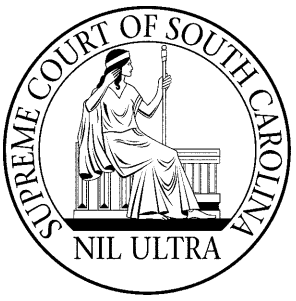


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 28**
**August 22, 2011**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

## PUBLISHED OPINIONS AND ORDERS



## UNPUBLISHED OPINIONS



## PETITIONS – UNITED STATES SUPREME COURT



## EXTENSION TO FILE PETITIONS – UNITED STATES SUPREME COURT



## PETITIONS FOR REHEARING

# The South Carolina Court of Appeals

## PUBLISHED OPINIONS



## UNPUBLISHED OPINIONS

2011-UP-392-Eric A. Autenrieth v. Curtis J. Lollis
(Anderson, Judge J. Cordell Maddox, Jr.)

2011-UP-393-State of South Carolina v. Rocco Capodanno, Jr.
(Lexington, Judge Robin B. Stilwell)

2011-UP-394-State v. Frederick Jeter
(Spartanburg, Judge E.C. Burnett, III)

**PETITIONS FOR REHEARING**

| | |
|---|---|
| 4805-Limehouse v. Hulsey | Pending |
| 4819-Columbia/CSA v. SC Medical Malpractice | Pending |
| 4834-SLED v. 1-Speedmaster S/N 00218 | Pending |
| 4838-Major v. Penn Community | Pending |
| 4839-Martinez v. Spartanburg | Pending |
| 4841-ERIE Ins. V. The Winter Construction Co. | Denied 8/12/11 |
| 4847-Smith v. Regional Medical | Pending |
| 4851-Davis v. KB Home/Meyer | Pending |
| 2011-UP-131-Burton v. Hardaway | Pending |
| 2011-UP-162-Bolds v. UTI Integrated | Pending |
| 2011-UP-174-Doering v. Woodman | Pending |
| 2011-UP-199-Davidson v. City of Beaufort | Pending |
| 2011-UP-209-McKinnedy v. SCDC | Pending |

| | |
|---|---|
| 2011-UP-255-State v. Walton | Pending |
| 2011-UP-260-McGonigal's v. RJG Construction | Pending |
| 2011-UP-263-State v. P. Sawyer | Pending |
| 2011-UP-264-Hauge v. Curran | Pending |
| 2011-UP-268-In the matter of Vincent N. | Pending |
| 2011-UP-273-State v. K. Ware | Pending |
| 2011-UP-285-State v. B. Burdine | Pending |
| 2011-UP-300-Service Corp. v. Bahama Sands | Pending |
| 2011-UP-301-Asmussen v. Asmussen | Pending |
| 2011-UP-304-State v. Winchester | Denied 8/17/11 |
| 2011-UP-305-SouthCoast Comm. Bank v. Low Country | Denied 8/15/11 |
| 2011-UP-325-Meehan v. Newton | Pending |
| 2011-UP-326-Salek v. Nirenblatt | Pending |
| 2011-UP-328-Davison v. Scaffe | Pending |
| 2011-UP-329-Still v. SCBCB | Pending |
| 2011-UP-334-LaSalle Bank v. Toney | Pending |
| 2011-UP-340-Smith v. Morris | Pending |
| 2011-UP-343-State v. Dantzler | Pending |
| 2011-UP-346-Batson v. Northside | Pending |
| 2011-UP-350-Ringstad v. SCDPPPS | Pending |

| | |
|---|---|
| 2011-UP-353-McKnight v. Montgomery | Pending |
| 2011-UP-358-JB Properties v. SC Coast & Lakes | Pending |
| 2011-UP-359-Price v. Investors Title Ins. | Pending |
| 2011-UP-361-State v. S. Williams | Pending |
| 2011-UP-363-State v. L. Wright | Pending |
| 2011-UP-364-Ugino v. Peter | Pending |
| 2011-UP-365-Strickland v. Kinard | Pending |
| 2011-UP-371-Shealy v. The Paul Shelton Rev. Trust | Pending |
| 2011-UP-372-Underground Boring, LLC v. P Mining | Pending |
| 2011-UP-379-Cunningham v. Cason | Pending |

