The Supreme Court of South Carolina

Re: Reconciliation of General Sessions Cases Statewide

ADMINISTRATIVE ORDER

In the interest of having an accurate record of pending criminal cases statewide, we find the need to address the reconciliation process to confirm the inventory of outstanding General Sessions cases.

Pursuant to the provisions of Article V, §4, of the South Carolina Constitution,

IT IS ORDERED that each Circuit Solicitor shall reconcile all pending General Sessions cases attributable to each county in their circuit with the records maintained by the County Clerks of Court. The Clerks shall provide to the Solicitors the most recent pending cases report from the County Statistics Self-Audit Portal and shall work with the Solicitors to reconcile the records and ensure that all case dispositions are accurately reported to the S.C. Judicial Department. The General Sessions records for each county must be reconciled no later than February 4, 2013. The

Solicitors shall notify the Director of Court Administration of compliance with this Order and that the record of pending cases is accurate as of the date of reconciliation. Thereafter, it is the ongoing responsibility of the Solicitors and Clerks to periodically reconcile General Sessions pending cases.

IT IS FURTHER ORDERED that Clerks of Court shall conduct monthly self-audits utilizing the County Statistics Self-Audit Portal to ensure that the records transmitted to the S.C. Judicial Department are accurate. Verification of the monthly self-audit will be submitted to Court Administration for the court's review on an ongoing basis.

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.

November 21, 2012
Columbia, South Carolina

The Supreme Court of South Carolina

Re: Uniform Differentiated Case Management

ORDER

Pursuant to the provisions of Article V, § 4, of the South Carolina Constitution, and in furtherance of this Court's decision in *State v. Langford*, Op. No. 27195 (S.C. Sup. Ct. filed November 21, 2012),

IT IS ORDERED that all General Sessions cases shall be processed under the procedures set forth in this order. This Uniform Differentiated Case Management Order supplements the Disposition of Cases in General Sessions Order dated November 21, 2012, and supersedes all previous Administrative Orders implementing Differentiated Case Management in each county. This Order shall be effective February 4, 2013.

The Court directs that in each General Sessions case arising before the various Magistrates and Municipal Courts of the county, the following procedure is to be followed:

A. Bond Hearing

1. Magistrates and Municipal Judges are required to transmit warrants to the Clerk of Court within fifteen (15) days as required by Rule 3(a) of the South Carolina Rules of Criminal Procedure.

2. All Defendants will be screened by the Magistrate at their bond hearing to determine if they qualify for appointment of counsel. The screening will be conducted by the on-duty Magistrate for all Defendants, including those charged by other jurisdictions. If the Defendant qualifies, the Public Defender (PD) will be appointed

provided the Defendant takes the necessary steps for that office to assume the case.

3. The Defendant will be served with a Notice of Initial Appearance at his or her bond hearing. The date of the Initial Appearance will be assigned in accordance with the schedule prepared and distributed by the Chief Judge for Administrative Purposes (CJAP). The Defendant's attendance at the initial appearance will be made a condition of that Defendant's bond by noting this under Section III of a Personal Recognizance Bond Form or Section D of a Surety Bond Form. At the time that the initial appearance is set, the Judge setting the Defendant's bond will inform the Defendant, orally and in writing, of his or her right to a Preliminary Hearing.

B. Initial Appearance

1. The Initial and Second Appearances will be presided over by the CJAP or a Judge designated by the CJAP for that purpose. The Initial Appearance will be held and a roll call will be conducted as necessary to ensure attendance. The Clerk of Court is authorized to issue a bench warrant for any Defendant who fails to appear and has not been excused by the CJAP.

2. There will be no continuances of the Initial Appearance.

3. A preliminary hearing must be requested in writing on or before the Initial Appearance date.

4. The following issues will be addressed at the Initial Appearance:

    a. If a Defendant qualifies for Court-appointed counsel and has not retained private counsel by his or her initial appearance, the PD will continue to represent the Defendant.

    b. If a Defendant qualifies for a PD but has retained private counsel prior to the initial appearance date, that attorney must file a general notice of representation with the Clerk of Court and serve a copy on the Solicitor's Office. The PD will be relieved of representation at that time.

c. If a Defendant did not qualify for a PD, and private counsel has been retained, a letter of representation must be filed with the Clerk of Court and served on the Solicitor's Office.

d. Unrepresented Defendants must apply for a PD at the Initial Appearance. The PD's Office will take applications and if approved, a PD will be assigned that day.

e. Defendants who remain unrepresented at or after the Initial Appearance must appear on their Second Appearance date and remain in court throughout that term until excused by the Court. These Defendants must appear for each successive term of court as required by their bond until their case is disposed.

f. Any mental health issues.

g. Any issues related to the analysis of drugs or other types of evidence.

h. Any other issue that may affect the timing of the disposition of the criminal case including issues related to conflicts of representation.

i. During the Initial Appearance the Solicitor may administratively dismiss case(s) without prejudice based upon insufficient evidence with which to prosecute. Within ten (10) days of such an administrative dismissal, the Solicitor's office shall notify the Clerk of Court of the dismissal based upon insufficient evidence and shall return the matter to law enforcement for further investigation. Administrative dismissals for this reason shall be coded by the Clerk of Court as a dismissal for insufficient evidence and should not be reported as a dismissal by the Solicitor.

5. In all cases where the Defendant is represented by the PD, the PD will assess the case prior to the Initial Appearance for possible conflicts of interest and resolve those conflicts readily identifiable

on that date. The Clerk of Court will, upon Affidavit of Conflict, appoint the next attorney from the list of available attorneys and advise the Defendant of the identity of his or her attorney. The newly appointed counsel will also be notified on that date and a preliminary hearing will be automatically scheduled for the Defendant.

6. The Solicitor and Defendant's attorney should exchange discovery as early in this process as possible. Accordingly, when feasible, Defendant's attorney and the State will enter into negotiations concerning pleas at the Initial Appearance. Any plea offer(s) must be communicated in writing to Defendant or the Defendant's attorney at least fourteen (14) days prior to Defendant's Second Appearance and accepted or rejected in writing prior to Defendant's Second Appearance. Likewise, the decision not to negotiate or extend a plea offer shall be communicated to Defendant or the Defendant's attorney in writing by the Solicitor at least fourteen (14) days prior to Defendant's Second Appearance. Should the plea offer be accepted by the Defendant a written acceptance signed by the Defendant and the Defendant's attorney must be served on the Solicitor assigned to the case. All plea negotiation documents must be filed in the Office of the Clerk of Court upon issuance by the Solicitor or acceptance by the Defendant.

7. Not later than the Initial Appearance, the Solicitor will provide discovery to Defendant or Defendant's attorney of record in all cases in which the appropriate motions have been filed with the Clerk of Court and served on the Solicitor's Office.

8. All law enforcement agencies are required to forward all existing case reports; investigative reports; and, incident reports, as well as other discovery, to the Solicitor's Office within thirty (30) days of a warrant being issued, but not later than fifteen (15) days prior to Defendant's Initial Appearance, if the Initial Appearance is less than thirty (30) days from the date the warrant is issued.

   If the law enforcement agency fails to provide discovery within this deadline, the warrant(s) may be dismissed without prejudice

by the CJAP or another Circuit Judge designated by him as his judicial representative.

Notification will be provided to the Defendant, or Defendant's attorney of record, and Defendant's bondsman that Defendant is not required to appear at the Initial Appearance when the warrants are dismissed. Prior to the issuance of another warrant after dismissal without prejudice of the original warrant for failure to timely comply with discovery transmittal, the requesting law enforcement agency must establish good cause for its initial failure to timely transmit discovery to the CJAP or to another Circuit Judge to whom that authority has been delegated by the CJAP. Failure to present good cause will result in the refusal to issue the second warrant. Application must be made to the CJAP before a new warrant is issued in a case initially dismissed for failure to provide timely discovery.

9. At the Initial Appearance all cases will be assigned to a 180 day track. The CJAP may entertain motions to remove any case from the track and establish a scheduling order where appropriate.

10. At the Second Appearance the court will inquire whether a matter is for plea or for trial. If the matter is a plea, the Court will assign a date and time for the plea hearing to be held. All sentencing sheets and other paperwork must be completed by the parties prior to the day the matter is set for a plea hearing. The plea affidavit must be completed by the Defendant, if self-represented, and by the Defendant and the Defendant's attorney prior to the time scheduled for the taking of the plea.

11. If the plea negotiations are unsuccessful at the Second Appearance the case will be scheduled for trial before one of the presiding General Sessions judges. Except for good cause shown to the CJAP, the CJAP must hear any plea taken after the case is scheduled for trial; or such information will be provided to the court as may be required by the CJAP prior to the taking of the plea.

12. Cases may be resolved at any time prior to any of the scheduled proceedings or the times allowed by the guidelines set out herein.

C. Preliminary Hearing

1. Preliminary hearings will be held at the appropriate Court issuing the charge against the Defendant.

2. Continuances of preliminary hearings may be granted only in extreme circumstances.

3. The Defendant or the Defendant's attorney must be present in order for a preliminary hearing to proceed. If a hearing has been requested in a case that involves an individual affiant, the failure of that affiant to appear and give testimony after notice, will result in the dismissal of the warrant upon motion for dismissal by the Defendant or defense counsel.

D. General Sessions Court Practice

Chambers Availability: The presiding Judges will be available from 9:00-9:30 AM on Tuesday through Friday of each General Sessions term to hold case status conferences with attorneys for the State and defense counsel. Either party may request conferences.

Case Disposition: Cases within the 180 day track or cases that have exceeded the 180 day track by less than one (1) year, shall remain under the control of the Solicitor, subject to the provisions set forth below:

1. General Docket:

a. The General Docket consists of all pending General Sessions matters. Absent the grant of a speedy trial motion, the Solicitor shall have the initial responsibility for designating when a case is ready for trial. Upon determining that a case is ready for trial, the Solicitor shall file with the Clerk of Court a "NOTICE OF COURT DOCKETING" on a form prescribed by the Supreme Court and shall serve all parties and counsel of record.

Upon receiving such notice, the Clerk shall place the case on the Court Docket and the matter may be called for trial any time after thirty (30) days from the filing of the NOTICE OF COURT DOCKETING. The Court Docket consists of all matters that the Solicitor has deemed ready for trial. Once the case is placed on the Court Docket, the Court assumes the responsibility for setting a trial date and the Clerk, under the direction and supervision of the CJAP, shall publish a trial roster from the Court Docket of cases subject for trial at least twenty-one (21) days before each term of court. Publication shall be effected once the Clerk makes the trial roster available in the Clerk's office or on the Clerk's internet site. The Clerk shall also distribute the trial roster to those attorneys listed upon it by Fax, US Mail, hand delivery, or electronic delivery. Cases on the trial roster not reached for trial will be subject to being called for the next two terms of court before being republished. It is the responsibility of each defense attorney to notify the Defendant that the case is scheduled for trial and to remind the Defendant of the right and obligation to be present at trial. Motions for continuance or other relief from a published trial roster shall be made in accordance with Rule 7, SCRCrimP. The CJAP or presiding Judge shall rule on the motion.

b. Nothing herein shall affect the Court's ability to schedule motions or other pretrial proceedings as may be appropriate, or the right of the CJAP to add cases to any trial roster or designate cases for a day certain as the CJAP deems appropriate, subject to the notification requirements set forth in paragraph (D)(1)(a), above.

Cases more than one year beyond their 180 day track will be automatically transferred to the CJAP's supervision as follows:

2. Judicial Docket:

a. If the Solicitor has not filed a NOTICE OF COURT DOCKETING in accordance with Paragraph (D)(1)(a) above for any case more than one (1) year beyond its assigned track,

it will be automatically transferred to the Judicial Docket, which the Clerk shall maintain separate and apart from the regular Court Docket. The CJAP will administer and supervise the Judicial Docket. The Solicitor must notify the Clerk within fifteen (15) days after expiration of this period of time of all cases that are in this category and furnish the following information: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Defense Counsel; (6) Date of Indictment (True Bill); (7) Track expiration date; (8) Prior request(s) for continuance. The Clerk will maintain the Judicial Docket which will include this information.

b. Upon placement on the Judicial Docket, the CJAP shall arrange for the scheduling of trial or other disposition of the case. Additionally, the CJAP may upon the request of any party transfer the case to the trial roster in accordance with Paragraphs (D)(1)(a) and (b).

c. If the case has not been disposed of more than one (1) year following its transfer to the Judicial Docket, the CJAP will dismiss the case, absent the Solicitor establishing good cause. Both the Solicitor and the Defendant shall be notified of the pending dismissal and be given an opportunity to be heard. Cases dismissed pursuant to this provision will be without prejudice, unless otherwise specified by the CJAP. The Solicitor will notify the victim(s) of cases dismissed pursuant to this provision.

3. Non-Track Cases: The Solicitor shall furnish to the CJAP a quarterly status report of all non-track cases. The report shall contain information regarding the progress of the case and the expected disposition date.

