana[3] and observed several hollowed out Phillies Blunt cigars in a cup in the center console. Vinesett stated that in his experience, individuals unroll Phillies Blunt cigars, discard the tobacco, and then reroll them with marijuana to appear as if the individual is smoking a normal cigar. Additionally, he testified that Morris and Nichols gave different stories of their purpose in traveling to Atlanta. He noted there were several empty Red Bull cans, indicative of a need to stay awake for long periods of

[3] Morris asks us to reexamine the record and make a new credibility determination of Vinesett's testimony. Specifically, Morris suggests that because Vinesett did not tell Morris that he smelled marijuana at the beginning of the stop, Vinesett's testimony that he smelled marijuana lacks credibility. However, the trial court found Vinesett's testimony credible, and that determination is left to its discretion. *See State v. Tutton*, 354 S.C. 319, 325–26, 580 S.E.2d 186, 190 (Ct. App. 2003).

time while driving. Vinesett also noted that Morris drove a rented vehicle, which is an indicator of drug trafficking. Looking at the totality of the circumstances from the point of view of the reasonably prudent police officer, we find there is evidence in the record to support the trial court's conclusion that a reasonable suspicion of criminal activity existed.

Furthermore, we believe Morris's claim that the length of the stop was unduly prolonged is without merit. In total, Morris's traffic stop lasted roughly thirteen minutes. Recently, we held ten minutes was a reasonable amount of time for an initial traffic stop, and that off-topic questions did not unduly extend the duration of the stop. *State v. Provet*, 405 S.C. 101, 109, 747 S.E.2d 453, 458 (2013). We cannot say a thirteen minute stop was unduly prolonged or burdensome, especially where a reasonable suspicion to extend the stop existed at the outset. At no point did the officers leave Morris and Nichols detained without purpose or instruction. In addition, we note that Morris and Nichols' frequent requests to use the restroom throughout the entirety of the stop contributed to its duration.

Because there is evidence in the record that supports the finding of a reasonable suspicion of criminal activity, we find no error in the court of appeals' affirmance of the trial court on this issue.

II. PROBABLE CAUSE

Morris also argues the trial court erred in determining probable cause existed to search the rental vehicle. In particular, he argues officers lacked probable cause to search the trunk of the car. We disagree.

The Fourth Amendment requires that a warrant for search and seizure be supported by probable cause. U.S. Const. amend. IV. Therefore, a warrantless search is per se unreasonable and violative of the Fourth Amendment unless the search falls within one of several well-recognized exceptions to the warrant requirement. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). These exceptions "include (1) search incident to a lawful arrest, (2) 'hot pursuit', (3) stop and frisk, (4) automobile exception, (5) the 'plain view' doctrine, and (6) consent." *State v. Bailey*, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). The automobile exception to requiring a search warrant exists in recognition of "the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained" and "the lessened expectation of privacy in motor vehicles

which are subject to government regulation." *State v. Cox*, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). To survive a Fourth Amendment challenge to a warrantless search, the State must establish the officer had probable cause and demonstrate one of the exceptions to the prohibition against warrantless searches and seizures applies. *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

Similar to reasonable suspicion, probable cause is a fluid concept. Probable cause is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Probable cause to conduct a search exists where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696. "The principle components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Id.* Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances. *State v. Brannon*, 347 S.C. 85, 92, 552 S.E.2d 773, 776 (Ct. App. 2001).

We find the record supports the conclusion that Vinesett had probable cause to search the entire vehicle. The scope of a "warrantless search . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). Although Morris argues that because Vinesett failed to find drugs in the passenger compartment of the vehicle, he lacked probable cause to search the trunk, this contention mistakes the object for which Vinesett had probable cause to search. Vinesett was not simply looking for burnt marijuana based on the smell he detected at the inception of the stop. In our view, it is clear the object of his search was raw marijuana. Vinesett observed other indicators of drug possession or trafficking that led him to the reasonable belief that contraband would be found within the vehicle. The unrolled and hollowed Phillies Blunt cigars in the console suggest the future intent of marijuana use, not recent use. Additionally, Morris and Nichols told inconsistent stories, drove a rental car, and had several empty cans of Red Bull. Although those factors appear banal independently, cumulatively they indicated drug trafficking to Vinesett, based on his training and expertise.

Accordingly, under our any evidence standard of review, we find the record supports the conclusion Vinesett reasonably believed the contraband he suspected could be found in the trunk of the vehicle. We therefore hold the court of appeals did not err in affirming the trial court's finding Vinesett had probable cause to search the entire vehicle.[4]

CONCLUSION

Accordingly, because we find evidence in the record to support the trial judge's findings that Vinesett had reasonable suspicion to extend the traffic stop and probable cause to search the entire vehicle, we affirm the court of appeals.

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

[4] Morris contends the failure of the drug dog to alert militates against the conclusion Vinesett had probable cause to search the trunk. Although the failure to alert is certainly a consideration in determining probable cause under the totality of the circumstances, it is not dispositive. Other jurisdictions have held that if a drug detection dog fails to alert during a search, it does not defeat probable cause. *See United States v. Davis*, 430 F.3d 345, 367 (6th Cir. 2005) (citing cases and acknowledging "a near universal recognition that a drug-sniffing dog's failure to alert does not necessarily destroy probable cause"); *United States v. Ramirez*, 342 F.3d 1210, 1213 (10th Cir. 2003) ("We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conducted at all."); *McKay v. State*, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) ("[A] drug sniffing dog's failure to detect drugs does not automatically negate probable cause."); *see also Illinois v. Caballes*, 543 U.S. 405, 411–412 (2005) (Souter, J., dissenting) ("The infallible dog . . . is a creature of legal fiction . . . their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers [or] the limitations of the dogs themselves . . . ."). Furthermore, Vinesett gave a reasonable explanation for why he believed the dog did not conduct a proper search.

JUSTICE PLEICONES: I respectfully dissent. In my view, it is a close question whether petitioner's traffic stop was unlawfully extended. *See State v. Hewins*, 409 S.C. 93, 760 S.E.2d 814 (2014). In any case, I would reverse the Court of Appeals' affirmance of the denial of petitioner's suppression motion. In my opinion, once the drug dog failed to alert, the already marginal "objectively reasonable suspicion" to search the vehicle and its trunk evaporated.[5] *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013).

I would reverse and remand for a new trial.

BEATTY, J., concurs.

[5] I am not persuaded by the majority's reliance on the dissent in *United States v. Davis*, 430 F.3d 345 (6th Cir. 2005). In *Davis*, the majority noted the dissent relied exclusively on cases where "even without the dog's alert there was probable cause to justify a more extended detention, whereas in this case there was only the more limited basis of reasonable suspicion." *Id*. at 359. As in *Davis*, here the State had at most only a "reasonable suspicion" that petitioner possessed illegal drugs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert L. Cullen, Andrew A. Corriveau and Andrea Hucks, Petitioners,

v.

J. Bennett McNeal, B. McNeal Partnership, L.P., Anthony R. Porter and Wright's Point Home Owners Association, Respondents.

Appellate Case No. 2011-196126

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 27489
Heard January 15, 2015 – Filed January 28, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

John E. North, Jr., of North & Black, PC, of Beaufort, for Petitioners.

Joel D. Bailey, of The Bailey Law Firm, PA, of Beaufort, for Respondents.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in *Cullen v. McNeal*, 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cynthia L. McNaughton, Respondent,

v.

Charleston Charter School for Math and Science, Inc., Appellant.

Appellate Case No. 2012-212451

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27490
Heard September 24, 2014 – Filed January 28, 2015

AFFIRMED

Thomas Bailey Smith, of Smith Law Firm, P.A., of Mount Pleasant, for Appellant.

Nancy Bloodgood and Lucy Clark Sanders, both of Foster Law Firm, L.L.C., of Charleston, for Respondent.

CHIEF JUSTICE TOAL: The Charleston Charter School for Math and Science (Appellant) appeals the trial court's decisions denying Appellant's motions for a directed verdict and judgment notwithstanding the verdict (JNOV) on McNaughton's wrongful termination/breach of contract claim; permitting the jury to award special damages; and granting attorney's fees to McNaughton under section 15-77-300 of the South Carolina Code. We affirm.

FACTS/PROCEDURAL BACKGROUND

In late 2008, Cynthia McNaughton, who was in her early to mid 50's at the time, was accepted into the South Carolina Department of Education's Program of Alternative Certification for Educators (PACE program), which enables individuals who earned a college degree—but did not complete a traditional teacher preparation program—to become certified South Carolina public school teachers.[1] Before beginning the PACE program, McNaughton worked as a graphic designer and previously taught art and theater design in Florida for seven years. When McNaughton began the PACE program, she hoped to make teaching her "exit career," and to work as a certified teacher for eleven or twelve years, at which point she planned to retire.

In August 2010, Appellant's principal (the principal) hired McNaughton to teach 6th, 7th, and 8th grade art, along with the yearbook class. When she was hired, Appellant knew that McNaughton was participating in the PACE program, and that her completion of the program was contingent upon her fulfillment of further requirements, including the completion of an induction teaching year. McNaughton signed an employment agreement, which stated that McNaughton "agree[d] to be a full-time teacher at Charleston Charter School for Math and Science for the school year 2010–2011."[2] The employment agreement further stated that it was "contingent on funding and enrollment" (the contingency clause). A "Wage Payment Notice" indicated that Appellant would pay McNaughton a

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[1] PACE is an intensive, selective program, and typically takes three years to complete after acceptance into the program. *PACE Overview,* S.C. State Dep't of Educ., http://ed.sc.gov/agency/se/Educator-Services/Alt-Licensure/pace/PACEOverview.cfm (last updated Oct. 16, 2014). Individuals in the PACE program teach for a year as an "induction teacher," as well as complete other courses and requirements. If someone completing the PACE program stops the program (i.e., loses her teaching job) before completing the program, she "*may* be allowed to reapply" and possibly start the program over from the beginning. *PACE FAQ,* S.C. State Dep't of Educ., http://ed.sc.gov/agency/se/Educator-Services/Alt-Licensure/pace/PACEFAQ.cfm (last updated April 16, 2014) (emphasis added).

[2] Appellant admitted that by virtue of the employment agreement, McNaughton was not an at-will employee.

yearly salary of $34,040.[3]

McNaughton received positive feedback from her students and their parents. According to the principal, McNaughton was a talented art teacher, especially when it came to designing cross-curricular lessons. Neither the principal nor any other faculty member experienced any problems with McNaughton's performance as a teacher, and McNaughton was never disciplined for any matter.

However, on December 1, 2010—in the middle of the school year—the principal informed McNaughton that Appellant was terminating her employment. The principal told McNaughton that Appellant needed to use the funds designated for McNaughton's salary to hire and pay a new math teacher because some of the students had performed poorly on a recent math achievement test.[4] McNaughton was surprised to learn of her termination and immediately became concerned that she would be unable to find another job as an induction teacher, especially in the middle of the school year.

At trial, the principal testified in detail about Appellant's budget and funding decisions. For each school year, Appellant projects an annual budget, then reconciles it on a monthly basis. According to the principal, in November 2010, she told Appellant's board of directors (the board) that Appellant was in a solid financial position. Soon after this statement, in December 2010, the principal made the decision to hire the new math teacher and terminate McNaughton's employment. Despite the fact that the principal asked the board for approval to hire new social studies and special education teachers in November 2010, for which the board approved a $72,000 budget change, the board minutes do not indicate that she consulted the board on her decision regarding McNaughton's

[3] McNaughton would have earned approximately $35,000 her first year as a certified teacher, and $36,000 her second year.