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

| | |
|---|---|
| 4367-State v. J. Page | Denied 8/19/10 |
| 4510-State v. Hoss Hicks | Granted |
| 4526-State v. B. Cope | Pending |
| 4529-State v. J. Tapp | Pending |
| 4548-Jones v. Enterprise | Pending |
| 4588-Springs and Davenport v. AAG Inc | Denied 12/2/10 |
| 4592-Weston v. Kim's Dollar Store | Pending |

| | |
|---|---|
| 4599-Fredrick v. Wellman | Denied 8/18/11 |
| 4605-Auto-Owners v. Rhodes | Pending |
| 4609-State v. Holland | Pending |
| 4614-US Bank v. Bell | Denied 12/2/10 |
| 4616-Too Tacky v. SCDHEC | Pending |
| 4617-Poch v. Bayshore | Pending |
| 4633-State v. G. Cooper | Pending |
| 4635-State v. C. Liverman | Pending |
| 4637-Shirley's Iron Works v. City of Union | Pending |
| 4654-Sierra Club v. SCDHEC | Denied 07/21/11 |
| 4659-Nationwide Mut. V. Rhoden | Pending |
| 4661-SCDOR v. Blue Moon | Pending |
| 4670-SCDC v. B. Cartrette | Pending |
| 4675-Middleton v. Eubank | Pending |
| 4680-State v. L. Garner | Pending |
| 4682-Farmer v. Farmer | Pending |
| 4687-State v. Taylor, S. | Pending |
| 4688-State v. Carmack | Pending |
| 4691-State v. C. Brown | Pending |
| 4692-In the matter of Manigo | Pending |

| | |
|---|---|
| 4697-State v. D. Cortez | Pending |
| 4698-State v. M. Baker | Pending |
| 4699-Manios v. Nelson Mullins | Pending |
| 4700-Wallace v. Day | Pending |
| 4702-Peterson v. Porter | Pending |
| 4705-Hudson v. Lancaster Convalescent | Pending |
| 4706-Pitts v. Fink | Pending |
| 4708-State v. Webb | Pending |
| 4711-Jennings v. Jennings | Pending |
| 4716-Johnson v. Horry County | Pending |
| 4721-Rutland (Est. of Rutland) v. SCDOT | Pending |
| 4725-Ashenfelder v. City of Georgetown | Pending |
| 4732-Fletcher v. MUSC | Pending |
| 4737-Hutson v. SC Ports Authority | Pending |
| 4738-SC Farm Bureau v. Kennedy | Pending |
| 4742-State v. Theodore Wills | Pending |
| 4746-Crisp v. SouthCo | Pending |
| 4747-State v. A. Gibson | Pending |
| 4750-Cullen v. McNeal | Pending |
| 4752-Farmer v. Florence Cty. | Pending |

| | |
|---|---|
| 4753-Ware v. Ware | Pending |
| 4755-Williams v. Smalls | Pending |
| 4756-Neeltec Enterprises v. Long | Pending |
| 4760-State v. Geer | Pending |
| 4761-Coake v. Burt | Pending |
| 4763-Jenkins v. Few | Pending |
| 4764-Walterboro Hospital v. Meacher | Pending |
| 4765-State v. D. Burgess | Pending |
| 4766-State v. T. Bryant | Pending |
| 4769-In the interest of Tracy B. | Pending |
| 4770-Pridgen v. Ward | Pending |
| 4779-AJG Holdings v. Dunn | Pending |
| 4781-Banks v. St. Matthews Baptist Church | Pending |
| 4785-State v. W. Smith | Pending |
| 4789-Harris v. USC | Pending |
| 4790-Holly Woods Assoc. v. Hiller | Pending |
| 4792-Curtis v. Blake | Pending |
| 4794-Beaufort School v. United National Ins. | Pending |
| 4798-State v. Orozco | Pending |
| 4799-Trask v. Beaufort County | Pending |