4. Old Case Disposition: Any case, including non-track cases, pending four (4) or more years from the date of indictment by the Grand Jury shall be dismissed by the CJAP, unless the Solicitor shall show good cause why it should not be dismissed. Such dismissal is without prejudice, unless otherwise specified by the

CJAP and the Solicitor shall have the right to re-present the matter to the Grand Jury. Before ordering dismissal, the Clerk of Court shall notify the Solicitor and the Defendant of the Court's intention to dismiss the case. The Solicitor shall: (1) within ten (10) days of receiving the notice from the Court, notify the victim(s) in writing of the Court's intended disposition and invite the victim(s) to file a written response with the Solicitor within ten (10) days; and (2) within thirty (30) days file a written response with the Court setting forth in detail the reasons, including the response(s) of the victim(s), why the case should not be dismissed and advising the court of the expected time of disposition. The Defendant may submit a written response within thirty (30) days of the Solicitor's filing. The CJAP may schedule a hearing, dismiss the case without a hearing, or take such further action as may be appropriate. Failure to respond as set forth herein will result in the matter being dismissed pursuant to this provision. If the Solicitor shows good cause, the case shall automatically be transferred to the Judicial Docket.

5. Defendant's Failure to Appear:

   a. Ninety (90) days after a bench warrant is issued for a Defendant who fails to appear, the case will be administratively transferred to FAILURE TO APPEAR status and removed from the docket. The Clerk shall transmit this information to Court Administration and that office shall remove the case from its list of active cases.

   b. The case may be transferred from the FAILURE TO APPEAR DOCKET to active case status upon written request of the Solicitor to the Clerk of Court who shall restore the case and notify the S.C. Judicial Department of this restoration. The case shall then follow the disposition procedure set forth in Paragraphs (D)(1), (2), and (4).

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

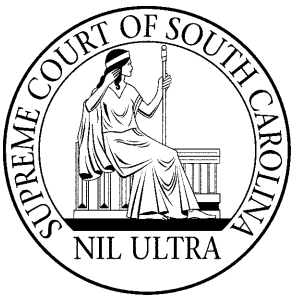
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Because I dissent from the *State v. Langford* opinion, I respectfully do not join in this order.

s/ Costa M. Pleicones J.

November 21, 2012
Columbia, South Carolina



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
November 28, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Order - In the Matter of Mark Andrew Brunty 26

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

27148 – Adoptive Couple v. Baby Girl Pending

2012-207307 - William Deans v. SC Dept. of Corrections Pending

2012-212913 - State v. Robert Holland Koon Pending

PETITIONS FOR REHEARING

27168 – Kareem J. Graves v. CAS Medical Systems Pending

27181 - Historic Charleston v. The City of Charleston Pending

2012-MO-035 – Julius Powell v. State Pending

2012-MO-041 - Professional Financial Services v. Terry White Pending

2012-MO-044 - Walter Mortgage v. Natasha L. Green Denied 11/15/2012

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27187 - Robert W. Oskin v. Stephen Mark Johnson Granted until 12/11/2012

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5053-The State v. Thomas Gilliland 28

5054-Thalia S., a minor under the age of fourteen years, et al. v. Progressive Select Insurance Company et al. 37

5055-Hazel Jeisel Rivera v. Warren Jared Newton et al. 44

5056-Park Regency, LLC, et al. v. R&D Development of the Carolinas et al. 55

5057-Terry Scott Swilling v. Pride Masonry of Gaffney et al. 73

UNPUBLISHED OPINIONS

2012-UP-624-Wells Fargo Bank, N.A. v. Kathleen M. Coffaro et al.
(Charleston, Judge Mikell R. Scarborough)

2012-UP-625-James Eric Jones v. Wal-Mart Stores, Inc. et al.
(Berkeley, Judge Roger M. Young)

2012-UP-626-Maurice L. Morant v. SCDC
(Administrative Law Judge Ralph King Anderson, III)

2012-UP-627-Louis Mack, III, v. American Spiral Weld Pipe Co. et al.
(Richland, Judge J. Michelle Childs)

2012-UP-628-State v. Norman Stoudenmire
(Spartanburg, Judge J. Derham Cole)

2012-UP-629-Empire Fire and Marine Ins. Co. v. RB Recovery and Retail et al.
(Barnwell, Judge Doyet A. Early, III)

2012-UP-630-SCDSS v. Katrina J., Michael W., and John Doe
(Lexington, Judge Richard W. Chewning, III)

2012-UP-631-SCDSS v. Kimberly E., Kenneth A.W. Sr., and Joshua M.
(Union, Judge Thomas Sprott, Jr.)

2012-UP-632-State v. Stevie Lamont Aiken
(Hampton, Judge Perry M. Buckner)

2012-UP-633-General Air Conditioning Services Corp. v. B&B Development of Anderson, LLC, et al.
(Anderson, Judge J. Cordell Maddox, Jr.)

2012-UP-634-Deborah Hiller v. Joe W. Hiller, Sr.
(Greenville, Judge W. Marsh Robertson)

2012-UP-635-James Martin v. Norfolk Southern Corp. et al.
(Aiken, Judge Doyet A. Early, III)

PETITIONS FOR REHEARING

5008-Stephens v. CSX Transportation	Pending
5011-A. Dreher v. SCDHEC	Pending
5016-SC Public Interest Foundation v. Greenville County	Pending
5017-State v. C. Manning (refiled opinion)	Pending
5033-State v. Derrick McDonald	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5038-State v. Jeremy McMillan	Pending
5039-State v. Wendell Williams	Pending
5042-State v. Ricky Cheeks	Pending
2012-UP-078-Tahaei v. Tahaei	Pending
2012-UP-267-State v. J. White	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-351-State v. K. Gilliard	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending

2012-UP-462-Tennant v. Bd. of Zoning Appeals Pending

2012-UP-475-Shah v. Palmetto Health Alliance Pending

2012-UP-487-David Garrison and Diane G. Garrison v. Dennis Pagette and Melanie Pagette v. Nesbitt Surveying Co., Inc. Pending

2012-UP-503-Isiah James v. SCDPPPS (5) Pending

2012-UP-520-Johnson v. Mew Pending

2012-UP-526-State v. Christopher Ryan Whitehead Pending

2012-UP-552-V. Miles v. Waffle House Inc. Pending

2012-UP-559-NAFH National Bank v. Tower Homes Inc. Pending

2012-UP-600-Karen Irby v. Augusta Lawson Pending

2012-UP-561-State v. Joseph Lathan Kelly Pending

2012-UP-563-State v. Marion Bonds Pending

2012-UP-570-Beverly Wheeler v. Spartanburg Sch. Dt. Six et al. Denied 11/26/12

2012-UP-571-Sarah Jo Gaylord v. Jules Gaylord Pending

2012-UP-576-State v. Trevee J. Gethers Pending

2012-UP-579-Andrea Beth Campbell v. Ronnie Brockway, M.D. et al. Pending

2012-UP-603-Fidelity Bank v. Cox Investment Group et al. Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4705-Hudson v. Lancaster Convalescent Pending

4725-Ashenfelder v. City of Georgetown Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher	Pending
4779-AJG Holdings v. Dunn	Pending
4819-Columbia/CSA v. SC Medical	Pending
4823-State v. L. Burgess	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. B. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending

4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending

4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5021-Southern Glass & Plastics Co, Inc. v. Kemper	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-263-State v. Phillip Sawyer	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Bobby Lee Burdine	Pending
2011-UP-304-State v. Billy Winchester	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. Eric Dantzler	Pending

2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. William Ricky Welch	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending

2011-UP-517-N. M. McLean et al. v. James B. Drennan, III Pending

2011-UP-519-Stevens & Wilkinson v. City of Columbia Pending

2011-UP-522-State v. Michael D. Jackson Pending

2011-UP-550-McCaskill v. Roth Pending

2011-UP-558-State v. Tawanda Williams Pending

2011-UP-562-State v. Tarus Henry Pending

2011-UP-565-Griggs v. Ashley Towne Village Pending

2011-UP-572-State v. Reico Welch Pending

2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund Pending

2011-UP-583-State v. David Lee Coward Pending

2011-UP-587-Trinity Inv. v. Marina Ventures Pending

2011-UP-590-A. Leon Ravenell v. Nancy Meyer Pending

2012-UP-003-In the matter of the care and treatment of G. Gonzalez Pending

2012-UP-008-SCDSS v. Michelle D.C. Pending

2012-UP-010-State v. Norman Mitchell Pending

2012-UP-014-State v. Andre Norris Pending

2012-UP-018-State v. Robert Phipps Pending

2012-UP-030-Babaee v. Moisture Warranty Corp. Pending

2012-UP-037-Livingston v. Danube Valley Pending

2012-UP-058-State v. Andra Byron Jamison Pending

2012-UP-060-Austin v. Stone Pending

2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending

2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending

The Supreme Court of South Carolina

In the Matter of Mark Andrew Brunty, Respondent

Appellate Case No. 2012-213410

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Elizabeth Jean Saraniti, Esquire, has been duly appointed

by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Saraniti's office.

Ms. Saraniti's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

November 21, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Gilliland, Appellant.

Appellate Case No. 2011-185606

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5053
Heard October 29, 2012 – Filed November 28, 2012

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie Kate Keeney, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

CURETON, A.J.: Thomas E. Gilliland appeals his conviction for first-degree burglary. He argues the trial court erred in declining to direct a verdict of acquittal

or, in the alternative, by refusing to give a jury charge on trespass as a lesser included offense of burglary. We affirm.

FACTS

I. Background

Gilliland and Pamela Morgan (Victim) met as co-workers. After they dated for a few months, Gilliland moved in with Victim. Following an incident in January 2010, Victim ended the relationship. Gilliland departed from the home, leaving his personal property behind. On February 16, 2010, the family court issued an order of protection forbidding Gilliland "to communicate or attempt to communicate with [Victim] in any way or to enter or attempt to enter [her] place of residence" for a period of six months.[1]

On March 15, 2010, Victim worked until 11:00 p.m. Arriving home at 12:10 a.m. on March 16, 2010, she unlocked her door, entered, and found Gilliland waiting for her inside. According to Victim, Gilliland told her he had come to talk and make up with her; he loved her; and he, not the family court, knew what was best for her. When Victim asked how he had entered her home, Gilliland would only say, "I'm a cat burglar. Doors can be jimmied, windows can be opened." According to Victim, she did not run because she did not believe she could get away, and she did not tell him to leave because she believed he would not listen to her.

When Victim tried to leave by taking her dog for a walk, Gilliland followed closely behind her. Back inside the house, Victim tried to dial 911 from her two home phones, but they had been disconnected. After more than two hours of alternately sitting and walking from room to room while Gilliland talked, Victim succeeded in going into the bathroom alone, where she dialed 911 from her cell phone. Police officers arrived soon afterward, interviewed Gilliland and Victim separately, and arrested Gilliland. He was charged with violation of a protective order and first-degree burglary.

[1] The family court issued the order of protection pursuant to the Protection from Domestic Abuse Act (the Act), S.C. Code Ann. §§ 20-4-10 to -395 (1985 & Supp. 2011).

II. Trial

At trial, Gilliland admitted to violating the protective order. However, he defended against the burglary charge by claiming he was present at the home with Victim's consent. According to Gilliland, Victim invited him to the home to collect his belongings and personally let him inside.

Deputy Ryan Flood recalled responding to Victim's domestic disturbance call at approximately 3:00 a.m. When Victim answered the deputy's knock at the back door, she quivered and appeared frightened. The officer interviewed Victim and Gilliland separately and took a statement from Victim. He recalled transcribing her account because she was shaking too much to write it herself. Next, Deputy Flood Mirandized and interviewed Gilliland, who explained he intended to reconcile with Victim and had entered the house through the bathroom window.[2] Gilliland did not mention any invitation to retrieve his belongings.

Victim also testified at trial. She recalled obtaining the order of protection but subsequently telephoning Gilliland's son. In that call, she offered to allow a member of Gilliland's family to retrieve his belongings from her home. However, the son handed the telephone to Gilliland, so Victim relayed the message to him. She denied inviting Gilliland to her home. Although no one ever collected his belongings, Gilliland continued to telephone Victim and send her love letters.

Gilliland testified in his defense. He acknowledged knowing the protective order barred him from contacting Victim, but he stated he "just loved her so much that [he] wanted to write her a letter." According to him, Victim telephoned his son several times in one day, asked for Gilliland, and invited him to come to her house "after she got off work" to pick up his belongings.

Gilliland recalled that, on the night of the incident, he walked eight miles to Victim's home, and Victim let him in. According to Gilliland, after Victim drank a glass of wine, the couple walked her dog, then went into the bedroom and made love. Gilliland stated he showered afterward, then Victim went into the bathroom on the pretense of showering and, while in the bathroom, called 911. He described

[2] Victim also testified the latch to her bathroom window had been tampered with or broken.

Victim returning to the living room, kissing him, lighting a cigarette, and finishing her wine. Gilliland testified Victim asked if he would like to walk the dog with her again, and he said yes. However, when she opened the door and stepped outside, "the deputy was standing there."

Gilliland recollected waiting in the patrol car while the deputy talked with Victim, then explaining to the officer that Victim had let him into her house when he knocked on the door. According to Gilliland, he told the officer he had gone to the house to reconcile with Victim and retrieve his belongings.