[4] Because of these results, the math department chair approached the principal in October, and they devised a plan to hire an additional math teacher in order to provide the students with twice the amount of math instruction that they had previously received. The plan involved placing the students in a computer-based math remediation class instead of art class for the spring semester.

employment or the creation of the new teaching position.[5]

The principal conceded that when McNaughton was terminated, there was funding available to pay McNaughton's salary, but that the funding was instead used to hire and pay the new math teacher. In fact, on cross-examination of the principal at trial, McNaughton's attorney pointed out multiple lines in the budget that had not been used as of November 2010, and ultimately were never used for their intended purposes. For example, in November 2010, Appellant had $25,054 designated for "teacher salary supplement" and $18,000 for "administrative staff services"—funds which were untouched at that time, and remain unused for their designated purposes throughout the school year.

Because McNaughton felt her termination was "unjust," she reviewed Appellant's grievance and termination policy and began the grievance procedure.[6] When McNaughton met with the principal in mid-January 2011 as the first step of the grievance procedure, the principal informed McNaughton for the first time that she had been "laid off." According to McNaughton, the principal also told her that Appellant had the legal right to move funding around as it chose, and that because McNaughton was an at-will employee, the principal "could do whatever she wanted." McNaughton testified that her grievance procedure ended when the chairwoman of the board notified McNaughton that she had no "standing" to continue the grievance procedure.

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[5] The principal testified that hiring and firing decisions are the principal's responsibility and do not require the board's approval. Although Appellant's charter states that the board's responsibilities include employing and contracting with teachers, the principal maintained that she was responsible for carrying out the charter, and the decision to hire the new math teacher and to terminate McNaughton's employment was in the best interests of the students.

[6] After reading Appellant's grievance and termination policy and learning more about Appellant's finances, McNaughton questioned the circumstances of her termination. Despite calling McNaughton's termination a "lay-off" and writing a letter of reference for her, the principal never offered McNaughton other available positions, even when Appellant hired a new art teacher for the 2011–2012 school year.

The principal wrote McNaughton a letter of reference to assist with McNaughton's job search. However, McNaughton was only able to find a job teaching two days a week, which did not grant her enough teaching hours to remain in the PACE program. McNaughton applied for jobs in graphic design as well as entry level jobs, but was unsuccessful. McNaughton also applied for and received unemployment benefits.

McNaughton testified that as a result of losing her job, she was forced to purchase COBRA health insurance for $250 per month (until she could no longer afford it and discontinued it), withdraw the available funds from her state retirement fund, and defer her student loans (which resulted in $2,500 additional interest). In addition, McNaughton testified that she was unable to refinance her home, and that her bank foreclosed upon her mortgage.

McNaughton filed a complaint against Appellant, alleging four causes of action: wrongful termination/breach of contract, breach of contract accompanied by a fraudulent act, third party beneficiary breach of contract, and grossly negligent supervision. In her complaint, McNaughton requested actual and special damages, costs, and attorney's fees pursuant to section 15-77-300 of the South Carolina Code.[7]

On June 4 and 5, 2012, a jury trial was held. After McNaughton presented her case, Appellant made a motion for a directed verdict on all causes of action, as well as McNaughton's entitlement to attorney's fees and damages. The trial court granted Appellant's motion on the breach of contract accompanied by a fraudulent act, third party breach of contract, and grossly negligent supervision claims. The court denied the motion as to the wrongful termination/breach of contract claim, attorney's fees, and damages. At the close of all of the evidence, Appellant again moved for a directed verdict on these issues, which the court denied.

The jury returned a verdict in favor of McNaughton on her breach of contract claim, finding $20,623 in actual damages and $74,112 in special damages.[8] After the jury verdict was announced, Appellant moved for JNOV

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[7] S.C. Code Ann. § 15-77-300 (2005).

[8] In her closing argument, McNaughton's attorney argued that McNaughton suffered damages of $17,000 in lost wages for the second semester of the 2010–

under Rule 50(b), SCRCP, and a new trial under Rule 59(a), SCRCP, which the court denied. McNaughton filed a petition for attorney's fees.

The trial court held a separate hearing on the issue of attorney's fees and awarded $37,894 in attorney's fees pursuant to section 15-77-300. In its order awarding attorney's fees, the trial court addressed and considered the factors of section 15-77-300 in detail.

Appellant appealed to the court of appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the trial court erred in denying Appellant's motions for a directed verdict and JNOV as to McNaughton's wrongful termination/breach of contract claim?

II. Whether the trial court erred in charging and allowing the jury to award McNaughton special damages for her wrongful termination/breach of contract claim?

III. Whether the trial court erred in awarding attorney's fees pursuant to section 15-77-300 of the South Carolina Code?

LAW/ANALYSIS

I. *Wrongful Termination/Breach of Contract*

2011 school year and $1,000, which would have been contributed to her retirement account if she had continued working for the remainder of the school year. The attorney also pointed out to the jury that as a result of her termination, McNaughton paid for COBRA health insurance after she lost her health insurance, and her home was foreclosed upon. In addition, the attorney argued that McNaughton had suffered career damages. She pointed out that McNaughton could have earned approximately $408,000 over the twelve years she planned to teach as a certified teacher, while she would have earned approximately $192,000 at a minimum wage job—a difference of $216,000.

Appellant argues that the trial court erred in denying its motions for a directed verdict and JNOV on McNaughton's breach of contract claim because Appellant was entitled to terminate McNaughton's employment pursuant to the contingency clause in her employment agreement. We disagree.

In ruling on a motion for a directed verdict or JNOV, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The trial court must deny either motion when the evidence yields more than one inference or its inference is in doubt. *Id.* This Court will reverse the trial court only when there is no evidence to support the trial court's ruling. *Id.* A jury's factual finding will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) (citing *Odom v. Weathersbee*, 225 S.C. 253, 260, 81 S.E.2d 788, 792 (1954)).

Appellant argues that "unless there was ongoing funding for [McNaughton's] position then the [employment agreement] entitled Appellant to end her employment without notice and before the school year ended." Therefore, in reviewing the trial court's rulings on the directed verdict and JNOV motions, we must determine whether there was sufficient evidence to suggest that—given the contingency clause—Appellant breached McNaughton's employment agreement because there was funding actually available for her position at the time of her termination.

The analysis of this issue hinges on whether the principal's decision to reallocate the funding initially designated for McNaughton's salary falls within the confines of the contingency clause, which states that McNaughton's employment was "contingent on funding and enrollment." Appellant contends that "the only evidence in this case shows that there was not even an extra penny available to fund [McNaughton's] position as a teacher." Not only is this contrary to the principal's statement at trial that there was indeed funding available to pay McNaughton's salary at the time of her termination, there is also other evidence in the record to support McNaughton's position.

For example, there was funding available in other line items of the budget, such as "teacher salary supplement" and "administrative staff services." Further,

despite the principal's testimony that "there was no play" in the line item for teachers' salaries, the record makes it clear that it was not unusual for the principal to ask the board for approval to move around funding in the budget—as evidenced by the board's decision in November 2010 to approve the use of $72,000 to hire new teachers.

Therefore, because there is evidence to support the jury's finding that Appellant breached McNaughton's employment agreement, we hold that the trial court properly denied Appellant's directed verdict and JNOV motions.

II. *Special Damages*

Special damages, also known as consequential damages, are actual damages. *Capps v. Watts*, 271 S.C. 276, 281, 246 S.E.2d 606, 609 (1978); *see Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 211, 414 S.E.2d 164, 166 (1992). Unlike general damages, which must necessarily result from the wrongful act upon which liability is based and are implied by the law, special damages are damages for losses that are the natural and proximate—but not the necessary—result of the injury, and may be recovered only when sufficiently stated and claimed. *Sheek v. Lee*, 289 S.C. 327, 328–29, 345 S.E.2d 496, 497 (1986) (citations omitted). Therefore, where a plaintiff seeks special damages in addition to general damages, he must plead and prove the special damages to avoid surprise. *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973).

If the plaintiff's proof is speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied. *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988). However, special damages "'occasioned by breach of contract *may* be recovered when such damages may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.'" *Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 252, 423 S.E.2d 124, 126 (1992) (emphasis added) (quoting *Goodwin v. Hilton Head Co.*, 273 S.C. 758, 761, 259 S.E.2d 611, 613 (1979)). Although "the defendant need not foresee the exactly dollar amount of the injury, the defendant must know or have reason to know the special circumstance so as to be able to judge the degree of probability that damage will result . . . ." *Id*. (quoting 5 Arthur Linton Corbin, *Corbin on Contracts* § 1014 (1964)).

In other words, special damages may be recovered in a contract action if "the defendant had notice of the circumstances from which they might reasonably be expected to result at the time the parties entered into the contract, as the effect of allowing such damages would be to add to the terms of the contract another element of damages, not contemplated by the parties." *Moore v. Atl. Coast Line R.R. Co.*, 85 S.C. 19, 19, 67 S.E. 11, 12 (1910); *see also Timmons*, 310 S.C. at 251, 423 S.E.2d at 125 ("The party claiming special damages must show that the defendant was clearly warned of the probable existence of unusual circumstances or that because of the defendant's own education, training, or information, the defendant had 'reason to foresee the probable existence of such circumstances.'" (quoting 5 Arthur Linton Corbin, *Corbin on Contracts* § 1011 (1964))).

A trial judge has considerable discretion in determining the amount of actual damages. *Santoro v. Schulthess*, 384 S.C. 250, 267, 681 S.E.2d 897, 906 (Ct. App. 2009) (citing *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310–11, 594 S.E.2d 867, 873 (Ct. App. 2004)). Based on this discretion afforded to trial judges, review on appeal is limited to the correction of errors of law. *Id.* Accordingly, this Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award. *Id.*

Appellant first argues that the trial court erred in allowing special damages because under *Shivers v. John H. Harland Co.*, 310 S.C. 217, 423 S.E.2d 105 (1992), McNaughton was limited to recovering damages for the term of her contract—her unpaid salary for the remainder of the 2010–2011 school year. In *Shivers*, we examined whether an employee's recovery for wrongful breach of an employment contract was limited to the amount of pay and other benefits he would have received during the notice period provided for in his contract.[9] *Id.* at 219, 423 S.E.2d at 106.

[9] There, the employee's employment contract required at least fifteen days written notice of either party's termination of the contract. *Shivers*, 310 S.C. at 219, 423 S.E.2d at 106. The employer discharged the employee for cause under another provision of the contract without notice, and a jury found the discharge for cause was wrongful. *Id.* The employer moved to limit the employee's damages as a matter of law to the amount of pay he would have received under the fifteen day notice provision. *Id.*

Ultimately, we concluded that the trial court was correct in limiting the employee's damages to the amount of pay and benefits he would have received during the notice period because those damages placed him in as good a position as he would have been had the employer performed the contract. *Id.* at 221, 423 S.E.2d at 108. In coming to this conclusion, we outlined the purpose of contractual damages:

> When an employee[] is wrongfully discharged under a contract for a definite term, the measure of damages generally is the wages for the unexpired portion of the term. This measure of damages allows an employee to receive the benefit of the bargain by putting him in as good a position as he would have been had the contract been performed.

Id. at 220, 423 S.E.2d at 107 (internal citations omitted).

Notwithstanding this statement on contract damages, *Shivers* addressed a narrow issue involving a notice provision, and therefore does not limit McNaughton's recovery to the portion of her salary she would have received from December 2010 until the end of the 2010–2011 school year. Accordingly, we hold that McNaughton was entitled to recover the loss she actually suffered as a result of the breach of her employment agreement. *See Shivers*, 310 S.C. at 220, 423 S.E.2d at 107; *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 210, 371 S.E.2d 532, 534 (1988) (stating that the proper measure of compensation for a breach of contract "is the loss actually suffered by the contractee as the result of the breach" (quoting *S.C. Fin. Corp. v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960))).

Appellant further argues that special damages were never contemplated because there is no evidence that Appellant would have employed McNaughton for more than one school year. We disagree, and find this argument irrelevant to the issue at hand because McNaughton did not contend that she is entitled to damages based on the extension of her employment agreement beyond one year. Instead, in arguing that she is entitled to special damages, she relies on her status as an induction teacher in the PACE program when she was terminated, and the fact that she planned to teach *as a certified teacher* in South Carolina for eleven to twelve years. Based upon the principal's testimony and the record, there is no doubt that at the time the parties entered into the employment agreement, Appellant was

aware of McNaughton's involvement in the PACE program, and thus was "clearly warned" of the repercussions of McNaughton losing her job as an induction teacher. *See Timmons*, 310 S.C. at 252, 423 S.E.2d at 126; *Moore*, 85 S.C. at 19, 67 S.E. at 12.