| | |
|---|---|
| 4800-State v. Wallace | Pending |
| 4808-Biggins v. Burdette | Pending |
| 4810-Menezes v. WL Ross & Co. | Pending |
| 4815-Sun Trust v. Bryant | Pending |
| 4820-Hutchinson v. Liberty Life | Pending |
| 4824-Lawson v. Hanson Brick | Pending |
| 4826-C-Sculptures, LLC v. G. Brown | Pending |
| 4828-Burke v. Anmed Health | Pending |
| 4830-State v. J. Miller | Pending |
| 4831-Matsell v. Crowfield Plantation | Pending |
| 4832-Crystal Pines v. Phillips | Pending |
| 2009-UP-322-State v. Kromah | Pending |
| 2009-UP-336-Sharp v. State Ports Authority | Pending |
| 2009-UP-564-Hall v. Rodriquez | Pending |
| 2010-UP-090-F. Freeman v. SCDC (4) | Pending |
| 2010-UP-141-State v. M. Hudson | Pending |
| 2010-UP-182-SCDHEC v. Przyborowski | Pending |
| 2010-UP-196-Black v. Black | Pending |
| 2010-UP-232-Alltel Communications v. SCDOR | Pending |
| 2010-UP-253-State v. M. Green | Pending |

| | |
|---|---|
| 2010-UP-256-State v. G. Senior | Pending |
| 2010-UP-273-Epps v. Epps | Pending |
| 2010-UP-281-State v. J. Moore | Pending |
| 2010-UP-287-Kelly, Kathleen v. Rachels, James | Pending |
| 2010-UP-289-DiMarco v. DiMarco | Pending |
| 2010-UP-302-McGauvran v. Dorchester County | Pending |
| 2010-UP-303-State v. N. Patrick | Pending |
| 2010-UP-308-State v. W. Jenkins | Pending |
| 2010-UP-317-State v. C. Lawrimore | Pending |
| 2010-UP-330-Blackwell v. Birket | Pending |
| 2010-UP-331-State v. Rocquemore | Pending |
| 2010-UP-339-Goins v. State | Pending |
| 2010-UP-340-Blackwell v. Birket (2) | Pending |
| 2010-UP-352-State v. D. McKown | Pending |
| 2010-UP-355-Nash v. Tara Plantation | Pending |
| 2010-UP-356-State v. Robinson | Pending |
| 2010-UP-362-State v. Sanders | Pending |
| 2010-UP-369-Island Preservation v. The State & DNR | Pending |
| 2010-UP-370-State v. J. Black | Pending |

| | |
|---|---|
| 2010-UP-372-State v. Z. Fowler | Pending |
| 2010-UP-378-State v. Parker | Pending |
| 2010-UP-406-State v. Larry Brent | Pending |
| 2010-UP-425-Cartee v. Countryman | Pending |
| 2010-UP-427-State v. S. Barnes | Pending |
| 2010-UP-437-State v. T. Johnson | Pending |
| 2010-UP-440-Bon Secours v. Barton Marlow | Pending |
| 2010-UP-448-State v. Pearlie Mae Sherald | Pending |
| 2010-UP-449-Sherald v. City of Myrtle Beach | Pending |
| 2010-UP-450-Riley v. Osmose Holding | Pending |
| 2010-UP-461-In the interest of Kaleem S. | Pending |
| 2010-UP-464-State v. J. Evans | Pending |
| 2010-UP-494-State v. Nathaniel Noel Bradley | Pending |
| 2010-UP-504-Paul v. SCDOT | Pending |
| 2010-UP-507-Cue-McNeil v. Watt | Pending |
| 2010-UP-523-Amisub of SC v. SCDHEC | Pending |
| 2010-UP-525-Sparks v. Palmetto Hardwood | Pending |
| 2010-UP-547-In the interest of Joelle T. | Pending |
| 2010-UP-552-State v. E. Williams | Pending |