When shown photographs of the damage to Victim's bathroom window, Gilliland denied causing it. On cross-examination, he noted he knew when Victim would be working and when she would likely return home. He admitted writing her several letters in April, May, June, July, August, September, and October 2010. He confirmed writing in another letter, dated just two weeks before the incident, that he understood the family court "think[s] they know how to protect you, but they don't. I must concentrate on what's good for us, and not what's right for the system." Although Gilliland claimed he received one letter in return from Victim, he did not produce it.

At the close of the State's case, Gilliland moved for a directed verdict, arguing the State had failed to prove the elements of first-degree burglary. The trial court denied his motion. At the close of testimony, he renewed his motion, which the trial court again denied. In addition, anticipating the State intended to assert his violation of the protective order satisfied the "intent to commit a crime" element of first-degree burglary, Gilliland requested a jury instruction on trespass as a lesser included offense. The trial court also denied this motion.

The jury found Gilliland guilty of both offenses, and he received concurrent sentences totaling fifteen years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

LAW/ANALYSIS

I. Directed Verdict

Gilliland asserts the trial court erred in declining to direct a verdict of acquittal on the first-degree burglary charge when the only evidence supporting the element of intent to commit a crime was his violation of a protective order. We disagree.

A court interpreting a statute looks first to the statute's plain language:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect.

State v. Whitner, Op. No. 27142 (S.C. Sup. Ct. filed Jul. 11, 2012) (Shearouse Adv. Sh. No. 23 at 46, 49) (citations and quotation marks omitted).

An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly submitted to the jury." *Id.* at 292-93, 625 S.E.2d at 648. The trial court may not consider the weight of the evidence. *Id.* at 292, 625 S.E.2d at 648. However, "when the [circumstantial] evidence presented merely raises a suspicion of guilt," the trial court should direct a verdict in favor of the accused. *State v. Bostick*, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (citing *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). A mere suspicion is a belief that is inspired by "facts or circumstances which do not amount to proof." *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

A person is guilty of first-degree burglary if he "enters a dwelling without consent and with intent to commit a crime in the dwelling" and either enters or remains in the dwelling during the nighttime. S.C. Code Ann. § 16-11-311(A) (2003). Although the intent to commit a crime must exist at the time the accused enters the dwelling, the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling. *State v. Pinckney*, 339 S.C. 346, 349-50, 529 S.E.2d 526, 527-28 (2000). First-degree burglary is a felony punishable by imprisonment of a term between fifteen years and life. S.C. Code Ann. § 16-11-311(B) (2003).

Pursuant to section 16-25-20(D) of the South Carolina Code (Supp. 2011):

> A person who violates the terms and conditions of an order of protection issued in this State under . . . [the Act] . . . is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than thirty days and fined not more than five hundred dollars.

For the purposes of section 16-25-20(D), an order of protection is one that is "issued to protect the petitioner or minor household members from the abuse of another household member where the respondent has received notice of the proceedings and has had an opportunity to be heard." S.C. Code Ann. § 20-4-20(f) (Supp. 2011).

We see no error. Our standard of review requires that we view the evidence in the record in the light most favorable to the State. *Weston*, 367 S.C. at 292, 625 S.E.2d at 648. In the case at bar, that evidence reflects Gilliland entered Victim's home against her wishes at some point before 12:10 a.m. and remained there for nearly three nighttime hours. Accordingly, the State established Gilliland (1) entered Victim's dwelling (2) without her consent and (3) remained there during the nighttime. *See* § 16-11-311(A) (setting forth elements of first-degree burglary).

Thus, the issue on appeal centers on the accused's intent to commit a crime within the dwelling, which the State contends it established through Gilliland's violation of the order of protection. *See id.*; *see also* § 16-25-20(D) (providing violation of a protective order issued under the Act is a misdemeanor). The question whether the violation of such an order is a crime sufficient to support first-degree burglary is novel in South Carolina.

We find the plain language of sections 16-11-311(A) and 16-25-20(D) is unambiguous. Accordingly, we may not impose a different interpretation on that language. *See Whitner*, Op. No. 27142 at 49 (holding a court must look to the plain meaning of unambiguous statutory language). First-degree burglary requires that, at the time the offender entered the dwelling, he intended to commit a crime once inside. § 16-11-311(A). Violating the terms and conditions of an order of protection is a crime. *See* § 16-25-20(D) ("A person who violates the terms and conditions of an order of protection issued . . . under . . . [the Act] . . . is guilty of a misdemeanor."). Gilliland argues unpersuasively that the good intentions with which he unlawfully entered Victim's home prevented his entry from rising to the level of a burglary; therefore, he is entitled to a directed verdict. Under his interpretation, section 16-25-20(D) would criminalize only abusive communications with the victim. Although an extensive search of our case law revealed a paucity of burglaries committed with benevolent intent, we find the plain language of sections 16-25-20(D) and 16-11-311(A) makes no allowance for good intentions. Neither statute purports to exclude a misdemeanor under section 16-25-20(D) from supporting a conviction of first-degree burglary. Neither statute requires a particular mental state for the violation of a protective order to become a criminal act. Neither statute establishes any exceptions or identifies violations that are not of a criminal nature. Accordingly, neither the trial court nor this court has the authority to impose such a limitation or exception.

Even ignoring the fact Gilliland violated the protective order by breaking into Victim's home, ample direct and circumstantial evidence existed from which the jury could conclude he intended to commit a crime once inside. *See Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648 (requiring an appellate court to find a case was properly submitted to the jury upon the presence in the record of "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused"). The order of protection forbade Gilliland "to communicate or attempt to communicate with [Victim] in any way or to enter or attempt to enter [her] place of residence." Deputy Flood, Victim, and Gilliland himself testified he went to the home with the intent of talking to Victim. Moreover, Gilliland repeatedly admitted knowing the protective order barred him from communicating or attempting to communicate with Victim "in any way" or entering or attempting to enter her home. In spite of the protective order, he entered Victim's home and talked to her for hours. Consequently, sufficient evidence existed for this question to be submitted to the jury, and the trial court did not err in declining to direct a verdict in Gilliland's favor.

II. Jury Instruction

Gilliland also asserts the trial court erred by refusing a jury instruction on the charge of trespass as a lesser included offense of first-degree burglary. We disagree.

Generally, "the trial court is required to charge only the current and correct law of South Carolina." *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). To warrant reversal, a trial court's refusal to give a requested jury instruction "must be both erroneous and prejudicial to the defendant." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). The evidence presented at trial determines the law to be charged to the jury. *Id.* at 261-62, 607 S.E.2d at 95.

"A trial [court] is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). The test for determining whether one offense is a lesser included offense of another "is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *Hope v. State*, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997) (quoting *State v. Bland*, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995)).

Finding Gilliland has failed to demonstrate error, we affirm. Absent error, we need not look for prejudice. *See Brown*, 362 S.C. at 262, 607 S.E.2d at 95 (requiring both error and prejudice for reversal of a trial court's refusal to give a requested jury instruction).

In determining trespass is not a lesser included offense of first-degree burglary, the trial court correctly relied on *State v. Cross*, 323 S.C. 41, 448 S.E.2d 569 (Ct. App. 1994), which is on point and has never been overruled. In that case, the victim's former boyfriend entered her home twice, sexually assaulted her at knifepoint once, took some of her belongings, and forced her to accompany him to Myrtle Beach. *Id.* at 43, 448 S.E.2d at 569-70. Although the jury acquitted the defendant of several other charges, it found him guilty of two counts of first-degree burglary. *Id.* at 43, 448 S.E.2d at 569. The court of appeals affirmed. *Id.* at 44-45, 448 S.E.2d at 570. Gilliland contends our opinion in that case is inapplicable here because the State failed to prove all elements of trespass in *Cross*. However, the

Cross court did not base its determinations concerning the relationship between trespass and burglary on the facts presented at Cross's trial. *Id.* Instead, it found neither statutory trespass nor common law criminal trespass was a lesser included offense of first-degree burglary, because each type of trespass requires the State to prove at least one element not present in first-degree burglary. *Id.* at 44, 448 S.E.2d at 570. Because the *Cross* court based its conclusion upon a properly conducted comparison of the elements of each offense and did not limit its holding to the facts of the case before it, the trial court in this matter did not err in relying on *Cross*.

CONCLUSION

We find the plain language of sections 16-25-20(D) and 16-11-311(A) is unambiguous and sets forth no exception, exclusion, or requirement precluding an intent to violate an order of protection from qualifying, for the purposes of first-degree burglary, as an intent to commit a crime. Therefore, we affirm the trial court's denial of Gilliland's motion for a directed verdict.

Moreover, we find the trial court properly applied the elements test and this court's opinion in *Cross* when it determined trespass was not a lesser included offense of first-degree burglary. Accordingly, the trial court did not err in declining to charge the jury on trespass.

For these reasons, the decision of the trial court is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thalia S., a minor under the age of 14 years, through her next friend and natural mother, Mercedes Aminta Gromacki, Mercedes Aminta Gromacki, as Personal Representative of the Estate of Angelina G., Mercedes Aminta Gromacki, Individually, and Kristopher Gromacki, Individually, Appellants,

v.

Progressive Select Insurance Company, f/k/a Progressive Auto Pro Insurance Company, Respondent.

Appellate Case No. 2011-195546

Appeal From Jasper County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5054
Heard October 18, 2012 – Filed November 28, 2012

AFFIRMED

Darrell T. Johnson, Jr., Warren Paul Johnson, and Mills L. Morrison, Jr., all of Law Office of Darrell Thomas Johnson, Jr., LLC, of Hardeeville, for Appellants.

John Robert Murphy, of Murphy & Grantland, PA, of Columbia, for Respondent.

CURETON, A.J.: In this dispute over insurance coverage, Appellants argue the trial court erred in granting summary judgment to Progressive Select Insurance Company (Progressive) because (1) their insurance policy affords bodily injury liability coverage pursuant to section 56-9-351 of the South Carolina Code (2006) and (2) the trial court's reliance on *Newton v. Progressive Northwestern Insurance Company*, 347 S.C. 271, 554 S.E.2d 437 (Ct. App. 2001), is misplaced. We affirm.

FACTS

The facts of this case are undisputed. On March 22, 2005, Kristopher Gromacki was driving his wife, Mercedes Salas, and children, Thalia and Angelina, from their home in Florida to Virginia. On Interstate 95 in South Carolina, Gromacki lost control of the vehicle, swerved into another lane, and was rear-ended by a tractor trailer operated by Fleet Source, Inc. Gromacki and Thalia were seen by a doctor the day of the accident and were released the same day. However, Salas suffered a brain injury that required emergency surgery, and Angelina passed away a few days after the accident.

Thalia and Salas sued Fleet Source, Gromacki, and the corporation that manufactured Angelina's child seat and ultimately settled with the two corporate defendants. The claims against Gromacki were referred to a special referee, who awarded damages to Thalia and Salas. Thereafter, Appellants filed a declaratory judgment action against Progressive, which is the basis for this appeal. In the complaint, Appellants alleged Progressive breached the policy of insurance by refusing to pay the limits of liability coverage under the policy. Appellants argued the policy should be enforced to include bodily injury liability coverage because the policy's out-of-state coverage provision requires coverage for accidents that occur in South Carolina.

Progressive served Appellants with a request for admission. Appellants admitted the policy was issued to Salas, a resident of Florida and the named insured under the policy. They further admitted the policy was neither issued nor delivered in South Carolina; the vehicle involved in the accident was principally garaged in Florida, not South Carolina; and on the date of the accident, Appellants were not residents of South Carolina. Appellants acknowledged the policy did not include any bodily injury liability coverage for accidents occurring in Florida. Moreover, they admitted Progressive did not certify proof of financial responsibility pursuant to South Carolina law on behalf of Appellants and Gromacki and Salas were not required to certify proof of financial responsibility prior to the accident.

Appellants confirmed Gromacki and Salas had not been involved in a prior accident in South Carolina before the accident relating to this dispute, nor had their driving privileges in South Carolina been suspended at the time of the accident. Finally, Appellants admitted they had no evidence either Gromacki or Salas had failed to satisfy a judgment relating to another motor vehicle accident prior to the accident.

Both sides moved for summary judgment. After a hearing, the trial court held the out-of-state coverage provision in the policy was not triggered and granted summary judgment to Progressive. Appellants filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, which the trial court denied. This appeal followed.

LAW/ANALYSIS

I. Procedural Posture

When reviewing the grant of a summary judgment motion, an appellate court "applies the same standard that governs the trial court under Rule 56(c), SCRCP." *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008). In determining whether any triable issues of fact exist, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

"The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." *Hansen ex rel. Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002) (quoting *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995)).

II. Analysis

First, Appellants argue their insurance policy must afford bodily injury liability coverage because section 56-9-351 of the South Carolina Code (2006) requires nonresident motorists to maintain bodily injury liability coverage while driving in South Carolina. We disagree.