Moreover, McNaughton presented evidence of her status in the PACE program, her inability to become a certified teacher through the PACE program after her employment was terminated, and the other financial consequences she suffered. Had Appellant not terminated McNaughton's employment, she most likely would have completed the PACE program and become a certified teacher. The damages McNaughton suffered as a result of the special circumstance of losing her position in the PACE program after Appellant terminated her was clearly within the contemplation of Appellant, as required by *Timmons*.[10]

Accordingly, we find that McNaughton presented evidence to support the jury's special damages award, and that the trial court did not err in charging and allowing the jury to award McNaughton special damages for her breach of contract claim.

III. *Attorney's Fees under Section 15-77-300*

Appellant argues the trial court erred in awarding attorney's fees under section 15-77-300 of the South Carolina Code.

Section 15-77-300 provides, in relevant part:

> (A) In any civil action brought by the State, any political subdivision of the State or **any party who is contesting state action** . . . the court may allow the prevailing party to recover reasonable

[10] The dissent cites *Timmons*, apparently for the proposition that special damages are not appropriate here. The dissent's view is at odds with *Timmons*, however, as *Timmons* permitted a special damages award for the same reason we allow them here—because the record indicates that Appellant was aware of the damages that would be occasioned by a breach of contract. *See* 310 S.C. at 253, 423 S.E.2d at 253 (finding special damages appropriate because the "record below indicates that [the defendant] was aware of the need for fill dirt and aware of the probable damage that would result from a time delay prior to her signing the contract").

> attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

(Emphasis added).

"The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001)).

A. State Action

Appellant argues that McNaughton's request for attorney's fees does not satisfy the factors of section 15-77-300 for three reasons. First, Appellant contends that as a charter school, it is not a state actor, and thus, there has been no "state action" to trigger application of the statute. We disagree.

Section 59-40-40(2)(a) of the South Carolina Code provides that a charter school "is, for purposes of state law and the state constitution, considered a public school and part of the South Carolina Public Charter School District, the local school district in which it is located, or is sponsored by a public or independent institution of higher learning." S.C. Code Ann. § 59-40-40(2)(a) (Supp. 2013). Section 59-17-10 of the South Carolina Code provides, in part, that "[e]very school district is and shall be a body politic and corporate . . . of . . . the State of South Carolina." S.C. Code Ann. 59-17-10 (Supp. 2013); *Camp v. Sarratt*, 291 S.C. 480, 481, 354 S.E.2d 390, 391 (1987). In its order awarding attorney's fees, the trial court found that under section 59-40-40(2), when read together with sections 59-

40-40(1)[11] and 59-40-50,[12] a charter school is considered a state entity and is subject to the provisions of section 15-77-300. We agree with the trial court's conclusion.

At trial, the principal testified that Appellant is funded by revenue received from the Charleston County School District. In addition, Appellant conceded that it is part of the public school system. Nevertheless, in its brief, Appellant set forth a list of reasons why it is not a state actor subject to section 15-77-300. For example, Appellant contends that as an "independent entity [which] is not supervised by anyone—including the state or the school district," it "stands alone" and is governed only by its board of directors. Further, Appellant asserts that it "does not have the authority to perform governmental functions such as taxing

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[11] Section 59-40-40(1) provides:

> A 'charter school' means a public, nonreligious, nonhome-based, nonprofit corporation forming a school that operates by sponsorship of a public school district, the South Carolina Public Charter School District, or a public or independent institution of higher learning, but is accountable to the board of trustees, or in the case of technical colleges, the area commission, of the sponsor which grants its charter. Nothing in this chapter prohibits charter schools from offering virtual services pursuant to state law and subsequent regulations defining virtual schools.

[12] Section 59-40-50(B)(4) states that a charter school must:

> be considered a school district for purposes of tort liability under South Carolina law, except that the tort immunity does not include acts of intentional or wilful racial discrimination by the governing body or employees of the charter school. Employees of charter schools must be relieved of personal liability for any tort or contract related to their school to the same extent that employees of traditional public schools in their school district or, in the case of the South Carolina Public Charter School District or a public or independent institution of higher learning sponsor, the local school district in which the charter school is located are relieved . . . .

S.C. Code Ann. § 59-40-50(B)(4) (Supp. 2013).

citizens to raise revenue or exercising the power of eminent domain," but that instead, "it is simply a non-profit corporation formed for the benefit of the public."

Contrary to Appellant's suggestion, state actors need not perform all possible governmental functions. Rather, Appellant is a state actor because it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state's duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution. *See* S.C. Const. art. XI, § 3; S.C. Code Ann. § 59-40-40(1). Charter schools such as Appellant would cease to exist but for the public funding which they receive. Accordingly, we hold that charter schools organized under Title 59, Chapter 40 of the South Carolina Code may be subject to attorney's fees awarded for "state action" under section 15-77-300.

B. Substantial Justification

Section 15-77-300(B)(1) requires that a court awarding attorney's fees under that section must find that the state actor "acted without substantial justification in pressing its claim" against the party requesting attorney's fees. Appellant argues that it did not lack substantial justification in defending McNaughton's breach of contract claim, and therefore, the trial court erred in awarding McNaughton attorney's fees.

To find that a party acted without substantial justification in pressing its claim, the party must have been "justified to a degree that could satisfy a reasonable person." *Heath v. Cnty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990). Action supported by substantial justification "has a reasonable basis in law and fact." *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Also relevant to the substantial justification consideration "is the outcome of the matter eventually litigated." *Layman*, 376 S.C. at 448, 658 S.E.2d at 327; *Heath*, 302 S.C. at 184, 394 S.E.2d at 712.

In its order, the trial court concluded that "[a]fter listening to the testimony presented during the case, the arguments of counsel, the evidence presented, and considering the jury's findings," Appellant was not substantially justified in pursuing its defense against McNaughton "as there was no reasonable basis in law or fact on which to defend [McNaughton's] breach of contract claim." We find no abuse of discretion in the trial court's finding that Appellant lacked substantial

justification under section 15-77-300(B)(1). *See Layman*, 376 S.C. at 444, 658 at 325.

C. Special Circumstances

Appellant also argues that special circumstances exist rendering the award of attorney's fees unjust. *See* S.C. Code Ann. § 15-77-300(B)(2). In particular, Appellant relies on the fact that the principal solicited legal advice before terminating McNaughton's employment to ensure that the existence of the contingency clause in her employment agreement did not have legal significance. Appellant also cites the contingency clause itself, its students' math scores, and the letter of recommendation provided to McNaughton as special circumstances making attorney's fees unjust. Appellant contends that because its decision to terminate McNaughton's employment was made in good faith and in pursuit of its students' best interests, the trial court should not have awarded attorney's fees.

The trial court rejected these arguments, and found that no special circumstances existed to make an award of attorney's fees unjust in this case. We find the trial court did not abuse its discretion in making this finding, but instead, carefully considered and applied each of the applicable factors in the statute. *See Layman*, 376 S.C. at 444, 658 S.E.2d at 325. Accordingly, we affirm the trial court's decision to award McNaughton's attorney's fees under section 15-77-300.

D. Section 59-40-50

Finally, Appellant contends that section 59-40-50(A) of the South Carolina Code exempts charter schools from liability under section 15-77-300, and because Appellant did not elect to be covered by the statute, the trial court erred in awarding attorney's fees. We disagree.

Section 59-40-50(A) provides:

> (A) Except as otherwise provided in this chapter, a charter school is exempt from all provisions of law and regulations applicable to a public school, a school board, or a district, although a charter school may elect to comply with one or more of these provisions of law or regulations.

S.C. Code Ann. § 59-40-50(A) (Supp. 2013). According to Appellant, because section 15-77-300 is not specifically listed in Section 59, Chapter 40 as one of the laws or regulations that applies to charter schools, Appellant cannot be held liable for attorney's fees under that section. We disagree.

The purpose of 59-40-50(A) is to distinguish between charter schools and other public schools, school boards, or school districts by providing charter schools with more flexibility in their operations. While section 15-77-300 is generally applicable to public schools, school boards, or districts, the provision also covers other state actors and "political subdivisions of the State." In other words, the provision was not enacted especially for public schools, school boards, or school districts, and is not a provision that a charter school may opt out of merely because of its charter school status as opposed to a traditional public school. Therefore, the exemption in section 59-40-50(A) does not cover section 15-77-300, and we hold that a court may find a charter school liable for attorney's fees under section 15-77-300.

CONCLUSION

For the foregoing reasons, the trial court's decision is

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part. I conclude that there is some slight evidence to support the trial court's denial of appellant's motions for directed verdict and JNOV on McNaughton's breach of contract claim, and therefore concur in the majority's affirmance of this issue. I dissent from those portions of the opinion which uphold the special damages award and the attorneys' fee award.

In order to recover special damages in this breach of contract suit, McNaughton was required to prove that appellant

> [w]as clearly warned of the probable existence of unusual circumstances or that because of the [appellant's] own education, training, or information, the [appellant] had "reason to foresee the probable existence of such circumstances."

Stern & Stern Assoc. v. Timmons, 310 S.C. 250, 423 S.E.2d 124 (1992) (internal citation omitted). In my opinion, appellant's status as an induction teacher in the PACE program pursuant to a one-year contract was not sufficient to render appellant liable for McNaughton's losses beyond her lost salary and benefits for the school year 2010-2011. *E.g.*, *Shivers v. John H. Harland Co., Inc.*, 310 S.C. 217, 423 S.E.2d 105 (1992) (proper measure of damages in breach of employment case). There is simply no evidence that McNaughton met the requirements of *Timmons*, and the rank speculation concerning her potential had she successfully completed the PACE program is not a substitute for such proof.

I also dissent from the majority's affirmance of the attorneys' fees awarded McNaughton pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2013). Assuming that appellant is a state actor within the meaning of this statute, appellant's decision to put McNaughton to her proof here was, in my opinion, substantially justified, particularly in light of the trial court's direction of a verdict in appellant's favor on three of McNaughton's causes of action. *See e.g. Cornelius v. Oconee Cnty.*, 369 S.C. 531, 633 S.E.2d 492 (2006) (state

acts with substantial justification when its position has a "reasonable basis in law and fact.").

For the reasons given above, I concur in part and dissent in part.

The Supreme Court of South Carolina

Michael D. Hall, Petitioner,

v.

State of South Carolina, South Carolina Attorney General, Solicitor for the Eighth Judicial Circuit, South Carolina Department of Corrections and City of Greenwood, Respondents.

Appellate Case No. 2014-001239

ORDER

We agreed to consider Petitioner Hall's allegations of unfairness in our original jurisdiction "to determine what relief, if any, may be available to inmates who are being adversely affected by unserved [arrest] warrants." *Hall v. State*, S.C. Sup. Ct. Order (filed August 14, 2014). On December 9, 2014, we heard oral arguments concerning the practices and procedures for serving arrest warrants on persons incarcerated in the South Carolina Department of Corrections (SCDC).

We conclude that complaints of SCDC inmates concerning adverse impacts resulting from unserved arrest warrants can be resolved by administrative action. It appears that local law enforcement is often unaware of the SCDC's Office of General Counsel's policy that it will be responsible for serving arrest warrants on SCDC inmates, if those warrants are forwarded to it. This policy is reflected in a 1986 memorandum issued by the South Carolina Judicial Department's Office of Court Administration, and reiterated in that Office's February 2012 memorandum. In order to help disseminate this SCDC policy, we republish the pertinent part of these memoranda below:

> The Office of General Counsel at the SCDC has requested that all warrants to be served upon any inmate within the

> Department be forwarded to their office for subsequent service. Court Administration endorses this request as the warrants could then be transmitted, by corrections personnel, to the particular institution where the individual is housed with instructions as to proper service. Such warrants can then be forwarded to one central location allowing their tracking and service.
>
> It is now requested that all warrants to be served upon inmates who are in the custody of the SCDC be transmitted to:
>
> Office of General Counsel
> South Carolina Department of Corrections
> 4444 Broad River Road
> Columbia, SC 29210

We order that Court Administration distribute a copy of this order to all summary court judges and clerks of court. We direct all magistrates, municipal court judges, and clerks of court to notify law enforcement officers of this order when an arrest warrant is issued, and to make copies of the order available. Finally, we dismiss this matter in our original jurisdiction as the issue raised by Petitioner Hall is now moot.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 28, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James R. Maull, Appellant,

v.