| | |
|---|---|
| 2011-UP-005-George v. Wendell | Pending |
| 2011-UP-006-State v. Gallman | Pending |
| 2011-UP-017-Dority v. Westvaco | Pending |
| 2011-UP-024-Michael Coffey v. Lisa Webb | Pending |
| 2011-UP-038-Dunson v. Alex Lee Inc. | Pending |
| 2011-UP-039-Chevrolet v. Azalea Motors | Pending |
| 2011-UP-041-State v. L. Brown | Pending |
| 2011-UP-052-Williamson v. Orangeburg | Pending |
| 2011-UP-059-State v. R. Campbell | Pending |
| 2011-UP-071-Walter Mtg. Co. v. Green | Pending |
| 2011-UP-076-Johnson v. Town of Iva | Pending |
| 2011-UP-084-Greenwood Beach v. Charleston | Pending |
| 2011-UP-091-State v. R. Watkins | Pending |
| 2011-UP-095-State v. E. Gamble | Pending |
| 2011-UP-108-Dippel v. Horry County | Pending |
| 2011-UP-109-Dippel v. Fowler | Pending |
| 2011-UP-110-S. Jackson v. F. Jackson | Pending |
| 2011-UP-112-Myles v. Main-Waters Enter. | Pending |
| 2011-UP-115-State v. B. Johnson | Pending |

| | |
|---|---|
| 2011-UP-121-In the matter of Simmons | Pending |
| 2011-UP-125-Groce v. Horry County | Pending |
| 2011-UP-130-SCDMV v. Brown | Pending |
| 2011-UP-132-Cantrell v. Carolinas Recycling | Pending |
| 2011-UP-136-SC Farm Bureau v. Jenkins | Pending |
| 2011-UP-137-State v. I. Romero | Pending |
| 2011-UP-138-State v. R. Rivera | Pending |
| 2011-UP-140-State v. P. Avery | Pending |
| 2011-UP-147-State v. B. Evans | Pending |
| 2011-UP-148-Mullen v. Beaufort County School | Pending |
| 2011-UP-152-Ritter v. Hurst | Pending |
| 2011-UP-173-Fisher v. Huckabee | Pending |
| 2011-UP-175-Carter v. Standard Fire Ins. | Pending |
| 2011-UP-185-State v. D. Brown | Pending |
| 2011-UP-187-Anasti v. Wilson | Pending |
| 2011-UP-208-State v. L. Bennett | Pending |
| 2011-UP-218-Squires v. SLED | Pending |
| 2011-UP-229-Zepeda-Cepeda v. Priority | Pending |
| 2011-UP-242-Bell v. Progressive Direct | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Crossmann Communities of North Carolina, Inc., Beazer Homes Investment Corp., and Daniel Rogers, Respondents/Appellants,

v.

Harleysville Mutual Insurance Company, Cincinnati Insurance Company, and Associated Insurors, Inc., of Myrtle Beach, Defendants,

of whom Harleysville Mutual Insurance Company is Appellant/Respondent.

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

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Opinion No. 26909
Re-heard May 23, 2011 – Re-filed August 22, 2011

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**AFFIRMED IN PART; REVERSED IN PART AND REMANDED**

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C. Mitchell Brown, William C. Wood, Jr., Matthew D. Patterson, and A. Mattison Bogan, of Nelson Mullins Riley &

Scarborough, of Columbia; Clifford Leon Welsh, of Welsh & Hughes, of North Myrtle Beach; David L. Brown, of Pinto Coates Kyre & Brown, PLLC, of Greensboro, North Carolina; Robert Curt Calamari, of McAngus Goudelock & Courie, LLC, of Myrtle Beach, for Appellant/Respondent.

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Stephen P. Groves, Sr., of Nexsen Pruet, LLC, of Charleston, and John J. Piegore, of Sanchez, Daniels & Hoffman, of Chicago, Illinois, for Amicus Curiae Property Casualty Insurers Association of America.

James L. Bruner, William D. Britt, Jr., Benjamin C. Bruner, and Matthew H. Stabler, of Bruner Powell Wall & Mullins, LLC, of Columbia, for Amici Curiae Associated General Contractors of America, Inc., and Carolinas AGC, Inc.

N. Ward Lambert and R. Patrick Smith, of Harper, Lambert & Brown, P.A., of Greenville, for Amici Curiae Associated Builders and Contractors of the Carolinas, Inc., and the School District of Greenville County.

Edwin Russell Jeter, Jr., of Jeter & Williams, P.A., of Columbia, for Amicus Curiae Leading Builders of America.

Charles H. McDonald and Daniel T. Brailsford, of Robinson, McFadden & Moore, PC, of Columbia, for Amici Curiae American Subcontractors Association of the Carolinas and Mechanical Contractors Association of South Carolina.