"An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." [1] *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008); *accord Barnier v. Rainey*, 890 So. 2d 357, 359 (Fla. Dist. Ct. App. 2004) ("In that the rights and obligations of parties under a policy of insurance arise out of a contract of insurance, they are governed by contract law."). "Where the terms of a contract are clear and unambiguous, its construction is for the court; but where the terms are ambiguous, the question of the parties' intent must be submitted to the jury." *Hansen*, 350 S.C. at 68, 565 S.E.2d at 116; *accord Ellenwood v. S. United Life Ins. Co.*, 373 So. 2d 392, 394 (Fla. Dist. Ct. App. 1979) ("If the language of a contract is unambiguous and not subject to conflicting inferences, its construction is for the court, not the jury."). Furthermore, "[w]hen a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006).

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[1] We are cognizant that "[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State and . . . are subject to the laws of this State." S.C. Code Ann. § 38-61-10 (2002). However, in construing a contract made between residents of another state, executed and delivered in the other state, and concerning lives or property usually located in the other state, South Carolina courts will look to the law of the state where the contract was issued. *Gordon v. Colonial Ins. Co. of Cal.*, 342 S.C. 152, 155-56, 536 S.E.2d 376, 378 (Ct. App. 2000). The question of which state's laws apply to Appellants' contract is not at issue in this appeal. Both Florida and South Carolina adhere to the same applicable principles; therefore, we provide citations to the law of both states.

Appellants base their argument upon language contained in the second paragraph of the out-of-state provision in the policy:

> If an accident to which this Part 1 applies occurs in any state, territory or possession of the United States of America or any province or territory of Canada other than the one in which a covered vehicle is principally garaged, and the state, province, territory or possession has:
>
> . . . .
>
> 2. *A compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the nonresident uses a vehicle in that state*, province, territory or possession, this policy will provide the greater of:
>
> a. the required minimum amounts and types of coverage; or
>
> b. the limits of Liability under this policy.

(emphasis added). According to Appellants, section 56-9-351 qualifies as a "similar law" for the purposes of Paragraph 2. That statute, entitled "Deposit of security by owner following accident; suspension of license and registration and notice thereof," provides:

> Within sixty days of receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in the amount of two hundred dollars or more, the Department of Motor Vehicles shall suspend the license of each operator or driver if he is the owner of the motor vehicle involved in the accident and all registrations of each owner of a motor vehicle involved in the accident. If the operator or driver is a nonresident, the privilege of operating a motor vehicle within this State and the privilege of the use within this State of a motor vehicle owned by him is suspended unless the operator, driver or

> owner, or both, deposits security in a sum not less than two hundred dollars or an additional amount as the department may specify that will be sufficient to satisfy a judgment that may be recovered for damages resulting from the accident which may be recovered against the operator or owner. Notice of the suspension must be sent by the department to the operator and owner at least ten days before the effective date of the suspension and shall state the amount required as security.

The plain language of this statute does not mandate that nonresident motorists maintain bodily injury liability coverage while driving in South Carolina. Section 56-9-351 does not operate against a nonresident motorist unless and until he causes "a motor vehicle accident within this State which . . . result[s] in bodily injury or death or damage to the property of any one person in the amount of two hundred dollars or more." After such an accident, the law requires either the suspension of the motorist's privilege to operate a motor vehicle in South Carolina or a deposit of funds sufficient to pay the damages resulting from the accident. We find these requirements are designed to protect the interests of the victims and prevent further accidents, not to punish the nonresident motorist.[2] Moreover, because these requirements do not apply to a nonresident motorist who has not caused an accident resulting in bodily injury, death, or property damage in excess of two hundred dollars, we find section 56-9-351 does not mandate that nonresident motorists maintain bodily injury liability coverage while driving in this state.

In view of these findings, we conclude section 56-9-351 is not a "compulsory insurance or similar law" under Paragraph 2 of the out-of-state coverage provision in Appellants' insurance policy. Consequently, the trial court did not err in determining Progressive was entitled to judgment as a matter of law.

Second, Appellants argue the trial court erred in relying on *Newton* because section 56-9-351 expressly requires nonresident motorists to carry bodily injury liability

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[2] As this court previously observed, the purpose of section 56-9-351 is to "compel the creation of a fund from which one might satisfy a judgment obtained against an operator or owner for damages resulting from a motor vehicle accident involving the operator's or owner's motor vehicle." *Newton v. Progressive Northwestern Ins. Co.*, 347 S.C. 271, 275, 554 S.E.2d 437, 439 (Ct. App. 2001).

coverage. In view of our determination that section 56-9-351 does not impose such a requirement, we need not reach this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

With regard to whether section 56-9-351 triggered the out-of-state coverage provision in Appellant's insurance policy, we find section 56-9-351 does not operate as a "compulsory insurance or similar law." Therefore, we find the out-of-state coverage provision was not triggered, and the trial court did not err in determining Progressive was entitled to judgment as a matter of law.

Because our decision concerning Appellants' first issue is dispositive of this appeal, we do not reach Appellants' remaining issue. Accordingly, the decision of the trial court is

AFFIRMED.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hazel Jeisel Rivera, Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc., and Edgar Rivera, Appellants.

Appellate Case No. 2010-168831

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

Opinion No. 5055
Heard November 28, 2012 – Filed November 28, 2012

AFFIRMED

J. Dwight Hudson, of Hudson Law Offices, of Myrtle Beach, for Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc.

Brandon A. Smith, of Turner Padget Graham & Laney, P.A., of Florence, for Appellant Edgar Rivera.

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

SHORT, J.: Warren Jared Newton, Newton's Farm, and J & J Logging, Inc. (collectively, the Newton defendants) and Edgar Rivera appeal the trial court's grant of Jeisel Rivera's new trial motion after the jury returned a verdict in favor of all defendants in this automobile accident case. We affirm.

FACTS

Jeisel and Edgar are siblings. On the night of the accident, Edgar received a telephone call indicating their father had been mugged and was injured. Edgar tried to conceal the call from his sister to avoid upsetting her, but Jeisel overheard and insisted on accompanying Edgar to check on their father. Edgar was eighteen years old, but was not a licensed driver. They got into a car owned by an acquaintance and were followed by a second car driven by a friend, Miguel Fernandez.

At the same time the events were unfolding at the Rivera residence, Warren Newton and his brother were preparing to move a heavy piece of logging equipment across a T-intersection at Pennyroyal Road in Georgetown County, South Carolina. Warren waited ten minutes for traffic to clear. Using a tractor trailer, he pulled straight across, blocking both lanes of the road and beginning to make a three-point turn. He was backing up to straighten the vehicle as Edgar and his companions approached. Edgar did not see the trailer in time to stop, and a collision occurred. Jeisel was ejected from the vehicle and suffered significant injuries.

Jeisel sued the Newton defendants and her brother. At trial, Jeisel testified she insisted that her brother take her to check on their father, and she did not think he could have done anything to avoid the accident. She also testified she was trying to reach her mother on her cell phone while they were driving, and she did not see the truck in time to warn Edgar. Edgar testified he may have been going slightly over the fifty-five miles-per-hour speed limit, and he did not see any warning signs about trucks entering the road as he approached the tractor trailer. He also testified he was familiar with this road and had driven on it before.

Thomas Onions testified as an expert in the plaintiff's case. In his opinion, the headlights of the tractor trailer made it appear as though a car was coming down the road. He testified the lights would have temporarily blinded Edgar, and he would not have been able to see the trailer in time to avoid the accident. Onions

stated the Newton brothers could have set up flares or reflective triangles to warn oncoming traffic of their presence, and they created a very dangerous condition in making this maneuver at night on a poorly lit road. He also stated Edgar may have been traveling faster than fifty-five miles per hour, but it was impossible to tell from the information provided. At the conclusion of Onions' testimony, the Newton defendants' attorney read into the record the summation portion of Onions' report, which stated:

> It's my opinion that the careless and negligent manner in which Warren, Warren Newton, undertook to move his truck and trailer across the roadway on the night of the accident was the most significant causal factor to the crash event. It is further my opinion that Edgar Rivera also contributed to this accident by failing to slow his vehicle appropriately and continuing to drive into an area visually obstructed by nighttime glare and poor lighting.

Trooper William Surratt responded to the accident scene and testified that according to his diagram of the scene, the tractor trailer's headlights would have been shining in the direction of oncoming traffic. He also stated he did not see warning signs on the road approaching the accident, and no skid marks were at the scene. Surratt testified Edgar did not have his driver's license at the scene.

At the conclusion of Jeisel's case, Edgar moved for a directed verdict based on Jeisel's alleged failure to produce any evidence of his negligence. The court concluded Edgar had testified he was speeding, and he did not see the tractor trailer or warning signs, which could have indicated he had failed to keep a proper lookout. The trial court denied the motion.

Warren Newton testified the tractor trailer had reflective tape on the side and between the tractor and the trailer, there were more than fifty lights, six of which were blinking at the time of the accident. He stated the truck headlights were angled away from the road, facing into the woods, when Edgar approached. He indicated he saw the cars approaching and estimated their speed at sixty-five to seventy miles per hour. Warren testified he flashed his lights, but the cars never slowed down. He further stated there were reflective signs approaching the intersection indicating trucks entered the highway. Warren acknowledged he and his brother did not use flashlights or reflective triangles that were available to them

to signal oncoming traffic, and they could have waited until morning to move the truck, an activity he estimated caused them to block the roadway for approximately twenty-five to thirty seconds. Joel Newton testified he was following the tractor trailer in a pick-up truck and had his headlights and emergency flashers on. He testified the tractor trailer's headlights were pointing toward the woods.

Timothy Ward, a witness who lived nearby and approached the scene soon after the accident happened, testified the headlights of the truck were pointed into the woods at about a forty-five-degree angle to the road. He further testified a couple of cars approached from both directions, but they were able to stop and turn around. Ward did not remember seeing lights on the trailer.

Charles Dickinson, an expert for the Newton defendants, opined that Edgar should have seen the tractor trailer if he had been paying attention and not speeding at the time of the accident. According to Dickinson, there was sufficient time, based on his information and his attempt to recreate the conditions the night the accident occurred, for Edgar to see the truck's headlights, readjust his vision, and stop the car before hitting the trailer.

The parties made several motions before the jury was charged. Jeisel moved to strike the Newton defendants' contributory negligence defense. The trial court granted this motion. The trial court also granted Jeisel's request not to charge the jury with unavoidable accident. However, over Jeisel's objection, the trial court allowed the verdict form to go to the jury with the option to find in favor of both defendants. The trial court found that even though Jeisel was not contributorily negligent and the accident was not unavoidable, the jury could find she did not meet her burden of proof in proving one or both defendants were negligent.

The jury deliberated and returned a verdict in favor of the defendants. The trial court granted Jeisel's new trial motion, stating, "The only reasonable inference from the evidence presented at the trial of this case is that one or more of the defendants were at fault in causing the accident that injured the plaintiff." The court further concluded: "[N]o evidence was presented that showed the plaintiff at fault. Therefore, I find and conclude that the court erred in not granting the plaintiff's motion for directed verdict as to liability and in instructing the jury that it could return a verdict in favor of all defendants. *See Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 [(Ct. App. 2007)]." Edgar and the Newton defendants appealed.

LAW/ANALYSIS

I. Jeisel's Alleged Negligence

The Newton defendants argue numerous alleged errors regarding Jeisel's own negligence, which we combine to address. The Newton defendants argue the trial court erred in the following: (1) granting a new trial because the jury could have imputed Edgar's negligence to Jeisel by virtue of her being the older and only licensed occupant of the vehicle; (2) excluding evidence of Jeisel's failure to keep a proper lookout; (3) failing to charge the jury that a passenger has a duty to exercise due care for his or her own safety; and (4) granting a new trial when Jeisel's own negligence contributed to her injuries. We disagree.

The admission or exclusion of evidence is within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence at trial. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "Furthermore, the trial court is required to charge only the current and correct law of South Carolina." *Id.* (citation omitted).

The Newton defendants contend numerous facts could have led the jury to infer Jeisel was negligent. For instance, the Newton defendants argue a reasonable inference arises that Jeisel was not wearing her seatbelt because she was ejected through the windshield of the car. Also, they argue an inference of her negligence could have been made based on her decision to ride with Edgar, an unlicensed driver. Additionally, the fact that Jeisel was trying to reach her mother on her cell phone could have inferred Jeisel was negligent as a passenger. Finally, the Newton defendants argue the jury could have imputed Edgar's negligence to Jeisel.

First, the Newton defendants failed to preserve their argument that the trial court erred in granting a new trial because the jury could have imputed Edgar's negligence to Jeisel by failing to raise this issue to the trial court. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (stating an appellant's argument must be sufficiently clear to allow the trial court to understand it and rule upon it).

As to the remainder of their arguments regarding Jeisel's own negligence, we find no error. First, no evidence was presented of Jeisel's negligence. Although the issue of a plaintiff's own comparative negligence is ordinarily a question of fact for the jury, where the evidence presented yields only one conclusion concerning liability, the trial court may determine the issue as a matter of law. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (explaining comparative negligence is ordinarily a question of fact for the jury); *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 353, 683 S.E.2d 818, 823 (Ct. App. 2009) ("When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict."), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012).