South Carolina Department of Health and Environmental Control and David Abdo, Respondents,

and Russell and Laura Schaible, Respondents.

Appellate Case No. 2013-001878

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5289
Heard December 10, 2014 – Filed January 28, 2015

AFFIRMED IN PART AND REMANDED

Michael A. Molony, of Young Clement Rivers, LLP, of Charleston, for Appellant.

Nathan Michael Haber, of Charleston, for Respondent South Carolina Department of Health and Environmental Control; David Abdo, of Charleston, pro se; and Leslie S. Riley, of McNair Law Firm, PA, of Charleston, for Respondents Russell and Laura Schaible.

LOCKEMY, J.: James Maull appeals the Administrative Law Court's (ALC's) order affirming the South Carolina Department of Health and Environmental Control's (DHEC's) decision to issue an amendment to a critical area permit to David Abdo for the construction of a dock along the Atlantic Intracoastal Waterway (the intracoastal waterway) in Charleston County. Maull argues the ALC erred in (1) finding this matter is a private dispute that does not impact the public interest and (2) failing to consider the adverse impact of the amendment on his use and enjoyment of his property. We affirm in part and remand.

FACTS

Maull lives at 27 Broughton Road in Charleston County near the intracoastal waterway and Wappoo Creek. He has a private recreational dock where he docks his 48-foot sport fishing boat. In August 2007, Abdo purchased property at 29 Broughton Road from the Estate of Rebecca Palmer (Palmer). A condition of this purchase was for Palmer to obtain a dock permit. On August 2, 2007, DHEC issued a critical area permit to Palmer (the Permit), which was later transferred to Abdo. The Permit authorized the location of a dock 82.5 feet from Maull's existing dock.[1] Russell and Laura Schaible reside at 31 Broughton Road and their property is adjacent to Abdo's property. The Schaibles objected to the Permit because they believed the proposed dock would be too close to their property line. They sought to have the Permit reviewed by DHEC's board (the Board) but review was denied.

In May 2008, Maull obtained approval from DHEC to change the configuration of his floating docks. Maull removed his existing floating docks, which were in a "U" configuration, and installed a 10' x 44' floating dock. Installation of the 10' x 44' floating dock resulted in Maull's dock being 19.8 feet from the shared property line with Abdo's property (the shared property line). In September 2009, Maull submitted as-built drawings for his dock, which reflected his dock was actually built approximately 18 feet from the shared property line.

In May 2011, Abdo applied to amend the Permit. Specifically, Abdo requested to reconfigure his proposed dock so that it would be located 20.5 feet from the shared property line and approximately 39 feet from Maull's existing dock. On October 6, 2011, DHEC issued an amendment to the Permit (Amendment), with a condition

[1] Abdo was not listed as an adjacent property owner on the Permit application and was not consulted about the proposed dock location.

requiring the proposed dock to be located 30.5 feet from the shared property line and approximately 49 feet from Maull's dock.

Thereafter, Maull, Abdo, and the Schaibles requested a final review conference before the Board. Maull requested the Amendment require Abdo's dock to be built 40.5 feet from the shared property line. Abdo and the Schaibles requested the dock be built 20.5 feet from the shared property line. During the conference, DHEC staff explained to the Board that its condition requiring the proposed dock to be located 30.5 feet from the shared property line was based on an erroneous belief that Maull's dock was located only 10 feet from the extended property line. The staff informed the Board that it later determined Maull's dock was actually 18.5 feet away from the shared property line.

The Board issued a final decision removing the special condition, finding it was based on DHEC staff's erroneous belief that Maull's dock was located 10 feet rather than 18.5 feet from the shared property line. The Board approved the Amendment as requested by Abdo and authorized approximately 39 feet between the Abdo proposed dock and Maull's dock.

Maull appealed the Board's decision to the ALC. Thereafter, the Schaibles filed a motion to intervene, which was granted.[2] At the hearing before the ALC, Abdo testified he requested the Amendment because the Permit placed his dock in a different location than the other docks in the area and would make it difficult to dock his boat at low tide. He explained he also requested the Amendment to preserve space for future potential modifications to his dock. Abdo confirmed that his proposed dock is 40 feet from the shared property line with the Schaibles.

Maull testified the distance between his dock and the proposed dock as approved by the Amendment will not allow him enough space to safely maneuver his 48-foot fishing boat onto the landward side of his dock. Maull testified he has previously docked his boat on the "channelward" side of his dock; however, he stopped because heavy boat traffic on the weekends would "beat the boat up against the dock . . . and put a lot of wear and tear on the pier." Maull stated he did not object to Abdo building a dock, he only objected to the location of the proposed dock as stated by the Amendment.

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[2] The Schaibles do not object to Abdo building a dock, but they object to any location that is closer to their shared property line and will negatively impact their view of the water.

On cross-examination, Maull admitted he could dock his boat at a marina; however, he enjoys working on his boat and sitting on it while it is docked at his home. He further admitted that even without Abdo's proposed dock, there are safety concerns with docking his boat because of the heavy boat traffic in the area and the strong currents. Maull admitted he could dock his boat on the channelward side of his dock; however, his boat is safer on the landward side because of the weekend boat traffic in the area.

Maull presented Crayton Walters who was qualified, without objection, as an expert witness in navigation, tidal and water current issues, and vessel navigation. Walter testified he has frequently navigated the intracoastal waterway and Wappoo Creek. He explained the area of the intracoastal waterway where Maull's dock is located is one of the heaviest trafficked areas for recreational boating activity in Charleston. According to Walters, there are strong currents near Maull's dock and the proposed dock that present unique navigational hazards to commercial and recreational traffic due to the difficulty of maneuvering and docking in the area. Walters stated that if Maull were required to navigate his boat out of the 40-foot space between Maull's dock and Abdo's proposed dock as permitted by the Amendment, it would be unsafe for members of the public who were navigating in the channel. He opined that 100 feet or two boat lengths were needed to safely navigate Maull's boat to the landward side of Maull's floating dock. He admitted, however, it was possible for Maull to amend the configuration of his dock to be able to safely dock his boat even with the proposed location of Abdo's dock. Finally, Walters stated that boats as large as Maull's boat are somewhat rare on Maull's side of Wappoo Creek.

Jeff Thompson, a senior wetland project manager with DHEC, testified amendments to critical area permits are not uncommon and that property owners who purchase property with an existing dock will often apply for amendments to make changes to the permitted dock. Thompson testified that in deciding whether to grant the Amendment, he considered navigational concerns related to the public's ability to navigate in Wappoo Creek. He explained Wappoo Creek is approximately 565 feet wide, and due to its width, Thompson disagreed with Walters' testimony that docking Maull's boat would create a safety hazard in the channel. He opined that docking Maull's boat would have little impact on public safety. Thompson further stated that he considered the "extent to which the [Amendment] could affect the value and enjoyment of adjacent owners," and he concluded "there was no significant impact to the value and enjoyment of adjacent

owners." According to Thompson, the Amendment is consistent with applicable statutes and regulations. He confirmed 40 feet between two docks is a standard distance based on the requirement that each property owner's dock be twenty feet from the extended property line under DHEC regulations.

On cross-examination, Thompson admitted that when DHEC issued the Permit in 2007, it stated that "the proposed dock would likely affect Maull's ability to navigate a large boat to and from a U-shaped slip on his dock, and [DHEC] should address this through a conditional permit." Thompson further admitted he had never docked a boat at Maull's dock. He acknowledged that the proposed dock could be moved to 30.5 feet from the shared property line and still be in compliance with the applicable regulations.

The ALC affirmed DHEC's decision to issue the Amendment. Specifically, it disagreed with Maull's attempt to characterize this dispute as impacting the public interest, finding "if [Maull] cannot moor his 48-foot boat on the landward side of his dock, there will be no impact on the public interest." Additionally, the ALC found that even if there was a navigational impact, the impact was not unreasonable given the heavy boat traffic in the area. The ALC noted that "[a]ny maneuvering of [Maull's] vessel that . . . [he] would have to undertake in order to navigate between the two docks, if he can at all, would take place in close proximity to his and Mr. Abdo's docks and would have little or no impact on the waterway traffic." Finally, the ALC determined DHEC "has fully complied with the requirements of 23A S.C. Code Ann. Regs 30-2, 30-4, 30-11, and 30-12, and S.C. Code Ann. § 48-39-150." This appeal followed.

STANDARD OF REVIEW

"Under the Administrative Procedures Act, the AL[C] presides as the fact-finder in contested cases." *White v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 247, 252, 708 S.E.2d 812, 814 (Ct. App. 2011); *see also Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 303, 682 S.E.2d 282, 287 (Ct. App. 2009) ("In a contested permitting case, the ALC presides as the fact finder."). "[T]his [c]ourt's [review] is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *White*, 392 S.C. at 252, 708 S.E.2d at 814 (first and third alterations in original) (internal quotation marks omitted). "In determining whether the AL[C]'s decision was supported by substantial evidence, this [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion

that the AL[C] reached." *Id.* (internal quotation marks omitted). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Id.* (internal quotation marks omitted).

LAW/ANALYSIS

Preservation

Initially, we address Respondents' preservation argument. Specifically, Respondents assert Maull's request that the Amendment be declared invalid is not preserved because at the ALC hearing, he only requested the Amendment be reversed and the Abdo dock placed at 30.5 feet or 40.5 feet from the shared property line. We disagree. Although Maull requests in his brief that we "reverse the [ALC]'s [order] . . . so that the Amendment is overturned and invalid," the substance of his argument is the ALC erred in affirming DHEC's decision to issue the Amendment. Specifically, he asserts the ALC erred in finding this matter is a private dispute that does not impact the public interest and in failing to consider the adverse impact of the amendment on his use and enjoyment of his property. These issues were raised to and ruled upon by the ALC. Therefore, the issues raised in this appeal are preserved.

I. Public Harm

A. Expert Testimony

Maull argues the ALC erred in finding this matter is a private dispute that does not impact the public interest. Initially, he asserts the ALC "wrongfully ignore[d] or misapprehend[ed] [Walters]'s testimony and opinions . . . and, in turn, erred in determining the nature of the navigational hazard arising from the Amendment and the Amendment's regulatory compliance." We disagree.

The ALC did not wrongfully misapprehend or ignore Walters's testimony. Here, the ALC acknowledged Walters's testimony that the proposed location of the dock would create navigational hazards. Specifically, Walters testified that if Maull attempted to get his boat in and out of a 40-foot space, it would be unsafe for members of the public. There was also evidence that the proposed location of the dock would not create a public harm. Maull admitted he could dock his boat on the channelward side of his dock and that he had done so in the past. Furthermore, Thompson explained that due to the width of Wappoo Creek, he disagreed with

Walters' testimony that docking Maull's boat would create a safety hazard in the channel. Although Maull argues Thompson's testimony was unreliable because, unlike Walters, Thompson was not qualified as an expert in navigation, the ALC acting as the factfinder was not restricted to accept only expert testimony. *See Sauers v. Poulin Bros. Homes, Inc.*, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("[T]he jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness."). The decision to accept or reject Walters's testimony was ultimately a question of credibility for the ALC to decide. *See Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (stating "[t]he credibility of testimony is a matter for the finder of fact to judge." (internal quotation marks omitted)). Accordingly, this argument is without merit.