As to the inferential evidence of Jeisel's failure to wear a seatbelt, a violation of the mandatory seatbelt law "is not negligence per se or contributory negligence, and is not admissible as evidence in a civil action." S.C. Code Ann. § 56-5-6540(C) (Supp. 2011); *see Clark v. Cantrell*, 332 S.C. 433, 451, 504 S.E.2d 605, 614-15 (Ct. App. 1998) (holding indirect evidence that plaintiff/decedent was not wearing a seatbelt was not inadmissible, but the court correctly instructed the jury it should not consider the seatbelt evidence in its deliberations), *aff'd as modified by* 339 S.C. 369, 529 S.E.2d 528 (2000); *Keaton v. Pearson*, 292 S.C. 579, 580, 358 S.E.2d 141, 141 (1987) (holding that in the absence of an affirmative statutory duty, the failure to use a seat belt does not constitute contributory negligence). Further, we find Jeisel's actions as a passenger are not, as a matter of law, sufficient to reverse the trial court's grant of a new trial. *See Thompson v. Michael*, 315 S.C. at 271, 433 S.E.2d at 854 ("In the absence of any fact or circumstance indicating the driver is *incompetent or careless*, an occupant of a vehicle is not required to anticipate negligence on the part of the driver."); *Funderburk v. Powell*, 181 S.C. 412, 421, 187 S.E. 742, 749 (1936) ("The standard of care to be observed and exercised by the occupant is of course ordinary care under the circumstances. It cannot be said, however, that in every case and under all circumstances it is the duty of an occupant of a motor vehicle to use his senses in order to discover approaching vehicles or other dangers, or that his failure to do so would be negligence.").

After a review of the record, we find no error in the trial court's rulings regarding Jeisel's own negligence.

II. Denial of Directed Verdict in Favor of Edgar

Edgar argues the trial court erred in denying his motion for directed verdict. We disagree. The evidence suggested that either Edgar, the Newton defendants, or both were negligent. Edgar admitted he was speeding, and the evidence illustrates he was potentially distracted by concern about his father's well-being. Although Jeisel testified she did not know how her brother could have avoided the accident, her expert indicated Edgar's speed and failure to slow down when confronted with glare contributed to the accident. Finally, the Newton defendants' expert testified the accident was due to Edgar's speed and failure to keep a proper lookout, and Warren Newton testified he estimated Edgar's speed between sixty-five and seventy miles per hour.

In considering a motion for directed verdict, the trial court is required to "view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (citation omitted). The trial court should not be concerned with the credibility or weight of evidence, only with its existence or nonexistence. *N. Am. Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 131, 720 S.E.2d 53, 57 (Ct. App. 2011). An appellate court reviewing a trial judge's denial of a motion for directed verdict will reverse only when no evidence exists to support the ruling or when the ruling is governed by an error of law. *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

In this case, there was evidence Edgar was speeding. Viewing the evidence in the light most favorable to Jeisel, we find no error in the trial court's denial of Edgar's motion for a directed verdict.

III. Grant of Jeisel's New Trial Motion

Edgar and the Newton defendants argue the trial court erred in granting Jeisel's motion for new trial. The Newton defendants also argue the trial court erred in finding the only reasonable inference to be drawn from the evidence was that one or more of the defendants were at fault. The Newton defendants finally argue Jeisel failed to meet her burden of proof in establishing any of the defendants were negligent. We disagree.

We previously discussed the evidence of Edgar's negligence in affirming the trial court's denial of his motion for directed verdict. We also find there was evidence the Newton defendants were negligent. The Newton defendants had to wait ten minutes before traffic cleared before maneuvering the tractor trailer diagonally across the road, completely blocking both lanes and preventing traffic from proceeding in either lane. Furthermore, Jeisel's expert testified the Newton defendants caused a dangerous condition by moving the equipment late at night with the knowledge that their presence in the intersection would be approximately twenty-five to thirty seconds. They did not use a flagman or flashlight to warn oncoming traffic or put out reflective triangles, which were available to them. We find no error by the trial court in granting the motion for a new trial.

Edgar additionally argues the trial court erred in granting the new trial because the court based its decision on its failure to grant Jeisel's directed verdict motion as to liability. He contends the new trial motion was made on the law, not the facts as contemplated by the thirteenth juror doctrine. We need not determine if the court erred in concluding it should have granted Jeisel's motion for directed verdict as to liability, because we find it was based on the facts, and it was within the trial court's discretion.

"The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law." *Winters v. Fiddie*, 394 S.C. 629, 638, 716 S.E.2d 316, 321 (Ct. App. 2011) (citations omitted). "In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror doctrine. The doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (internal quotation marks and citations omitted). This court's review of a trial court's grant of a new trial is limited to consideration of whether evidence exists to support the trial court's order. *Id.* As long as there is conflicting evidence, the trial court's grant of a new trial will not be disturbed. *Id.* at 597-98, 681 S.E.2d at 883.

Under the thirteenth juror doctrine, the trial court may grant a new trial based on its view of the facts. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). Our supreme court discussed the thirteenth juror doctrine in *Folkens*:

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id. (internal citation omitted).

At this stage of a trial, the court may weigh the evidence even though it is not permitted to do so in considering a directed verdict motion. *See Buxton v. Thompson Dental Co.*, 307 S.C. 523, 528, 415 S.E.2d 844, 848 (Ct. App. 1992) (affirming the trial court's grant of a new trial motion after its denial of a directed verdict motion), *overruled on other grounds by Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994). "The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 632, 578 S.E.2d 746, 748 (Ct. App. 2003) (citation omitted). We find the trial court's refusal to grant a directed verdict was not necessarily inconsistent with the grant of a new trial. *See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 334, __ S.E.2d __ (2012) ("The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion.").

We find the trial court's grant of a new trial *was* based on its view of the facts, evidenced in its finding that the only reasonable inference from the evidence was "that one or more of the defendants were at fault in causing the accident that injured the plaintiff." The court also found no evidence showed Jeisel was at fault. Furthermore, we need not address whether the trial court erred in finding it should have granted Jeisel's motion for a directed verdict because we find the trial court granted the new trial on the facts, and its decision was not wholly unsupported by the evidence. *See Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 552, 593 S.E.2d 504, 508 (Ct. App. 2004) (affirming the grant of a new trial under the thirteenth juror doctrine after viewing the trial court's order as a whole, coupled with the court's statements); *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 355-56, 594 S.E.2d 888, 897 (Ct. App. 2004) (reading the trial court's order as a whole in finding the reasons for the court's order were "amply clear"); *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008) ("When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.").

We likewise find no error in the trial court's citation to *Howard v. Roberson*, 376 S.C. 143, 147-48, 654 S.E.2d 877, 879 (Ct. App. 2007), in which this court affirmed the trial court's grant of a motion for directed verdict in favor of a passenger against two drivers. This court stated: "The evidence presented at trial yielded only one conclusion—that the negligence of at least one driver, if not both, resulted in the accident causing [the plaintiff's] injuries." *Id.* at 151, 656 S.E.2d at 881. In this case, we need not determine if the trial court erred in finding it should have granted Jeisel directed verdict because the learned judge did not err in granting a new trial based on the facts. Therefore, we find no prejudicial error in its citation to *Howard*.

Finally, without citation to legal authority in his initial brief, Edgar argues there was sufficient evidence of the negligence of an unnamed party such as the State of South Carolina or Georgetown County to support the jury's verdict. This issue is deemed abandoned. *See State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority); *see also McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) (stating an issue may not be raised for the first time in a reply brief).

CONCLUSION

For the foregoing reasons, the trial court's order granting a new trial is

AFFIRMED.

LOCKEMY, J., concurs.

KONDUROS, J., concurs in part and dissents in part.

KONDUROS, J., concurring in part and dissenting in part: I agree with the majority's analysis in sections I and II. However, I must respectfully dissent as to the trial court's grant of Jiesel's new trial motion. The trial court granted a new trial based on its failure to direct a verdict in Jiesel's favor as to the liability of one or both defendants. Because this was the basis of the order, as evidenced by its language and reliance on *Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007), I believe the analysis as to whether the denial of directed verdict was appropriate is essential to the new trial question.

On that point, I believe the trial court correctly denied Jeisel's motion, because the jury could have found she failed to meet her burden of proof as to the negligence of both defendants. Jeisel testified she did not believe Edgar could have done anything to avoid the accident, and the parties presented conflicting testimony regarding the direction the tractor-trailer's headlights were shining and how well the truck and area were lit the night of the accident. *See Moore v. Levitre*, 294 S.C. 453, 453-54, 365 S.E.2d 730, 730 (1988) (stating in deciding a directed verdict motion, the trial court must view the evidence and its inferences in the light most favorable to the opposing party and should deny the motion if the evidence yields more than one inference or if its inferences are in doubt).

Because I believe the trial court's grant of a new trial was based on an erroneous change of heart with respect to the directed verdict motion, I would reverse the trial court's grant of a new trial and reinstate the jury's verdict.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Park Regency, LLC, Landy Properties, LLC, and Sowers Properties, LLC, individually and in a derivative capacity on behalf of Crossroads Retail, LLC, Appellants,

v.

R&D Development of the Carolinas, LLC, Hawkensen Construction, Inc., and Carl's Construction, Inc., Respondents.

Appellate Case No. 2011-187167

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5056
Heard October 3, 2012 – Filed November 29, 2012

AFFIRMED AS MODIFIED

Walter Keith Martens, of Hamilton, Martens & Ballou, LLC, of Rock Hill, for Appellants.

Thomas B. Roper, of Rock Hill, and James B. Richardson, Jr., of Columbia, for Respondents.

CURETON, A.J.: In this suit arising from a dispute among members of a limited liability company (LLC), the trial court dissociated R&D Development of the Carolinas, LLC (R&D) from the company and ordered the remaining members of

the company to purchase R&D's distributional interest. Appellants contend the trial court erred in (1) not considering the company's legal obligation to repay debts to its remaining members and other relevant and undisputed evidence when valuing R&D's distributional interest and (2) treating R&D's liability to the other members as an offset to the fair value of its distributional interest instead of entering a judgment against the dissociated member. We affirm as modified.

FACTS

Crossroads Retail, LLC (Crossroads) was formed for the purpose of developing a tract of land in Fort Mill (the Property), which initially consisted of 29.84 acres. After the relationships between members of Crossroads broke down, Park Regency, LLC (Park Regency); Landy Properties, LLC (Landy Properties); and Sowers Properties, LLC (Sowers Properties) (collectively, Appellants) filed this action to dissociate R&D from Crossroads. Appellants joined Hawkensen Construction, Inc. (Hawkensen) and Carl's Construction, Inc. (Carl's) as defendants.

Hawkensen, R&D, and Carl's (collectively, Respondents) were owned, at least in part, by Carl Hawkensen.[1] Hawkensen was an incorporated construction company. R&D was an LLC, in which Carl Hawkensen owned an 85% interest and Chad Whitmire owned the remaining 15%. Originally incorporated in 1990, Carl's was administratively dissolved in 1997. However, after the dissolution, Carl Hawkensen continued to operate Carl's as a sole proprietorship.

I. Acquisition of the Property

In 2006, Hawkensen deposited $75,000 in earnest money on a contract to purchase the Property for $2,957,600. After Hawkensen failed to secure adequate funding, the seller enlisted the assistance of Eric Sowers, a mortgage broker. Sowers referred Carl Hawkensen to Roger Gaines of Park Regency, a company that had recently sold some investment property and was seeking new investment property

[1] In an effort to differentiate the individual from the companies that bear his name, we refer to Carl Hawkensen by his first and last names.

for a section 1031 exchange.[2] On July 25, 2006, the three reduced a preliminary acquisition and development agreement to writing. Later, Gaines introduced Carl Hawkensen to Steven Landy of Landy Properties, another investor. Ultimately, Park Regency agreed to provide as much as $800,000 toward the purchase of the Property, and Landy Properties provided $201,100 in additional funds. Park Regency took out a loan in the amount of $1,922,440 to cover the remainder of the purchase price.

On September 27, 2006, Park Regency, Hawkensen, R&D, Sowers, and Landy executed a written contract (the Crossroads Commons Agreement) memorializing their intent to purchase and develop the Property. The Crossroads Commons Agreement established a sequence of events affecting the obligations and ownership interests of the parties. Park Regency agreed to accept title to the Property pending R&D's completion of its obligations and to transfer title as described below. Hawkensen and R&D agreed to assign Hawkensen's rights under the purchase contract to Park Regency, establish an account "insuring Hawkensen['s] . . . performance," pay the interest and carrying charges on loans used to develop the Property, and maintain at least $80,000 in an escrow account for that purpose. Furthermore, R&D agreed it would "[i]mmediately commence and complete at cost the first phase of clearing and grading of the Property in a good and workmanlike manner" in compliance with a previously established budget.[3] Hawkensen agreed to ensure R&D complied with its obligations.

All parties agreed that, upon R&D's fulfillment of its obligations, the remaining members of the group would receive their ownership interests in the Property: R&D would receive a 47.5% interest, Sowers would receive a 5% interest for providing "professional services," and Landy Properties would receive a 10%

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[2] Section 1031 of the Internal Revenue Code permits a taxpayer to exchange, within a prescribed period of time, property held for investment for other property of like kind without recognizing any gain or loss in value for tax purposes. 26 U.S.C.A. § 1031(a)(1) (2011).