B. *White v. South Carolina Department of Health & Environmental Control*

Maull next argues the ALC's finding of private harm is inconsistent with *White v. South Carolina Department of Health & Environmental Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011) (per curiam). Specifically, he asserts the present case is analogous to *White* because "we have undisputed testimony that the limited space between the Abdo and Maull docks would necessarily require additional, unnecessary, and potentially dangerous maneuvering in the busy Wappoo Creek area posing an impediment to the free flow of commercial and recreational traffic in the area." We disagree.

In *White*, Coffin Point (the HOA) requested a permit to build a community dock, which would be located twenty feet from the extended property line between the HOA's property and the property of White, who maintained a commercial dock for shrimpers to buy fuel and ice. 392 S.C. at 251, 708 S.E.2d at 814. After the permit was issued, the HOA built the dock so that it crossed White's extended property line, and White filed an action to enforce the permit as written. *Id.* The Bureau of Ocean and Coastal Resource Management (OCRM) determined the dock was built in compliance and issued an "after-the-fact permit amendment." *Id.* White then challenged the amendment, alleging the community dock would cause a disruption to his commercial operations from his dock—selling fuel and ice to commercial shrimpers. *Id.* The ALC ruled in favor of White and ordered the HOA to rebuild its dock in accordance with the original permit. *Id.* On appeal, the HOA argued that policing disputes between neighboring dock owners is a private matter not contemplated by the policies of the Act. *Id.* at 255, 708 S.E.2d at 816. Our court disagreed, finding the case "d[id] not involve a mere private navigational dispute."

Id. at 256, 708 S.E.2d at 817. We found the case involved the disruption of a commercial enterprise and its customers, and also concerned the needs of White's customers, members of the public, and the local shrimping industry in general. *Id.* at 256, 708 S.E.2d at 816-17.

Additionally, this court noted the number of White's customers decreased after the dock was built, there had been a steady decline in White's gross sales, and two customers testified that the limited space between White's dock and the HOA's dock, combined with the size of their shrimp boats, presented a danger of their boats colliding with the HOA's dock when they attempted to leave White's dock to exit the creek. *Id.* at 257-58, 708 S.E.2d at 817. Moreover, White estimated that the distance between the HOA dock and his commercial dock was approximately thirty-five feet, and the average shrimp boat that visited his dock was seventy feet. *Id.* at 258 n.5, 708 S.E.2d at 817 n.5. Therefore, we found substantial evidence supported the ALC's conclusion that the location of the dock constituted a material harm to the policies of the Act. *Id.* at 257, 708 S.E.2d at 817.

White is distinguishable from the case at bar. In *White*, the allegation was that the community dock would disrupt White's commercial operations from his dock—selling fuel and ice to commercial shrimpers. 392 S.C. at 251, 708 S.E.2d at 814. Here, however, Maull's dock and the proposed dock are private docks that are not used for commercial enterprises. Although Maull contends the proposed dock will impose an "impediment to the free flow of commercial and recreational traffic in the area," we fail to see how Maull's inability to dock his boat in the manner he prefers will disrupt the other boat traffic in the area. Additionally, the safety concerns in *White* are not present here. In *White*, the distance between the HOA dock and the commercial dock was approximately 35 feet, and the average shrimp boat that visited White's dock was 70 feet. *Id.* at 258 n.5, 708 S.E.2d at 818 n.5. Here, however, the distance between the Abdo dock and Maull's dock is 39 feet, and the length of Maull's boat is 48 feet. Moreover, as Thompson explained, Wappoo Creek is approximately 565 feet wide, which indicates that the docking of Maull's boat would have little impact on the other boat traffic in the area. It is also important to note that in *White*, the question before this court was whether substantial evidence supported the ALC's finding that there were serious safety concerns raised by the proposed dock. 392 S.C. at 257-58, 708 S.E.2d at 817. Here, however, the ALC concluded Maull failed to show this dispute negatively impacted the public, and, based on the foregoing, substantial evidence supports that finding.

The present case is similar to *Dorman v. South Carolina Department of Health and Environmental Control*, a case relied on by the ALC in finding this was a private dispute. 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). In *Dorman*, two neighboring landowners objected to a proposed boat dock, arguing the dock would crowd their existing docks and the roof would obstruct their view. *Id.* at 162-63, 565 S.E.2d at 121. This court adopted OCRM's interpretation of South Carolina Regulation 30-12, which included the position that any navigational issue between docks is a private property issue. *Id.* at 171, 565 S.E.2d at 126. Specifically, the Appellate Panel of OCRM stated, "It is not the policy of OCRM to police navigational disputes that should be dealt with among the adjacent property owners." *Id.* at 163, 565 S.E.2d at 121 (internal quotation mark omitted). This court remanded the case to the ALC to determine whether the permit should be granted in light of OCRM's interpretation of Regulation 30-12. *Id.* at 171-72, 565 S.E.2d at 126.

Although Maull points to the heavy boat traffic and strong currents in the area, his main argument is that the proposed dock will make it more difficult to dock his boat in the manner he prefers. Many of these obstacles will exist regardless of the dock's location, and the ALC considered these factors in finding the matter was a private dispute. The ALC also considered that there are numerous other similar docks in the area that have to deal with these hardships. Therefore, the ALC did not err in finding this was a private dispute.

C. *Brownlee v. South Carolina Department of Health & Environmental Control*

Maull next relies on *Brownlee v. South Carolina Department of Health & Environmental Control*, 382 S.C. 129, 676 S.E.2d 116 (2009) to argue that DHEC's decision to grant the Amendment has spawned this litigation to protect the use and enjoyment of his dock.

In *Brownlee*, the issue was whether a tributary should be deemed nonnavigable due to the fact that a manmade structure was creating an impediment to navigation. 382 S.C. at 131, 136-37, 676 S.E.2d at 117, 119-20. The structure, a dock constructed by Mr. Atkinson, was located in the mouth of the tributary and was not in compliance with a DHEC permit. *Id.* at 131, 133 n.4, 676 S.E.2d at 117, 118 n.4. The appellants sought to have this tributary designated as nonnavigable because they wanted to extend their docks across the tributary to the Bohicket Creek. *Id.* at 131, 676 S.E.2d at 117. The supreme court admonished DHEC, stating "the unnecessary litigation that has been spawned with this case and several

others by the location of the Atkinson dock constitutes a waste of valuable judicial resources. Public funds would have been better spent in enforcing compliance rather than engaging in protracted litigation to resolve what is essentially a dispute among neighbors." *Id.* at 143, 676 S.E.2d at 123. Nevertheless, the court concluded the Atkinson dock did not render the tributary nonnavigable, noting "the test for navigability does not hinge on the existence of man-made impediments or other obstructions." *Id.* at 141, 676 S.E.2d at 122.

Maull argues the present case is similar to *Brownlee* because DHEC "failed to adhere to, much less even consider, the same issues that were resolved in the 2007 permit." We disagree. In *Brownlee*, the supreme court admonished DHEC because DHEC had been aware the Atkinson dock was not in compliance for eighteen years yet failed to take action to enforce its finding of noncompliance. 382 S.C. at 142-43, 676 S.E.2d at 123. Although DHEC first issued the Permit in this case in 2007, placing the proposed dock 82.5 feet from Maull's existing dock, the Permit was issued without input from Abdo. Furthermore, Thompson testified amendments to permits in critical areas are not uncommon. Moreover, the Amendment was issued in compliance with applicable regulations because it placed the dock 20.5 feet from the shared property line, and the proposed dock conforms to other docks in the area unlike the structure at issue in *Brownlee*. Therefore, *Brownlee* is distinguishable from the present case.

D. Miscellaneous Factual Findings

1. Mooring the Boat

Next, Maull asserts "clear error" from the ALC's finding that "the question of navigation of the Maull boat can be resolved by mooring it on the outboard portion of the dock." We disagree. Maull specifically testified he had docked his boat on the channelward side of his dock; however, he preferred to dock it on the landward side of his dock because weekend boat traffic through the channel could cause damage to his boat and dock. Therefore, the ALC did not err in making this finding.

2. Vessels of Similar Size

Maull argues no evidence supports the ALC's finding that there are no vessels of similar sizes on the southern portion of Wappoo Creek where Maull's dock is located. We disagree. On cross-examination, Walters twice testified that boats the

size of Maull's are somewhat rare on Maull's side of Wappoo Creek. Therefore, substantial evidence supports this finding.

3. Regulation 30-12(A)(1)(a)

Maull next argues the navigational restriction that Regulation 30-12(A)(1)(a) (2011) seeks to prevent—restrictions and hazards to public navigation in the AIWW—has been demonstrated. We disagree.

Pursuant to Regulation 30-12(A)(1)(a), "Docks and piers shall be limited to one structure per parcel or lot and in all instances . . . shall not restrict the reasonable navigation or public use of State lands and waters . . . ."

As previously stated, Maull's inability to dock his boat in the manner he prefers will not disrupt other boat traffic in the area. Although Walters and Maull testified the location of the proposed dock would impact the commercial and recreational traffic in the area, there was substantial evidence that indicated there would be little impact on navigation in this area. Therefore, this argument is without merit.

II. Use and Enjoyment of Property

Maull next argues the ALC erred in failing to consider the adverse impact of the Amendment on his use and enjoyment of his property. He points out that in 2007, DHEC determined the original Palmer permit application would negatively impact Maull's use of his dock; however, when DHEC issued the Amendment it failed to consider the adverse impact to Maull's use and enjoyment of his dock. According to Maull, the ALC erred because subsection 48-39-150(A)(10) of the South Carolina Code (2008) requires DHEC to consider the effect of the proposed use on the value and enjoyment of adjacent owners, independent of its policies on navigation. We remand this issue to the ALC.

Pursuant to subsection 48-39-150(A)(10), "In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations . . . [t]he extent to which the proposed use could affect the value and enjoyment of adjacent

owners." "[Subs]ection 48-39-150(A)(10) requires OCRM to consider the effect of the proposed use on the value and enjoyment of adjacent owners. This consideration is independent of OCRM's policies on navigation." *White*, 392 S.C. at 258, 708 S.E.2d at 818. "After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit." S.C. Code Ann. § 48-39-150(B) (2008).

Initially, we find this issue should be remanded because the ALC did not specifically address this issue in its order. *See Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 19-20, 698 S.E.2d 612, 622 (2010) (noting our limited scope of review from a decision of the ALC does not allow us to make our own factual findings and remand may be appropriate when the ALC's order is insufficient for appellate review). In its order, the ALC cited subsection 48-39-150(A)(10) for the proposition that DHEC must consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners." The ALC, however, never specifically addressed the impact the Amendment would have on Maull's use and enjoyment of his property. Our review of the order indicates the ALC affirmed DHEC's decision based on its finding that this was a private dispute that did not impact navigation in the area. The only portions of the order where the ALC arguably addresses the impact on Maull's use and enjoyment of his property is in its conclusion of law number 17, which states "I further conclude the Amendment falls within and complies with the applicable regulations and statute" and in its conclusion, which states, "I find and conclude that DHEC has fully complied with the requirements of 23A S.C. Code Ann. Regs. 30-2, 30-4, 30-11, and 30-12 and S.C. Code Ann. § 48-39-150." These general rulings are insufficient to permit a meaningful review of this issue because our court has specifically stated that DHEC must consider the effect of the proposed use on the value and enjoyment of adjacent owners independent of its policies on navigation. *See White,* 392 S.C. at 258, 708 S.E.2d at 818. Therefore, we remand this issue to the ALC. On remand, the ALC is instructed to make a finding as to whether DHEC considered the effect of the Amendment on the value and enjoyment of adjacent property owners as required by subsection 48-39-150(A)(10), and to determine whether that finding was justified.

CONCLUSION

For the foregoing reasons, we affirm the ALC's finding that this matter is a private dispute that does not impact the public interest. Additionally, we remand to the ALC to make a finding as to whether DHEC considered the effect of the Amendment on the value and enjoyment of adjacent property owners as required by subsection 48-39-150(A)(10), and to determine whether that finding was justified.