[3] Although referenced as "Exhibit B" in the Crossroads Commons Agreement, this budget does not appear in the record and appears to have been misplaced prior to litigation. However, a budget introduced without objection at trial indicates the budgeted amount was $596,700.

interest for supplying funds for the purchase of the Property. On October 6, 2006, Park Regency acquired title to the Property.

II. Formation of Crossroads

A. Agreement among Tenants in Common

On November 9, 2007, Park Regency, R&D, Landy Properties, and Sowers Properties (collectively, the Tenants) executed an Agreement among Tenants in Common (the TIC Agreement). The TIC Agreement recognized that the Tenants already owned the Property in the proportions identified in the Crossroads Commons Agreement: Park Regency owned 37.5%, R&D owned 47.5%, Landy Properties owned 10%, and Sowers Properties owned 5%. The TIC Agreement states the Tenants, as owners of the Property:

> [D]esire by this Agreement to set forth and confirm their mutual agreements and understandings with respect to their ownership interests in the Property, their respective rights and obligations as tenants in common of the Property, and their right to manage, rent, operate, maintain, alter, improve, lease, transfer, sell or otherwise control the disposition of the property or any part thereof.

The TIC Agreement acknowledged mutual ownership of the Property and established each Tenant's rights and obligations, including requirements concerning a Tenant's withdrawal from the group.

Following the appointment of a property manager, the Tenants anticipated quarterly disbursements of any monies received that exceeded the Property's operating costs. They established an order for these disbursements. First, Park Regency and then Landy Properties would receive payments up to the amounts they had invested. Next, Hawkensen, in its capacity as Horizontal Developer, would receive payments for "its unpaid hard costs including costs prior to closing such as initial contract deposit, engineering, surveying, etc." Finally, the Tenants would receive payments corresponding to their proportionate shares.

In the event revenues from the Property and the Tenants' reserves were insufficient to pay taxes, loan payments, or other operating costs, the Tenants agreed to

contribute the necessary funds in accordance with their proportionate shares. Although any Tenant's failure to contribute would be an event of default, two provisions specifically addressed R&D's participation. First, in the event of R&D's uncured default for failure to contribute, the other Tenants could purchase R&D's interest in the Property for 75% of its fair market value, "reduced further by any payment outstanding by R&D." Second, R&D agreed to maintain $250,000 in an escrow account for the purpose of paying "all interest and other carrying charges" on the loan or loans encumbering the Property. R&D's failure to do so would be an event of default.

Paragraph 11 of the TIC Agreement addressed transfers of Tenants' interests, with subsection (c) outlining events of default. In the event of a Tenant's default, the remaining Tenants would have the option (1) to cure using funds from the defaulting Tenant's distributions or (2) to purchase the defaulting Tenant's interest in the Property. Paragraph 11(c)(ii) described the method for determining the purchase price of a defaulting Tenant's interest. After an independent appraiser determined the fair market value of the Property, the parties would determine the value of the dissociating Tenant's distributional interest by calculating the difference between (1) the fair market value of the Property, multiplied by the defaulting Tenant's proportionate share; and (2) all outstanding financial obligations as of the date of closing, multiplied by the defaulting Tenant's proportionate share. Paragraph 10(a) defined the specific obligations as taxes and "maintenance expenses required by [Hawkensen] or any property manager and approved by [a 51% majority vote of the Tenants]." The remaining Tenants would then pay the dissociating Tenant 75% of the value of its distributional interest, less any amounts the dissociating Tenant owed.

The Tenants agreed any closing resulting from an event of default and conducted pursuant to the TIC Agreement would take place "within two hundred seventy (270) days from the date of notice of the Event of Default." However, they could extend the closing date "by any period necessary to determine the purchase price" of the defaulting Tenant's interest. Payment to the defaulting Tenant would be "in cash at closing."

B. Transfers of Ownership

One week after executing the TIC Agreement, Park Regency conveyed the Property via quit-claim deed to the Tenants, as contemplated in the Crossroads

Commons Agreement.[4] In May 2008, the Tenants sold approximately fifteen acres of the Property to a third party for $750,000.[5] The Tenants used the proceeds from that sale to pay down the loan on the Property. In addition, they formed Crossroads, with each Tenant receiving a share of ownership in the LLC equal to its proportionate share of the Property under the TIC Agreement. They did not execute an operating agreement. On May 30, 2008, the Tenants executed a quit-claim deed conveying their remaining interest in the Property to Crossroads. In doing so, the Tenants retained the same percentages of ownership in Crossroads, and therefore in the unsold portion of the Property, that they had held in the Property itself.

III. Financial Disputes

Hawkensen established a budget of $596,700 to complete the initial work on the Property. Having completed most of this work between June and November 2007, Hawkensen submitted payment applications for its work in September 2007, December 2007, and May 2008. The Tenants approved these payment applications, which totaled $581,199.02. The Tenants paid Hawkensen $424,481.32 directly, made interest payments totaling $76,717.70 on Hawkensen's behalf, and deposited $80,000 into an escrow account on Hawkensen's behalf.[6]

On November 30, 2007, Whitmire, on behalf of R&D, sent the Tenants an email requesting payment of $216,540 for "equipment costs" Hawkensen owed to its

[4] Accordingly, Park Regency received an ownership interest of 37.5%, R&D received 47.5%, Landy Properties received 10%, and Sowers Properties received 5%.

[5] According to Gaines, the sold portion was later developed into apartments known as Crossroads Commons. Hawkensen performed some site preparation work for those apartments. At the time of trial, Crossroads Commons, LLC, Phase 1, and Crossroads Commons, LLC, Phase 2, in which the Tenants were minority members, owned the apartment site.

[6] The interest and escrow payments appear to satisfy Hawkensen's obligations under the Crossroads Commons Agreement.

sister company, Carl's.[7] Upon determining the charges were not reimbursable as "expenses incurred from an outside source," the Tenants declined to pay.

After ownership of the Property transferred to Crossroads, R&D made monthly interest payments on the bank loan until July 2009, at which point it notified the other Tenants it would make no further payments. The other Tenants began making the interest payments, which totaled $146,200.

IV. Litigation and Dissociation

On December 15, 2009, Appellants filed the instant action against Respondents, who answered and counterclaimed. The case was tried on September 27 and 28, 2010.

At trial, Gaines testified he believed the TIC Agreement governed dissociation of a member of Crossroads. He anticipated Crossroads' debts to its members would be deducted from the company's value prior to any division of assets or liability, but he was unable to point to authority in the TIC Agreement and conceded Crossroads' debts to its members had not been memorialized in written notes. Furthermore, Gaines stated Appellants desired an award of damages for breach of contract. However, he agreed any award of damages should be "set off against any distributional interest that the Court may determine should be paid to R&D."

Doug Gentile, the certified public accountant for Crossroads, recalled the Tenants' preparations to sell a portion of the Property. He testified the Tenants asked him whether the conveyance of their ownership interests in the Property from the tenancy in common to Crossroads would create a taxable event. After consulting with tax counsel, Gentile concluded it would not create a taxable event because neither the percentages of ownership nor the identities of the owners would change.

[7] At his deposition, Carl Hawkensen testified Carl's was a rental company that provided heavy equipment for site work at the Property. Whitmire testified at trial that he prepared the emailed bill to cover the cost of using Carl Hawkensen's equipment.

He further testified that, as of the date of trial, Crossroads was liable for $2,936,710.50: $1,900,000 remained owing on a bank loan; $75,000, to Hawkensen; $783,460.50, to park Regency; $201,000, to Landy; and $4,150, to a company called Capital Gaines. In addition, Crossroads had advanced $27,000 to Whitmire. On September 27, 2010, Gentile prepared a balance sheet for Crossroads showing those debts as liabilities. According to Gentile, it was not unusual for an LLC to carry its members' contributions as liabilities, but that approach would be reflected in the company's operating agreement. He opined that if Crossroads regarded its members' contributions as liabilities, the net value of the company would be zero.

On November 9, 2010, the appraisers returned their report on the remaining acreage. The appraisers concluded the remaining Property had a market value of $3,140,000 as of October 29, 2010. In the alternative, the appraisers stated it held a "120-day liquidation value" of $725,000 as of the same date.

On December 17, 2010, the trial court entered an order dissociating R&D from Crossroads and requiring the remaining Tenants to pay R&D up to $265,438 for its distributional interest upon the bona fide sale or transfer of the Property. Both sides filed motions to alter or amend the judgment. In their motion, Appellants informed the trial court the ownership of the Property was at risk because their lender had filed a foreclosure action against Crossroads. Although the trial court denied both motions, it nonetheless modified its earlier finding that Park Regency's and Landy Properties' contributions were "no interest loans" to Crossroads to state that those payments "were in the nature of capital contributions, not loans." This appeal followed.

STANDARD OF REVIEW

Whether an action "is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). "The term 'dissociation' refers to the change in the relationships among the dissociated member [of an LLC], the company and the other members caused by a member's ceasing to be associated in the carrying on of the company's business." S.C. Code Ann. § 33-44-601 cmt. (2006). Similar actions terminating business relationships among parties, such as actions for dissolution, sound in equity. *See Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (LLC); *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391

S.E.2d 538, 543 (1990) (partnership). Accordingly, an action for dissociation is also equitable in nature.

An appellate court reviewing a decision in an action in equity may determine facts in accordance with its own view of the preponderance of the evidence. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

LAW/ANALYSIS

I. Windfall

Appellants assert the trial court erred in failing to consider relevant and undisputed evidence affecting the fair value of R&D's distributional interest, including Crossroads' obligation to repay debt to its other members and economic conditions impairing the marketability of Crossroads' single asset. As a result, Appellants contend the trial court improperly placed R&D "in a better position than it would have held as a member in good standing." We affirm but modify the trial court's order as discussed below.

"The operating agreement of [an LLC] is a binding contract that governs the relations among the members, managers, and the company." *Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). South Carolina law provides, "all members of [an LLC] may enter into an operating agreement, which need not be in writing, . . . to govern relations among the members, managers, and company." S.C. Code Ann. § 33-44-103(a) (2006). "Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply." *Clary*, 398 S.C. at 297, 727 S.E.2d at 778.

A court reviewing a written contract must discern:

> [T]he intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a

> contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945); *see also ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."). "Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001).

We affirm but modify the trial court's order to require reimbursement of Park Regency's and Landy Properties' contributions prior to a determination of R&D's distributional interest, but only in the event Appellants elect to pay R&D after the sale or other disposition of the Property. Before concluding the TIC Agreement controlled the valuation of R&D's distributional interest, the trial court carefully considered all circumstances affecting R&D's dissociation and reviewed the applicable law. We find that, in fashioning its solution to a complex problem, the trial court overlooked the likelihood that its decision awarded R&D a greater payout from the sale of the Property than it would have received had it remained a member of Crossroads or than the remaining Tenants would receive.

The trial court found the parties had adopted the TIC Agreement as Crossroads' de facto operating agreement. None of the parties challenged this finding on appeal; therefore, it is the law of the case. *See Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) (holding an unappealed ruling is the law of the case and may not be reviewed on appeal). Accordingly, the TIC Agreement governs the relationships among the Tenants and between the Tenants and Crossroads. *See Clary*, 398 S.C. at 297, 727 S.E.2d at 778 (construing section 33-44-103(a) to say an LLC's operating agreement binds its members and supersedes statute in matters addressed by the operating agreement).

A. TIC Agreement

In dissociating a member of an LLC whose sole asset suffered from a depressed value due to a poor economy, the trial court crafted a remedy using the valuation formula from the TIC Agreement's dissociation provisions. That valuation formula provides:

> . . . [T]he purchase price of [a dissociating member's] interest shall be 75% of the Determination as defined below, less any sums due and owing by the transferring co-Tenant.
>
> . . . .
>
> After a conclusive determination of the fair market value of the Property is made as provided herein (the "Determination"), the purchase price payable to the Transferring Co-Tenant shall equal the difference of (i) the product of (x) the Determination multiplied by (y) the Proportionate Share of the Transferring Co-Tenant less (ii) the product of (x) the Proportionate Share of the Transferring Co-Tenant multiplied by (y) all outstanding Obligations as of the date of the closing of the Transferring Co-Tenant's interest.

Paragraph 10(a) defined "Obligations" as "taxes, maintenance, insurance and payments on any outstanding mortgages on the Property or any other expenses required by the Horizontal Developer or any property manager and approved by Co-Tenants holding at least fifty[-]one percent (51%) of the Proportionate Shares, in connection with the operation of the Property."

We agree with the trial court that the remedy in this case should be based upon the entirety of the TIC Agreement and not solely the dissociation provisions. Its solution discards some requirements of the dissociation provisions and imposes other requirements found elsewhere in the TIC Agreement. For example, rather than imposing the 270-day time limit for closing the purchase of the dissociating Tenant's interest described in Paragraph 11(c)(iii), the trial court permitted Appellants to elect whether to purchase R&D's interest upon the bona fide sale of the Property or sooner.[8] Should Crossroads sell the Property before purchasing

[8] We recognize that allowing Crossroads to delay purchasing R&D's interest in the property delays the resolution of this matter. Both the TIC Agreement and the applicable statute establish deadlines for the conclusion of a member's dissociation. *See* S.C. Code Ann. § 33-44-701 (2006) (establishing time limits for company to

R&D's interest, Appellants would use the actual sale price of the Property to calculate the value of R&D's interest. In those circumstances, the purchase price of R&D's interest could not exceed $265,438, its purchase price based upon the fair market value of the Property provided by the appraiser. The trial court further found that treating R&D as a transferring member under the provisions of Paragraph 11(a) of the TIC Agreement "would be inequitable," in that it "could unduly burden [Crossroads] and could result in a windfall for R&D."[9]

We further agree with the trial court's solution, which invokes other provisions of the TIC Agreement, including the profit and distribution provisions of paragraphs 6(d) and 9, and particularly in the event Appellants purchase R&D's distributional interest upon the sale of the Property. Paragraphs 6(d) and 9 memorialize the parties' desire to support and benefit from their common enterprise in proportion to their respective ownership interests. Paragraph 9 expresses their intent to share any profits and bear any losses in proportion to their respective ownership interests in Crossroads: "Any net income, gain or loss from the operation of the Property . . . shall be allocated among the Co-Tenants in accordance with their Proportionate Share[s]." Paragraph 6(d) echoes this intent but provides a hierarchy for payments in the event the Property generates more income than is necessary for its day-to-day operations. Specifically, it provides:

> Within thirty (30) days after the end of each calendar quarter, Co-Tenants agree to cause the property manager when appointed to pay to each Co-Tenant Available Cash (as defined below) as follows:

---

purchase a dissociating member's interest). However, this approach also provides an opportunity for all parties, including R&D, to maximize their investments in the Property by waiting for the market to improve. Furthermore, no party appealed the trial court's failure to impose such a deadline.

[9] By refusing to apply Paragraph 11(a), the trial court prevented R&D from selling its interest in Crossroads to a third party. Paragraph 11(a) required a transferring member to give the other Tenants notice of its intent to transfer its interest. If none of the other Tenants offered to purchase that interest within thirty days of the notice, the transferring member would have 180 days in which to "sell, transfer, or otherwise convey its interest" to someone else.

> (i) first, to Park Regency, an amount equal to its invested capital and then to Landy [Properties] in an amount equal to its invested capital, plus in each case any and all costs associated with the transactions contemplated by this Agreement (i[.]e. legal and other professional fees).
>
> (ii) second, to Hawkensen, an amount equal to its unpaid hard costs including costs prior to closing such as initial contract deposit, engineering, surveying, etc. in accordance with the attached Exhibit B.
>
> (iii) finally, to each Co-Tenant its Proportionate Share.
>
> "Available Cash" shall be any cash generated by the Property in excess of that reasonably necessary for the operation of the Property, including payments on the loans, reserves for expenses, repairs and such capital improvements that Co-Tenants holding at least sixty percent (60%) of Proportionate Shares, in their reasonable discretion, determine should be made.

The trial court permitted Crossroads to pay R&D for its distributional interest either before or after the sale or transfer of the Property. Were Crossroads to pay R&D while it still owned the Property, it would retain both its equity in the Property and the potential for greater profit. These appear to be the circumstances the parties contemplated when they drafted the dissociation provisions. However, were Crossroads to sell or transfer the Property first, no further potential for profit from disposing of the Property would exist. Our review of the entire TIC Agreement suggests the parties did not anticipate dissociating a member upon the sale of the Property. The trial court's employment of requirements not appearing in the TIC Agreement's dissociation provisions suggests it reached the same conclusion.

Accordingly, to the extent the trial court's decision permits Crossroads to purchase R&D's distributional interest before selling the Property, we affirm. Crossroads may elect to purchase R&D's interest for $265,438 at any time prior to selling the Property, and its remaining members may recoup their contributions under the distribution scheme of Paragraph 6(d). To the extent the trial court's decision

provides for Crossroads to purchase R&D's interest after the bona fide sale or other transfer of the Property, we modify the trial court's order to require any calculation of the "Obligations" to add the amounts of Park Regency's and Landy Properties' contributions as obligations owed by Crossroads.[10]

B. Remaining Arguments

Appellants' remaining arguments concerning the economic conditions and the contributions' status as loans are unpersuasive. The trial court clearly considered these arguments in making its final decision, which relies upon and incorporates the language in the TIC Agreement. This decision made allowance for the depressed economic conditions by permitting Crossroads to delay purchasing R&D's interest until a bona fide sale of the Property.

II. Judgment and Offset

Appellants assert the trial court erred in treating R&D's liability to Crossroads' other members as an offset against the fair value of its distributional interest instead of entering an immediately enforceable judgment against R&D. In support, they note they brought suit against Respondents both as individuals and on behalf of Crossroads. We disagree.

Generally, an LLC "is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (2006). A member of an LLC:

> [M]ay maintain an action against . . . another member . . . for legal or equitable relief, with or without an accounting as to the company's business, to enforce:
>
> (1) the member's rights under the operating agreement; . . . and
>
> (3) the rights that otherwise protect the interests of the member, including rights and interests arising

[10] We observe the parties' written agreements did not provide for the recovery of the contributions of any other member.

> independently of the member's relationship to the company.

S.C. Code Ann. § 33-44-410(a) (2006).

A personal inability to perform does not excuse a member's failure to meet its obligation to contribute to the LLC. S.C. Code Ann. § 33-44-402(a) (2006). "If a member does not make the required contribution of property or services, the member is obligated at the option of the company to contribute money equal to the value of that portion of the stated contribution which has not been made." *Id.* When a member of an LLC makes payments "for the preservation of [the LLC's] business or property," those payments constitute an interest-bearing loan to the company which it must repay. S.C. Code Ann. § 33-44-403 (2006).

We affirm the trial court's decision and note specifically the trial court's findings that:

> [Appellants] also assert that they should have been granted judgment against R&D for its failure to pay the interest on the mortgage loan on the [Property], as required by the [TIC Agreement], which also served as the operating agreement of the LLC. First of all, the judgment, if granted, would be in favor of Crossroads, not the other [Appellants]. R&D's contractual obligation was to the LLC.

The trial court added that any judgment against R&D would serve to increase the purchase price of its distributional interest, which was already reduced by the amount of the interest payments made by the other Tenants.

Although Appellants brought this action both as individuals and on behalf of Crossroads, we find the evidence adduced at trial demonstrated that R&D's default affected Appellants in their capacities as members of the LLC, not as individuals. R&D's failure to satisfy its contribution obligations harmed Crossroads. *See* § 33-44-201 (stating an LLC is a separate legal entity from its members). Accordingly, any cause of action arising from R&D's failure to meet its contribution obligations belonged to Crossroads. The harm Appellants suffered resulted from their decision to make the payments in R&D's stead. Under section 33-44-403, those payments

constitute interest-bearing loans, which the LLC is obligated to repay. As a result, Appellants' cause of action for repayment of the loans is against Crossroads, not R&D.

Finally, we find the trial court's decision to reduce the purchase price of R&D's distributional interest by the amounts R&D failed to pay comports with the TIC Agreement. In Paragraph 10(a), the parties stated that, in the event of an uncured breach by R&D, the remaining Tenants could "acquire R&D's interest at three quarters of the fair market value of the [P]roperty, reduced further by any payment outstanding by R&D." Paragraph 11(c)(ii) recites their agreement to subtract from the purchase price of a dissociating member's distributional interest "any sums due and owing by the [dissociating member]." Accordingly, the trial court's requirement that Appellants subtract the amounts R&D owed Crossroads from the purchase price of its distributional interest harmonizes with both the applicable statute and the TIC Agreement.

To the extent Appellants argue under other theories, we decline to address those arguments as unpreserved.[11] Generally, an "appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. The burden of presenting a record sufficient to allow appellate review lies with the appellant. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). The record in this matter does not indicate which arguments Appellants raised in their Rule 59(e) motion or at the hearing on that motion. As a result, the record is insufficient for this court to determine whether any additional arguments are preserved.

CONCLUSION

We find the trial court did not err in fashioning an equitable solution to R&D's dissociation from the terms in the TIC Agreement. However, to the extent the trial court's decision provides for Crossroads to purchase R&D's distributional interest after the bona fide sale or other transfer of the Property, we modify the trial court's

[11] Therefore, we do not reach the question of whether a co-surety who pays more than his proportionate share of a loan obligation may sue another co-surety on the theory his recovery is subrogated to the rights of the lender.

order to require any such calculation to add the amounts of Park Regency's and Landy Properties' contributions to the Obligations, as monies owed by Crossroads.

In addition, we find the trial court's grant of judgment to Crossroads, only, and its decision to reduce the purchase price of R&D's distributional interest by the amount of its debt to Crossroads comport with both the applicable statute and the TIC Agreement. Accordingly, the decision of the trial court is

AFFIRMED AS MODIFIED.

WILLIAMS, J., concurs.

FEW, C.J., Concurs in part and dissents in part.

FEW, C.J., concurring in part and dissenting in part: I concur with the majority as to section II of the LAW/ANALYSIS section. I disagree, however, with the majority's resolution of the fair value of R&D's distributional interest. To that extent, I respectfully dissent.

This business dispute could have been resolved very simply if the participants in the transaction had properly documented their agreement and the changes they made to it over time. Because they did not do so, the courts have been forced to fashion a resolution. In my opinion, the trial court placed too much emphasis on the tenancy in common agreement. *See* S.C. Code Ann. § 33-44-702(a)(1) (2006) (listing "any agreement among . . . the members" as one factor the court shall consider in "determin[ing] the fair value of the [distributional] interest" in an LLC). Considering all indicators of the fair value of R&D's interest, particularly the participants' intent expressed at the time they entered this transaction that the funds contributed by Park Regency and Landy Properties were to be paid back to them before the value of any participant's interest was calculated, I would set the fair value of R&D's distributional interest at $72,421.88.[12] When that figure is

[12] I arrived at this figure by deducting the funds contributed by Park Regency and Landy Properties and the amount of Crossroads' other liabilities from the appraised value of the property. I applied R&D's 47.5% ownership interest to that figure and reduced the result by the 25% default penalty in the tenancy in common agreement.

offset by the amount R&D owes for refusing to make the interest payments it agreed to make, the amount due to R&D for its interest is zero.

Appraised Value of the Property	$3,140,000.00
Park Regency and Landy Properties	- $984,560.50
Crossroads' Other Liabilities	- $1,952,150.00
	$203,289.50
R&D's Ownership Interest	x 0.475
	$96,562.51
Penalty for Default	x 0.75
Amount Due to R&D	**$72,421.88**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry Scott Swilling, Employee/Claimant, Respondent,

v.

Pride Masonry of Gaffney, Employer, and Central Mutual Insurance Company, Carrier, Appellants.

Appellate Case No. 2011-199988

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5057
Heard October 29, 2012 – Filed November 28, 2012

AFFIRMED

Duke K. McCall, Jr., of Smith Moore Leatherwood, LLP, of Greenville, for Appellants.

V. Laniel Chapman, of Chapman, Byrholdt & Yon, LLP, and Michael F. Mullinax, of Mullinax Law Firm, both of Anderson, for Respondent.

SHORT, J.: Terry Scott Swilling, Employee/Claimant, filed this workers' compensation action against Pride Masonry of Gaffney, Employer, and Central Mutual Insurance Company, Carrier (collectively, Pride). Pride appealed, arguing error in the following: (1) the calculation of Swilling's average weekly wage; (2) the finding of permanent and total disability (PTD); (3) the finding that a subsequent injury was proximately caused by a work-related injury; and (4) the award of a lump-sum payment. We affirm.

FACTS

On June 8, 2006, while employed as a stonemason for Pride, Swilling was injured as he operated a skid steer to build a cement block room on a construction site. Swilling twisted his left ankle when he stepped out of the skid steer and fell onto gravel. He also struck his head, left elbow, and back. Swilling severely injured his left leg, resulting in two surgeries and an epidural steroid block. Subsequently, he experienced severe pain extending from his foot into his hip and back. This caused him to place more pressure on his right leg and resulted in an antalgic gait. Swilling filed a workers' compensation claim for PTD. He claimed an average weekly wage of $840, based on $21 per hour at forty hours per week, with a corresponding compensation rate of $560.03.

Pride admitted the injury but denied Swilling was entitled to PTD. Pride also contested Swilling's average weekly wage, alleging a weekly wage of $742.14 with a compensation rate of $494.79. Finally, Pride sought credit for overpayment of benefits because Swilling suffered two subsequent accidents: a June 2009 motorcycle accident and an April 2010 automobile accident.

At an August 2010 hearing before a single commissioner of the South Carolina Workers' Compensation Commission (the Commission), Swilling testified he has been in the masonry business his entire working life. He is married and has two children. Although he graduated from high school in 1981, he reads at a third-grade level and cannot write, but he can sign his name.

At the time of the hearing, Swilling testified he was still experiencing excruciating pain in his foot, whole leg, and back, and he wore a brace from his left ankle to his knee and another brace on his right leg. He continued to use narcotic pain medication. It made him sleepy and dizzy, which caused him to fall. He had attempted to discontinue its use, but he suffered severe pain without the

medication. Swilling also suffered migraines and depression, and he was being treated by a psychiatrist. His sleep was disrupted due to pain, and he slept during the day in a sitting position. He admitted he suffered anxiety due to numerous break-ins at his house in 2008. Swilling also testified he attempted to return to work as a delivery driver, but he became sleepy and was afraid he would cause an accident. He worked between surgeries performing light-duty labor for Pride.