AFFIRMED IN PART AND REMANDED.

FEW, C.J., and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex parte: South Carolina Property and Casualty Insurance Guaranty Association, Appellant, and South Carolina Uninsured Employers' Fund, Respondent,

In re:

Artemio Alvarez, Steven Cameron, William Brockman, Martha Burke, Lucille Dwight, Robert Hunter, Tammy Miller, Patricia Wade-Portee, Jessie Pringle, and Ruth Harmon, Claimants,

v.

Quality HR Services, Inc., Spectrum HR, LLC, Keith's Welding Service, Inc., and Capital City Insurance Co. Inc., Defendants,

Of whom Quality HR Services, Inc., Keith's Welding Service, Inc., and Capital City Insurance Co. Inc. are Respondents.

Appellate Case No. 2013-000575

Appeal From Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 5290
Heard November 6, 2014 – Filed January 28, 2015

VACATED AND REMANDED

J. Hubert Wood, III and Kathryn F. Walton, Wood Law Group, LLC, of Charleston, for Appellant.

David Hill Keller, Constangy Brooks & Smith, LLP, of Greenville, for Respondent South Carolina Uninsured Employers' Fund; Duke K. McCall, Jr. and Zandra L. Johnson, Smith Moore Leatherwood, LLP, of Greenville, for Respondent Quality HR Services, Inc.; and Wesley Jackson Shull and Benjamin Mason Renfrow, Willson Jones Carter & Baxley, P.A., of Greenville, and Candace G. Hindersman, Willson Jones Carter & Baxley, P.A., of Columbia, all for Respondents Keith's Welding Service, Inc. and Capital City Insurance Co. Inc.

FEW, C.J.: The workers' compensation commission issued an order determining whether the South Carolina Property and Casualty Insurance Guaranty Association or the South Carolina Uninsured Employers' Fund was liable to pay benefits in ten consolidated workers' compensation cases. However, the commission never determined whether any of the ten claimants are entitled to benefits. We find the commission's order was not a final decision, and thus not immediately appealable. We vacate the circuit court's order on appeal from the commission and remand to the commission with instructions to promptly decide the merits of each claim.

I. Facts and Procedural History

This appeal involves ten separate workers' compensation cases, each filed more than ten years ago. The claimants were employed by one of two professional employment organizations—Quality HR Services, Inc. and Spectrum HR, LLC—both of which attempted to obtain workers' compensation insurance coverage in 2003 from Realm National Insurance Company. Realm subsequently became insolvent after a proposed purchase of the company fell through.

Before Realm became insolvent, however, its prospective purchaser, American Insurance Managers (AIM), issued certificates of workers' compensation insurance to Quality and Spectrum on behalf of Realm. The ten claimants filed workers' compensation claims, with accident dates after AIM issued the certificates of

insurance. Realm disavowed these certificates and denied coverage, arguing AIM had no authority to bind Realm by issuing the certificates.

The single commissioner consolidated the cases to address whether Realm provided coverage to Quality and Spectrum based on AIM's issuance of the certificates of insurance. Due to Realm's insolvency, the Guaranty Association, which was established by statute to pay the claims of insolvent insurance companies, became a party to the consolidated case. *See* S.C. Code Ann. § 38-31-60(b) (2002) (stating the Guaranty Association "is considered the insurer to the extent of its obligation on the covered claims . . . as if the insurer had not become insolvent"). The Uninsured Employers' Fund also became a party based on Realm's assertion that Quality and Spectrum were uninsured employers. *See* S.C. Code Ann. § 42-7-200(A)(1) (2015) (stating the Uninsured Employers' Fund was "created to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage").

In 2008, the commissioner held a hearing on the consolidated case. During the hearing, the commissioner clarified that the only issue before it was "which party would be liable [to pay] these claims," and stated, "we're not here today to determine whether any benefits are due to any particular claimant." The commissioner issued an order holding both the Guaranty Association and the Uninsured Employers' Fund liable to pay different claims depending on whether the date of accident fell within, or outside of, certain time periods. In January 2010, an appellate panel of the commission affirmed. In September 2010, the circuit court remanded the case to the commission to obtain answers to three specific questions. The commission answered the questions by order dated August 2012. The circuit court then reversed the commission, holding the Guaranty Association liable to pay all claims. The Guaranty Association appealed the circuit court's decision.

At the time of oral argument before this court, the commission had made no determination as to whether any claimant is entitled to benefits.[1] Counsel

[1] Steven Cameron was apparently receiving temporary benefits at one time. However, those benefits were being paid by the respondent Capital City Insurance Company—not the Guaranty Association or the Uninsured Employers' Fund.

conceded at oral argument that neither the Guaranty Association nor the Uninsured Employers' Fund has paid any benefits to a single claimant.

II. Appealability

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). Section 1-23-380 of the Act limits appeals to those from a "final decision" of the commission. An order of the commission is not a final decision unless it resolves the entire action. *See Price v. Peachtree Elec. Servs., Inc.*, 405 S.C. 455, 457, 748 S.E.2d 229, 230 (2013) ("An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review."); *Bone*, 404 S.C. at 73, 744 S.E.2d at 556 (same); *see also* 404 S.C. at 75, 744 S.E.2d at 557 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010))).

In this case, the commission ruled only on the coverage issue and did not decide the individual claimants' entitlement to benefits. Because the commission has yet to determine the substantive rights of the claimants, the commission's order is not a final decision. *Bone*, 404 S.C. at 73-74, 75, 744 S.E.2d at 556, 557.

Before oral argument, we directed the parties to file memoranda addressing whether the circuit court's order was appealable under *Bone* and whether the commission had subject matter jurisdiction over the dispute, *see Price v. Peachtree Elec. Serv., Inc.*, 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct. App. 2011) (holding the commission lacks subject matter jurisdiction over "[c]laims not affecting the employee's right to compensation"), *aff'd as modified*, 405 S.C. 455, 748 S.E.2d 229 (2013). We received only one memorandum, jointly filed by the Guaranty Association, the Uninsured Employers' Fund, and Quality. Their position as to jurisdiction convinces us the order is not immediately appealable.

Citing *Labouseur v. Harleysville Mut. Ins. Co.*, 302 S.C. 540, 543, 397 S.E.2d 526, 528 (1990), the parties filing the memorandum assert, "When there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning . . . coverage . . . is in the [commission]." The parties

argue jurisdiction existed because the underlying workers' compensation claims were pending before the commission "and remain pending at present." By asserting that the coverage dispute is bound up with the pending claims for benefits for purposes of determining jurisdiction, the parties demonstrate the commission's order—resolving coverage only—is not final for purposes of determining appealability.

We are troubled that these claims have been pending in the commission for ten years. "Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, *swift recovery* for workplace injuries regardless of fault." *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (emphasis added).[2] While we applaud the commission's desire to promote efficiency by consolidating similar coverage questions, the actual effect of the commission's approach was to delay resolution of the substantive claims, which in turn has frustrated the intention of the Legislature. If the claimants were entitled to benefits, they were entitled to receive them many years ago. If the claimants were not entitled to benefits, Quality and Spectrum were entitled to have the claims denied many years ago. By litigating the coverage issue before determining the merits of the underlying workers' compensation claims, the commission failed to obey its Legislative mandate to *promptly* determine whether injured workers are entitled to benefits.

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[2] *See also James v. Anne's Inc.*, 390 S.C. 188, 201, 701 S.E.2d 730, 737 (2010) (stating the commission is "responsible for effectuating the purposes of the workers' compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives" (citation omitted)); 99 C.J.S. *Workers' Compensation* § 16 (2013) (stating "considerations leading to the enactment of the compensation legislation [include] a desire to provide a remedy or form of relief to, or settlement of the claims of, injured workers or their dependents that is prompt and speedy" (footnote omitted)); 82 Am. Jur. 2d *Workers' Compensation* § 12 (2013) ("A state's workers' compensation act . . . provid[es] injured employees with an efficient system of rights, remedies, and procedures with the goal of giving them prompt relief. Among the purposes of a workers' compensation act [is] . . . providing prompt justice for injured workers and preventing the delays that might arise from protracted litigation." (footnotes omitted)).

We find the commission's order was not a final decision under *Bone* and thus not immediately appealable. We **VACATE** the order of the circuit court and **REMAND** to the commission. We instruct the commission to promptly resolve the claims of these ten claimants.

LOCKEMY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel A. Rose, Claimant, Respondent,

v.

JJS Trucking, LLC, Chris Thompson Services, LLC, Bridgefield Casualty Ins. Co., and South Carolina Uninsured Employers' Fund, Defendants,

Of whom Chris Thompson Services, LLC and Bridgefield Casualty Ins. Co. are Appellants,

and

JJS Trucking, LLC and South Carolina Uninsured Employers' Fund are Respondents.

Appellate Case No. 2013-001322

Appeal From The Workers' Compensation Commission

Opinion No. 5291
Submitted November 1, 2014 – Filed January 28, 2015

APPEAL DISMISSED

Kirsten Leslie Barr, Trask & Howell, LLC, of Mt. Pleasant, for Appellants.

Joseph Brooks Fisher, George Sink, PA Injury Lawyers, of North Charleston, and Benjamin William Akery, The Steinberg Law Firm, LLP, of Goose Creek, for Respondent Samuel A. Rose; John Eric Kaufmann, of Columbia, for Respondent JJS Trucking, LLC; and Amy V. Cofield, Cofield Law Firm, of Lexington, for Respondent South Carolina Uninsured Employers' Fund.

FEW, C.J.: Chris Thompson Services, LLC and its carrier appeal the workers' compensation commission's refusal to order a transfer of responsibility pursuant to subsection 42-1-415(A) of the South Carolina Code (2015). Because the commission has not yet ruled on the merits of Samuel Rose's entire claim for benefits, however, the order is not a final decision, and thus not immediately appealable. We dismiss.

Rose filed this workers' compensation action alleging he sustained accidental injuries to his right knee, back, neck, and head while working for JJS Trucking, LLC. At the time of Rose's injury, JJS Trucking was a subcontractor for Chris Thompson Services and was uninsured. The commission ordered Chris Thompson Services to pay for Rose's medical treatment and temporary total disability benefits.

Chris Thompson Services petitioned the commission "to transfer responsibility for continuing compensation and benefits" to the South Carolina Uninsured Employers' Fund pursuant to subsection 42-1-415(A). The commission refused to order the transfer, finding the issue of transfer was "not ripe for adjudication at this time." The commission also determined Rose had not reached maximum medical improvement, and thus did not rule on his claim for permanent disability.

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). Section 1-23-380 of the Act limits appeals to those from a "final decision" of the commission. An order of the commission is not a final decision unless it resolves the entire action. *See Price v. Peachtree Elec. Servs., Inc.*, 405 S.C. 455, 457, 748 S.E.2d 229, 230 (2013) ("An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review."); *Bone*, 404 S.C. at 73, 744 S.E.2d at

556 (same); *see also* 404 S.C. at 75, 744 S.E.2d at 557 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010))). The commission's order leaves the merits of Rose's claim for permanent disability unresolved. Therefore, the order is not a final decision and not immediately appealable.

Appellants argue, however, the commission's refusal to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund under subsection 42-1-415(A) is immediately appealable under the following provision of section 1-23-380: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Appellants contend they "are required under the [commission's] order to make ongoing payments to [Rose], in addition to adjusting the claim and providing medical benefits, all despite the fact that . . . Appellants properly petitioned the commission to transfer continuing liability to the [Uninsured Employers' Fund]." Appellants further contend that reimbursement from the Fund after final judgment is not an adequate remedy and this court's "failure to address the appeal at this time would deprive . . . Appellants of any meaningful remedy and would vitiate the statutory scheme envisioned by the General Assembly with the enactment of [section] 42-1-415."

We do not agree that dismissing this appeal deprives Appellants of an adequate remedy. Appellants make no specific argument as to how the commission's refusal to address transfer at this time affects Appellants in any way other than to delay the payment of money. *See Bone*, 404 S.C. at 74, 744 S.E.2d at 556 (stating an employer and its insurance carrier "have an adequate remedy in that they may raise the issue of compensability" after a final award by the commission). The Uninsured Employers' Fund appears to acknowledge that it would be required to reimburse Appellants if the commission later orders a transfer. Therefore, if the commission eventually determines the transfer was adequately documented and thus should have been ordered, Appellants will recover their payments through reimbursement. If the commission does not later order a transfer, Appellants have an adequate remedy in an appeal after the commission's final decision in the case.

Because we dismiss the appeal on the ground that the order is not immediately appealable, we decline to address Appellants' argument that the denial of transfer to the Uninsured Employers' Fund before final judgment is contrary to the legislative intent of section 42-1-415.

APPEAL DISMISSED.[1]

THOMAS and LOCKEMY, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crossmann Communities of North Carolina, Inc., and Beazer Homes Investment Corp., Appellants,

v.

Harleysville Mutual Insurance Company, Cincinnati Insurance Company, Defendants,

Of Whom Cincinnati Insurance Company is the Respondent.

Appellate Case No. 2012-213245

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

Opinion No. 5292
Heard October 7, 2014 – Filed January 28, 2015

AFFIRMED

David B. Miller, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, and Martin M. McNerney and Taylor T. Lankford, of King & Spalding, LLP, of Washington, D.C., for Appellants.

Franklin J. Smith, Jr., of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for Respondent.

SHORT, J.: In this insurance dispute, Crossmann Communities of North Carolina, Inc. (Crossmann) and Beazer Homes Investment Corp. (Beazer) (collectively, Appellants) appeal the trial court's order finding Cincinnati Insurance Company (Cincinnati) has no obligation to Appellants for costs incurred by Beazer to repair property damage at several condominium projects. Appellants argue the trial court erred in (1) determining commercial general liability (CGL) insurance policies underlying Cincinnati's umbrella policies were not exhausted and (2) finding Cincinnati was not bound by a 2007 judgment. We affirm.

FACTS

Between 1992 and 1999, Appellants and other contractors and subcontractors constructed multiple condominium projects in South Carolina and were subsequently sued by numerous homeowners alleging property damage arising from construction defects.[1] Appellants settled with the homeowners for approximately $16.8 million.[2] Appellants then filed a declaratory action seeking coverage for the settlement payments it made from numerous insurers, including Harleysville Mutual Insurance Company (Harleysville) under a series of CGL policies and Cincinnati under a series of CGL umbrella policies. Prior to trial, several of Appellants' other insurers settled with Appellants for $8.6 million, providing coverage for the homeowners' claims. *Crossmann II*, 395 S.C. at 46 n.2, 717 S.E.2d at 592 n.2.

Harleysville provided Appellants CGL primary and excess coverage. The Harleysville primary policies provided a $1 million "each occurrence" limit and a $2 million "products completed operations aggregate" limit for the policy periods from 7/29/93 to 8/29/98. The Harleysville excess policies provided a $10 million

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[1] *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 44-45, 717 S.E.2d 589, 591-92 (2011) ("*Crossmann II*"). The South Carolina Supreme Court originally issued an opinion on January 7, 2011. *Id.* at 44, 717 S.E.2d at 591. The court withdrew that opinion and issued *Crossmann II*, finding the CGL policies provided coverage. *Id.*

[2] The plaintiffs in the underlying lawsuits were condominium projects constructed between 1992 and 1998 in Horry County: River Oaks I, River Oaks II, Waterway Village at River Oaks, Buck Creek Golf Villas, and Lightkeepers Village/Rose.

"each occurrence" limit and an "aggregate limit" from July 29, 1994 to August 29, 1998. The Harleysville policies defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" and "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property."

Cincinnati provided excess umbrella policies for the policy periods from July 1, 1998 to July 1, 2002 and provided $10 million coverage for "each occurrence annual limit and annual aggregate limit." These policies defined "occurrence" as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions" and defined "property damage" as "[p]hysical injury to or destruction of tangible property[,] including all resulting loss of use."

The parties stipulated to the facts and amount of damages and presented only the coverage and allocation questions to the trial court. The jury panel was dismissed, and the trial court determined the coverage issue as a matter of law. The parties' stipulations, *inter alia*, were as follows:

> 1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies (the "Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damage" in the Policies are $7.2 million. If the Court finds that there has been an occurrence or occurrences, then the Court shall find that [Appellants'] insured loss is $7.2 million . . . .
>
> 2) The parties agree that the damage referred to in paragraph 1 above began within 30 days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until [Appellants] paid to settle the underling (sic) cases, whichever came first.
>
> * * *
>
> 6) Harleysville and Cincinnati agree that, for purposes of the disposition of this matter at the trial court

level, they will not raise the applicability of policy exclusions with respect to [the trial court's] consideration of the issues identified below in paragraph 9. Harleysville and Cincinnati preserve the right to raise the applicability of policy exclusions on appeal to the extent permitted by the South Carolina Rules of Appellate Procedure and South Carolina law in response to contentions raised by [Appellants] that give rise to a policy exclusion.

7) The parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the underlying cases[,] which have been produced and exchanged in discovery in the case.

8) The parties agree that the following matters are the only issues of law to be addressed by [the trial court]:
a. Did the property damage giving rise to [Appellants'] claims for coverage arise from an "occurrence";
b. In the event the Court finds that there was an occurrence or occurrences, how shall the $7.2 million in insured damages referred to in paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk";
c. In the event judgment is entered for [Appellants], and that the Court determines that "time on the risk" is the proper allocation method, what is the proper period over which the "time on the risk" should be calculated. All parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any *pro rata* time on the risk allocation period. . . .

* * *

> 9) The parties agree that Cincinnati can argue to the Court that the underlying insurance has not been exhausted and that Cincinnati has no obligation to "drop down" and cover [Appellants] for losses in the Underlying Lawsuits, and [Appellants] can oppose Cincinnati's contention and argue that Cincinnati's policies are presently triggered.
> 10) The parties agree that all rights to appeal are preserved as to any and all rulings and judgments of the trial court.
>
> * * *
>
> 13) Cincinnati's applicable policies are excess policies with a "follow from" endorsement applicable to completed operations.

At the first hearing on remand, the trial court asked the parties if the stipulations remained the "status quo, a part and partial [sic] of this case." All parties agreed they did.

By order filed May 3, 2007, the trial court found, *inter alia*, (1) coverage because "property damage" arose from an "occurrence" under the Harleysville and Cincinnati policies; (2) the parties had stipulated the loss was $7.2 million; (3) the condominium projects sustained "property damage" during the policy periods; (4) damages against Harleysville in the amount of $7.2 million and entered judgment accordingly; and (5) because the combined limits of the Harleysville policies exceeded the $7.2 million in stipulated damages and the damages were to be allocated in accordance with the joint and several methodology, the court need not rule on whether the Cincinnati excess/umbrella policies were triggered. Harleysville appealed the 2007 order. Cincinnati did not appeal.

Our supreme court affirmed the trial court's finding of coverage, but it reversed the trial court's finding that damages were to be allocated by the joint and several liability method. *Crossmann II*, 395 S.C. at 66-67, 717 S.E.2d at 603. Instead, the supreme court found Harleysville's liability was limited to its pro rata share of the losses based on the "time on the risk" allocation of liability method. *Id.* at 63, 717 S.E.2d at 601. The court found the standard CGL policy

> require[s] that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the [time-on-risk] formula . . . as the default method for allocating shares of the loss. . . . [T]he premise [is] that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk.

Id. at 66, 717 S.E.2d at 603. Thus, the court remanded the action to the trial court for a determination of Harleysville's liability. *Id.* at 67, 717 S.E.2d at 603. The court stated:

> We leave it to the sound discretion of the trial court to determine whether it is necessary to apply the "time on risk" formula separately to each individual building or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case. Thus, we emphasize that trial courts employing the "time on risk" approach may alter the default formula . . . where a strict application would be unduly burdensome or otherwise inappropriate under the circumstances of a particular case.

Id. at 66, 717 S.E.2d at 602. The court noted:

> Prior to the trial court's decision, Crossmann consented to the dismissal of its claims against Defendant Associated Insurors, Inc.
>
> Defendant Cincinnati Insurance Company only issued excess insurance policies to Crossmann. Because the trial court found Harleysville's policies were sufficient to indemnify the entire $7.2 million in stipulated damages, it did not rule on whether Cincinnati's policies provided coverage, though it did find that the homeowners in the

> underlying lawsuits suffered property damage during Cincinnati's policy periods.

Id. at 44 n.1, 717 S.E.2d at 591 n.1.

On remand, the trial court held hearings in 2012 on January 5 and March 1. By order dated May 23, 2012, the trial court found Harleysville's pro rata share of the $7.2 million in stipulated damages to be $1,580,146. In a separate order also dated May 23, 2012, the court found Cincinnati's excess policies were not triggered because the underlying CGL policies were not exhausted, and Cincinnati was not precluded from litigating this issue by not appealing the 2007 judgment. The court found Cincinnati's excess policies provided coverage between May 29, 1998, and September 1, 2002. The court found because the Cincinnati policy is a "follow from" policy under Stipulation 13, the potentially covered damages in the settling carriers' policies and the excess policies were similar. Finally, the court looked to the clauses in Cincinnati's policies reinforcing the excess nature of the policies, including the "Other Insurance" provision, which stated, "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." The policies also included a "Limits of Insurance" clause, which provided as follows:

> a. If the limits of "underlying insurance" have been reduced by payment of claims, this policy will continue in force as excess of the reduced "underlying insurance"; or
> b. If the limits of "underlying insurance" have been exhausted by payment of claims, this policy will continue in force as "underlying insurance." Section III, 4(a),(b).

Thus, the trial court found the Cincinnati polices could be triggered only if the underlying policies were exhausted by either paying the full limits available or by Appellants funding the difference between a settlement for less than the full limits and the limits of the relevant policies. The court found the excess policies would be triggered if the amount of the damages paid in settlement of the underlying cases, as calculated using the "time on risk" method, exceeded the limits of the underlying insurance for each policy period.

Crossmann paid a total of $16,770,750 to settle the underlying lawsuits. In Stipulation 1, the parties stipulated to $7.2 million in "property damage" resulting from water intrusion if there was an "occurrence" under the Harleysville and Cincinnati polices. The trial court found the balance, $9,570,750, represented the cost to repair "defective construction." The court noted: "While [Appellants] argue[] that the measure of Cincinnati's potential liability should be . . . $16,770,750[,] . . . the Court is bound by the parties' Stipulation that the potentially covered damages are $7.2 million."

The underlying policies each provided $1 million, per occurrence, per year; $2 million, annual aggregate for the following periods:

Indiana[3]	5/29/98 to 8/29/98
Massachusetts Bay	8/29/98 to 8/29/00
Regent	8/29/98 to 1/1/02

Utilizing the default rule from *Crossmann II* that assumes damage occurs in equal portions during each year that it progresses, the court evenly allocated the damages from the period of thirty days after the Certificate of Occupancy (CO) was issued until repairs were completed or the underlying lawsuits were settled.

The court compared the amount of the settlement in each case to the total settlement amount of $16,770,750; applied that percentage to the stipulated damages of $7.2 million; and arrived at a pro rata allocation of stipulated damages. The court then applied a daily calculation of loss (Loss/Day) using the stipulated damages:

Project	Stipulated Damages		Average Days of Progressive Loss		Loss/ Day
River Oaks I	$3,187,440	÷	3,659	=	$871
River Oaks II	$1,213,200	÷	2,592	=	$468
Waterway	$1,684,800	÷	3,316	=	$508
Buck Creek	$ 941,760	÷	3,730	=	$252

[3] Indiana's policy was effective beginning July 1, 1997, until August 29, 1998, but it only covered Appellants between May and August of 1998, for a total of ninety-six days.