Swilling admitted he was injured in the 2009 motorcycle accident, but he explained it affected the upper right side of his body and did not exacerbate his left leg injury. He also testified the 2010 automobile accident resulted in four broken ribs, but it did not contribute to the disability caused by his work-related accident. On cross-examination, Swilling disputed the medical records, which indicated he injured his back in the motorcycle and automobile accidents. Swilling also maintained an April 2010 fall was related to his work-related injury.

Pride admitted Swilling earned $21 per hour. Rather than file a claim with its carrier, Pride paid Swilling's medical bills until February 2010, when it began sending the bills to its insurance carrier. Pride paid Swilling a salary of $840 per week until March 2010, when Swilling could no longer work. The carrier did not make any payments.

The single commissioner found Swilling to be a credible witness. The commissioner also found although Pride was duly notified of the accident, it failed to report it to the Commission, and Swilling was paid $21 per hour for forty hours per week resulting in an average weekly wage of $840, which was the salary he was earning at the time of the accident. The commissioner found exceptional reasons existed to deviate from the Form 20, pursuant to section 42-1-40 of the South Carolina Code, and he found Swilling's average weekly wage to be $840 with a corresponding compensation rate of $560.03.

The commissioner also determined Swilling's injuries from the work-related accident alone, despite the subsequent motorcycle and automobile accidents, rendered him permanently and totally disabled. The commissioner ordered temporary total disability of $11,200.60 from March 2010 to the date of the hearing; reimbursement of medical bills; a lump-sum award of $228,657.84 for the remainder of Swilling's entitlement to five hundred weeks of compensation; and payment of future causally-related medical bills to his left leg, right leg, back, and psychological condition.

Pride filed a Form 30 Request for Commission Review. An appellate panel of the South Carolina Workers' Compensation Commission heard the matter. Other than amending the award to prorate the lump-sum award to minimize the reduction of Swilling's Social Security benefits pursuant to *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010), the Commission affirmed the single commissioner. Pride appealed, and the circuit court affirmed. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2011). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the Commission reached. *Lark*, 276 S.C. at 135, 276 S.E.2d at 306.

LAW/ANALYSIS

A. Average Weekly Wage

Pride argues the Commission erred in calculating Swilling's average weekly wage. We disagree.

According to Pride's Form 20, Swilling was hired on April 3, 2006, and his injury occurred on June 8, 2006. Swilling continued to work for several months until his first surgery. Until 2010, Swilling worked when he was able, performing light duty. He was paid $21 per hour for forty hours per week, totaling $840 per week. On the Form 20, Pride calculated Swilling's average weekly wage by claiming earnings of $28,943.50 over a period of thirty-nine working weeks for an average wage of $742.14 per week.

Section 42-1-40 of the South Carolina Code provides for the calculation of the average weekly wage. S.C. Code Ann. § 42-1-40 (Supp. 2011). "The statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). "The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978).

In *Pugh v. Piedmont Mechanical*, 396 S.C. 31, 38, 719 S.E.2d 676, 680 (Ct. App. 2011), this court explained:

> The primary method for calculating the average weekly wage is to take "the total wages paid for the last four quarters divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." § 42-1-40; *Pilgrim v. Eaton*, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App. 2010). "The [Commission] must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." *Pilgrim*, 391 S.C. at 44-45, 703 S.E.2d at 244 (citing § 42-1-40).

"When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." § 42-1-40.

The Commission in *Pugh* calculated the claimant's average weekly wage for a 2007 injury based on the seventeen-week period he worked prior to the injury. *Pugh*, 396 S.C. at 37, 719 S.E.2d at 679-80. The primary method of calculating average weekly wages was not appropriate because the claimant had not worked the fifty-two weeks preceding the injury. *Id.* at 38, 719 S.E.2d at 680. Therefore, the Commission calculated the average weekly wage based on the employer's Form 20, which divided the salary paid by the actual number of weeks the claimant worked. *Id.* The *Pugh* court found when the Commission determines the primary method of calculation is not permissible, "it is required to consider which of the

alternative methods for calculating the average weekly wage is most appropriate based on the facts." *Id.* at 39, 719 S.E.2d at 680. "Before the [C]ommission may use any one of these alternatives, the [C]ommission must find, or the record must clearly show, that the necessary conditions exist." *Pilgrim v. Eaton*, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App. 2010).

Pride argues the Commission should have calculated Swilling's average weekly wage based on the income he earned over thirty-nine weeks. This is the method utilized by the Commission in *Pugh*, and it "is proper if two 'predicate conditions' exist: (1) it is 'practicable' to use the alternative method and (2) the calculation yields a result 'fair and just' to both parties." *Pugh*, 396 S.C. at 39, 719 S.E.2d at 680 (quoting *Pilgrim*, 391 S.C. at 46, 703 S.E.2d at 245).

In this case, the Commission adopted the single commissioner's order finding "pursuant to S.C. Code Ann. § 42-1-40, exceptional reasons exist[ed] to deviate from the Form 20." The Commission also found the following: (1) Pride paid Swilling his regular salary of $840 per week after the injury, which was substantiated by Swilling's W-2s and tax returns; (2) although Pride's payment could be deemed benevolent, its motive was questionable and appeared to be an attempt to avoid filing a claim with its insurance carrier; and (3) Pride ceased working only when he could no longer physically perform his duties. We find the Commission's use of the statutory language indicates it was cognizant of the requirement to show the "necessary conditions to deviate" existed. *See Pilgrim*, 391 S.C. at 45, 703 S.E.2d at 244 (requiring the Commission to find, or the record to clearly show, the necessary conditions to deviate exist before employing one of the alternative methods of calculating average weekly wage). We also find substantial evidence in the record supports the Commission's findings. *See Roberts v. McNair Law Firm*, 366 S.C. 50, 53-54, 619 S.E.2d 453, 455-56 (Ct. App. 2005) (applying the substantial evidence standard of review to affirm the Commission's finding regarding whether the claimant was entitled to deviation from the statutory method of calculating average weekly wages).

B. Partial and Total Disability

Pride next argues the Commission erred in finding Swilling suffered PTD. We disagree.

Swilling's vocational expert, Dr. Benson Hecker, opined that given Swilling's age, education, vocational background, lack of transferable skills, impairments, limitations, and chronic pain, Swilling was "not job ready" and was totally disabled. Dr. Robert A. Dameron, Jr., opined Swilling had a forty-eight percent impairment of the left lower extremity and an eleven percent impairment of the spine. He also opined Swilling would require ongoing pain management treatment and psychological support. Dameron concluded "[i]t is unlikely [Swilling] will be able to return to gainful employment." Swilling's orthopaedic surgeon, Dr. George R. Bruce, concluded Swilling had a forty-seven percent left lower extremity impairment and a decreased range of motion, which combined for a sixty percent left lower extremity impairment and equaled a twenty-four percent whole person impairment. Swilling also received a ten percent mental/emotional impairment rating.

A claimant is entitled to a finding of PTD "[w]hen the incapacity for work resulting from an injury is total." S.C. Code Ann. § 42-9-10(A) (Supp. 2011). Our supreme court explained PTD in *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 117-18, 473 S.E.2d 699, 701-02 (1996) (footnotes and final citation omitted):

> There are two situations in which the Commission can find a claimant totally disabled. First, for certain conditions resulting from work-related injuries, a claimant is *deemed* totally disabled and need not demonstrate loss of earning capacity to recover workers' compensation benefits. *See, e.g.*, S.C. Code Ann. § 42-9-10 (Supp. 1994) (classifying loss of certain limbs and body parts as total disability as a matter of law; classifying as total disability paraplegia, quadriplegia, and physical brain damage resulting from compensable injuries) . . . . Under the circumstances in which a worker is *deemed* totally disabled, the medical model of workers' compensation predominates.
>
> In contrast, the earning impairment model predominates when a worker is not statutorily *deemed* totally disabled. Under this model, the Commission may predicate a finding of total disability on the claimant's complete loss of earning capacity as a result of a work-related injury.

> *See* S.C. Code Ann. § 42-1-120 (1985) ("The term '*disability*' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."); S.C. Code Ann. § 42-9-10 (Supp. 1994) ("When the incapacity for work resulting from an injury is total, the employer shall pay . . . to the injured employee during the total disability . . . ."); *Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 118 S.E.2d 812 (1961). Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity.

Thus, the economic model defines disability in terms of a claimant's loss of earning capacity, and the medical model defines disability based upon specific degrees of medical impairment to specified body parts. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003). "[T]he extent of disability is a question of fact to be proved as any other fact is proved." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 384, 335 S.E.2d 91, 95 (Ct. App. 1985). Findings of fact by the Commission are reviewed under the substantial evidence standard of review, and this court will not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981).

In its brief, Pride points to other medical evidence in the record indicating at least one of Swilling's physicians encouraged him to return to work, another described him as stable and able to walk without a brace, and an evaluation conducted in 2009 indicated Swilling was qualified to perform several types of employment. However, when the evidence is conflicting, the findings of the Commission are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). Accordingly, this court will not overturn a finding of fact by the Commission "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (quoting *Indep. Stave Co. v. Fulton*, 476 S.W.2d 792, 793 (Ark. 1972)). We find there was substantial evidence to affirm the Commission's factual finding that Swilling's work-related injury caused PTD.

C. Subsequent Injury

Pride next argues the Commission erred in finding Swilling's April 2010 fall was related to his work-related injury. We disagree.

In explaining his April 2010 fall, Swilling testified he fell from his back porch when his left leg "gave out" while he was entering his house. He hit his head on a stepping stone and sought treatment at the emergency room. The Commission found the April 2010 accident was related to his leg and ordered Pride to reimburse the medical providers for all related treatment.

"Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." *Tims v. J.D. Kitts Constr.*, 393 S.C. 496, 504, 713 S.E.2d 340, 344 (Ct. App. 2011) (citations omitted). We find substantial evidence to support the Commission's finding. *See Sanders v. Wal-Mart Stores, Inc.*, 379 S.C. 554, 559-62, 666 S.E.2d 297, 300-01 (Ct. App. 2008) (applying the substantial evidence standard of review to the Commission's determination of whether a subsequent fall was related to a previously compensable knee injury).

D. Lump-Sum Payment

Pride finally argues the Commission erred in awarding Swilling a lump-sum payment. We disagree.

Swilling testified to financial distress caused by Pride's cessation of payments five months prior to the hearing before the single commissioner. He explained he was "close to losing [his] house," and he had to "get food stamps and beg for money" to support his family. Although Swilling is functionally illiterate, he is able to count money. Furthermore, a treating psychologist reported he manifested an average level of intellectual potential.

The single commissioner found Swilling's best interests would be served by the receipt of a lump-sum payment, and the award should be paid in a lump sum based upon the evidence and testimony presented. The Commission modified the award pursuant to *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010), to avoid any negative impact on Swilling's entitlement to Social Security benefits. *See id.* at

199-200, 701 S.E.2d at 736 ("The purpose of allocating a lump[-]sum disability award over the claimant's lifetime is to make sure a claimant is not being economically penalized by the Social Security Administration's calculation of an offset. The Social Security Administration expressly recognizes and accepts such allocations as a matter of routine practice.").

Our legislature set forth a special standard for review of lump-sum awards as follows: "Upon a finding by the [C]ommission that a lump[-]sum payment should be made, the burden of proof as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal proceedings." S.C. Code Ann. § 42-9-301 (1985). Accordingly, our review of a lump-sum award is under the abuse of discretion standard, rather than the substantial evidence standard of review ordinarily employed in reviewing factual findings of the Commission. *Thompson v. S.C. Steel Erectors*, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct. App. 2006). "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Id.*

The purpose of a workers' compensation award is to provide a substitute for the wages of the injured employee, and the ordinary payment of compensation is in installment payments. *Woods v. Sumter Stress-Crete, Inc.*, 266 S.C. 245, 247-48, 222 S.E.2d 760, 761 (1976). "In determining whether to award a lump[-]sum payment to a claimant, the Commission must consider whether the award will cause a hardship to the employer or carrier and whether the payment would be in the best interest of the claimant and his family." *Thompson*, 369 S.C. at 616, 632 S.E.2d at 880. In *Thompson*, this court affirmed a partial lump-sum award when the injured employee required funds to build a new house due to his work-related paraplegia, and there was no credible evidence the funds would be squandered. *Id.* at 616-17, 632 S.E.2d at 880. Likewise, this court summarily affirmed a lump-sum award when the claimant "demonstrated an ability to manage large sums of money in a prudent fashion" and testified he needed the funds to do major repair work to his house, which would be more costly if the repairs were not done in a timely fashion. *Cox v. Mills*, 286 S.C. 226, 227, 332 S.E.2d 562, 563 (Ct. App. 1985).

In this case, Swilling presented evidence the lump-sum award would be in his best interest. Furthermore, Pride offered no evidence of hardship arising from a lump-sum award. Accordingly, we find no abuse of discretion by the Commission in awarding a lump sum.

CONCLUSION

For the foregoing reasons, the circuit court's order is

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.