Lightkeepers Village/Rose	$ 172,800	÷	4,707		=	$ 37
				Total Loss/Day		$2,136

The court finally compared the Loss/Day of $2,136 to the daily underlying policy limits, finding the daily underlying coverage to be $2,740. Because the daily underlying coverage was more than the Loss/Day, the court found the excess coverage was not triggered. Appellants moved for reconsideration. After an August 27, 2012 hearing, the trial court denied the motion to reconsider. This appeal followed.[4]

STANDARD OF REVIEW

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). If the dispute is an action to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* 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. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "Where the action presents a question of law, as does this declaratory action, this Court's review is plenary and without deference to the trial court." *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 592.

LAW/ANALYSIS

I. Exhaustion

Appellants argue the trial court erred in finding the underlying CGL policy limits were not exhausted; therefore, it erred in finding coverage under Cincinnati's policies was not triggered. We disagree.

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[4] After the circuit court issued its May 23, 2012 order, Appellants and Harleysville "resolved their disputes"; thus, Harleysville is not involved in this appeal.

Appellants maintain the limits of the underlying policies have been exhausted under the joint and several method of allocation and Cincinnati's liability is $5,619,854. Appellants argue because coverage for "property damage" under the Cincinnati policies "applies anywhere" and the "underlying insurance" definition includes "any type of self-insurance or alternative method by which the insured arranges for funding of legal liabilities that affords coverage that this policy covers," the policies were triggered when the limits of the underlying policies were paid by (1) the underlying insurers, (2) Appellants, or (3) a combination of the underlying insurers and Appellants. Thus, Appellants argue payments made to claimants in states other than South Carolina should have been considered in determining whether the underlying policy limits were exhausted.[5]

In its order denying Appellants' motion to reconsider, the trial court addressed this issue, stating:

> While it is undisputed that [Appellants] paid substantial sums to settle claims in other jurisdictions, [Appellants] failed to demonstrate what portion of the monies paid, if any, were for covered claims as set forth in *Crossmann II* . . . . Further, [Appellants have] failed to identify what part of any alleged covered claims would be allocated to the Cincinnati policy periods utilizing the pro rata/time on risk methodology as set forth in *Crossmann II*. Only "property damages" caused by an "occurrence" that occurred during Cincinnati's policy period would act to exhaust the underlying CGL limits.
>
> In an effort to show that the amounts paid to settle cases in other states should be considered in this litigation, [Appellants rely] on statements contained in [their] Answers to Interrogatories . . . . [Appellants] did not state in [their] discovery response that any property damage was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period. Further, during the August 27, 2012

[5] Appellants allege they paid $42.7 million in Indiana and more than $13 million in Kentucky to settle homeowner construction defect claims.

> hearing [on the motion to reconsider], [Appellants] did not present any evidence to the Court that any property damage in the Indiana and Kentucky cases was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period.

Thus, the court denied the motion to reconsider regarding payments to resolve claims in states other than South Carolina.

Appellants rely on an affidavit of W. Mark Berry, a former Beazer[6] officer, who testified regarding the settlement negotiations and claims made in other states. Berry stated the following: "Beazer has expended over $27,770,073 through January 2006 for remediation of *property damage* in connection with the settlement of the [Indiana lawsuits]. . . ." (emphasis added). Based on Berry's use of the phrase "property damage" in his affidavit, Appellants claim the payments made were to remedy property damage as defined by the underlying policies, thereby triggering the Cincinnati excess policies.

Appellants also rely on summaries of damage claims paid in the Indiana and Kentucky litigations. Appellants claim payments of $42.7 million in the Indiana litigation and more than $13 million in the Kentucky litigation. They further claim Beazer's settlement with Cincinnati in the other state litigation[7] is "strong evidence that even Cincinnati believes the Underlying Insurance is exhausted." In addition, Appellants claim Cincinnati was required to dispute their submission of the damages paid in the other state litigation.

We find Appellants' reliance misplaced. Appellants submitted no information specifying the portions of these payments that related to property damage as defined under the policies compared to the costs related to defective construction, which were not covered under the polices. The burden of proof in a declaratory judgment action rests on the plaintiff. *Martin v. Cantrell*, 225 S.C. 140, 144, 81 S.E.2d 37, 38-39 (1954). We find no error by the trial court in rejecting Appellants' bare assertion that all of the claims paid in the other state litigations

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[6] Beazer acquired Crossmann in April 2002.

[7] Cincinnati paid Appellants $11 million in settlement for losses in Indiana and Kentucky under these policies.

arose from property damage, and we find no justification for abrogating the stipulations.

Appellants also claim because the stipulations were not signed by the underlying insurers and it is undisputed Appellants paid $16.8 million to resolve the underlying lawsuits in South Carolina, those insurers were obligated for the entire $16.8 million; thus, Appellants should be able to claim the entire $16.8 million in resolving its dispute toward exhaustion. We disagree.

"A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998). "Stipulations, of course, are binding upon those who make them." *Id.* (citing 73 Am.Jur.2d *Stipulations* § 8, at 543 (1974)); *see Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided."); *see also Indep. Grain Dealers Mktg. Ass'n v. Beard*, 284 S.C. 309, 312, 326 S.E.2d 169, 171 (Ct. App. 1985) ("When the parties entered into an agreed stipulation of fact as basis for the decision by the master, both were bound by the stipulations and the master could not go beyond the stipulations to determine the facts upon which the case was to be decided.").

"A stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination of the parties['] rights or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein." *Suddeth v. Knight*, 280 S.C. 540, 544-45, 314 S.E.2d 11, 14 (Ct. App. 1984). However, a stipulation will not be abrogated without "the written consent of both parties, or one of the parties has been relieved from its operation by an order of the Court based upon such a showing as satisfies the Court that the interests of justice require that he should be so relieved." *Brown v. Pechman*, 55 S.C. 555, 567, 33 S.E. 732, 737 (1899).

In this case, Stipulation 1 provided if there is an "occurrence," "the damages at the underlying projects that resulted from water intrusion and that meet the definition of property damage in the Policies are $7.2 million." Harleysville, Cincinnati, and Appellants were the signatories on the stipulations. There was no agreement to

abrogate this stipulation,[8] and Appellants provided no basis requiring the trial court to abrogate the stipulation in the interest of justice.

At the time the stipulations were agreed upon, the parties had not determined the issue of whether there was an "occurrence." The question of whether the underlying policies would be exhausted was in dispute. Furthermore, Appellants have not shown what portion of the payments made in Indiana and Kentucky constituted "property damage" and what portion was for defective construction, which was not covered under the underlying or Cincinnati policies. *See Crossman II*, 395 S.C. at 49, 717 S.E.2d at 593 (emphasizing the difference between a claim for the cost of repairing defective work, which is not a claim for property damage and a claim for the costs of repairing damage caused by defective work, which is a claim for property damage). We find the trial court's analysis is consistent with our supreme court's analysis in *Crossmann II*. Further, we find the trial court correctly used the stipulated damages in assessing whether the underlying policies had been exhausted.

Appellants next argue Stipulation 1, which states property damage is $7.2 million, related to coverage only under the Cincinnati and Harleysville policies and does not determine exhaustion regarding payments of South Carolina claims made by other insurers or payments of claims made in other state litigations. We disagree.

Stipulation 8 provides the following: "The parties agree that the following matters are the only issues of law to be addressed by [the trial court] . . . . (b) In the event the Court finds that there was an occurrence or occurrences, how shall the $7.2 million in insured damages referred to in paragraph 1 above be allocated . . . ?" We find the stipulations clear, unambiguous, and binding on Appellants.

Appellants argue in the alternative that under the time-on-the-risk methodology, Cincinnati is still obligated to pay $3,038,300. Citing *Liberty Mutual Fire Insurance Co. v. J.T. Walker Industries, Inc.*, 817 F.Supp. d 784, 789 (D.S.C. 2011), Appellants argue all the property damage that takes place in a single policy year is a separate occurrence. We disagree.

[8] In fact, at the first hearing on remand, Appellants specifically agreed the stipulations remained the "status quo, a part and partial [sic] of this case."

In *J.T. Walker*, the district court stated: "The only interpretation of 'occurrence' able to reconcile all of the policy language in a manner consistent with *Crossmann II* is that all of the damage that happens in one policy year constitutes a single 'occurrence,' and therefore progressive environmental damage creates 'a "separate" occurrence in each policy year.'" 817 F.Supp.2d at 789 (quoting *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094, 1105 (N.J. 2004)).

The method of allocation first considered by the trial court was the default rule from *Crossmann II*, assuming damage occurs in equal portions during each year that it progressed. *Crossmann II*, 395 S.C. at 64-65, 717 S.E.2d at 602. The trial court then computed the pro rata allocation based on a daily loss rather than an annual loss because Indiana had coverage for less than a year and Regent had coverage for less than two years. The trial court noted this was the methodology originally advanced by Appellants.

We find no error in the methodology employed by the trial court. As articulated in *Crossmann II*, the default rule is subject to alteration *at the discretion of the trial court*:

> This 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.
>
> In this case, a strict application of the basic "time on risk" formula might be inappropriate. There were numerous buildings involved in the underlying lawsuit against Crossmann, each with its own certificate of occupancy, and the parties have stipulated that the damage began "within 30 days after the Certificate of Occupancy was issued for each building." Further, the parties stipulated that the damage "progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first." Accordingly, it may be that, as to each

> building, each policy was "on the risk" for a slightly different proportion of the total damage period. We leave it to the sound discretion of the trial court to determine whether it is necessary to apply the "time on risk" formula separately to each individual building or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case. Thus, we emphasize that trial courts employing the "time on risk" approach may alter the default formula set forth above where a strict application would be unduly burdensome or otherwise inappropriate under the circumstances of a particular case. However, any such alterations must remain within the bounds of a pro rata/"time on risk" approach: the formula must result in a reasonable approximation of the amount of property damage that occurred during each insurer's policy period.

Id. at 65-66, 717 S.E.2d 589, 602.

Finally, Appellants argue the excess policies should be triggered whether the payments made to determine exhaustion derived from underlying insurers, settlements paid by Appellants, or both as was found by the Seventh Circuit Court of Appeals in lawsuits against Beazer in Indiana. *See Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653, 659 (7th Cir. 2010) (citing Indiana public policy favoring out-of-court settlement and finding other interpretation would deter parties who have both CGL and excess insurance from settling with their CGL insurers). We disagree.

We find the origin of the payments is irrelevant in this case where the stipulated damages were $7.2 million and Appellants settled with the underlying insurers for $8.6 million. The excess coverage is not triggered because the stipulated property damage has been paid, not because of who made the payments. We find no error by the trial court in the method of calculation utilized to determine Cincinnati's excess coverage was not triggered.

II. 2007 Judgment

Appellants argue the trial court erred in reversing its joint and several allocation method as to Cincinnati because Cincinnati did not appeal the 2007 judgment. Relying on the doctrine of law of the case, Appellants argue the trial court erred in applying the time on the risk allocation method rather than the joint and several allocation method. According to Appellants, Cincinnati's failure to either appeal the 2007 judgment or raise the law of the case issue in its remand briefs indicated an acceptance of the joint and several liability allocation method. We disagree.

Under the law of the case doctrine, "[a]n unappealed ruling is the law of the case and requires affirmance." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010); *see Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (finding an unchallenged ruling, "right or wrong, [was] the law of th[e] case"). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (internal quotations marks omitted). The law of the case doctrine applies to issues explicitly decided and issues necessarily decided in the former case. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011).

We find the law of the case doctrine does not apply in this case. First, the parties specifically stipulated in Stipulation 8(c) that if "time on the risk" was determined to be the proper allocation method, "[a]ll parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for a pro rata time on the risk allocation period." In Stipulation 9, "[t]he parties agree[d] that Cincinnati can argue . . . that the underlying insurance has not been exhausted . . . ." In addition, the 2007 judgment did not explicitly or necessarily decide the issue of whether the underlying policies had been exhausted, thereby triggering Cincinnati's excess coverage. We find no merit to Appellants' law of the case argument.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.