Robert L. Widener, Benjamin E. Nicholson, V, and A. Victor Rawl, of McNair Law Firm, P.A., of Columbia, for Amici Curiae Home Builders Association of South Carolina and the National Association of Home Builders.

J. Cameron Halford, of Halford, Niemiec & Freeman, L.L.P., of Fort Mill, for Amicus Curiae Ledgestone Court Residents of York County.

John P. Henry, of Thompson & Henry, P.A., of Conway, for Amicus Curiae Riverwalk at Arrowhead Country Club Property Owners Association, Inc., et al.

Justin Lucey, of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Amicus Curiae Medical University of South Carolina.

George E. Mullen, of Mullen Wylie, LLC, of Hilton Head Island, for Amicus Curiae Coastal Carolina University Student Housing Foundation.

W. Jefferson Leath, Jr., and Michael S. Seekings, of Leath, Bouch & Seekings, LLP, of Charleston, for Amici Curiae Community Associations Institute and the South Carolina Chapter of the Community Associations Institute.

H. Brewton Hagood, of Rosen Rosen & Hagood, LLC, of Charleston, for Amicus Curiae Charleston County School District.

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**JUSTICE KITTREDGE:** In this commercial general liability ("CGL") policy dispute, we issued an opinion on January 7, 2011, finding no coverage. We subsequently granted a rehearing petition and received numerous amici briefs. Today, we withdraw our initial opinion and issue this opinion, finding the CGL policies provide coverage for the stipulated progressive property damages.

Appellant/Respondent Harleysville Mutual Insurance Company ("Harleysville") issued a series of standard CGL policies to the Respondent developers or their predecessors (collectively "Crossmann") for a series of condominium projects in the Myrtle Beach area of South Carolina. The exterior components of the condominium projects were negligently constructed, which resulted in water penetration and progressive damage to otherwise nondefective components of the condominium projects. The homeowners settled their lawsuits against Respondents. Crossmann then filed this declaratory judgment action to determine coverage under Harleysville's policies. Prior to trial, several of Crossmann's other insurers settled with Crossmann, providing coverage for the homeowners' claims. Based on the remaining parties' stipulations and our suggestion in L-J, Inc. v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 123 n.4, 621 S.E.2d 33, 36 n.4 (2005), that a "CGL policy may . . . provide coverage in cases where faulty workmanship causes . . . damage to other property," the trial court determined the homeowners' claims were covered by Harleysville's policies.[1] We affirm the finding of coverage.

The finding of coverage requires that we address a matter not reached in our initial and now withdrawn opinion. Harleysville appeals from the trial court's determination that its liability to Crossmann is joint and several with Crossmann's other CGL insurers. We reverse the finding of joint and several liability and find the scope of Harleysville's liability is limited to damages accrued during its "time on the risk." In so ruling, we adhere to our holding in Joe Harden Builders, Inc. v. Aetna Casualty & Surety Co., 326 S.C. 231, 486 S.E.2d 89 (1997), but overrule Century Indemnity Co. v. Golden Hills Builders, Inc., 348

[1] Prior to the trial court's decision, Crossmann consented to the dismissal of its claims against Defendant Associated Insurors, Inc.

Defendant Cincinnati Insurance Company only issued excess insurance policies to Crossmann. Because the trial court found Harleysville's policies were sufficient to indemnify the entire $7.2 million in stipulated damages, it did not rule on whether Cincinnati's policies provided coverage, though it did find that the homeowners in the underlying lawsuits suffered property damage during Cincinnati's policy periods.

S.C. 559, 561 S.E.2d 355 (2002). Using our "time on risk" framework, the allocation of the damage award against Crossmann must conform to the actual distribution of property damage across the progressive damage period. Where proof of the actual property damage distribution is not available, the allocation formula adopted herein will serve as an appropriate default method for dividing the loss among Crossmann's insurers. We remand to the trial court for further consideration of the "time on risk" allocation.

**I.**

Crossmann constructed multiple condominium projects from 1992 through 1999, which are at issue in this case. Crossmann utilized subcontractors to construct the condominium projects. In 2001, the homeowners filed suit against Crossmann after they discovered construction defects and resulting problems with the units. The homeowners alleged Crossmann defectively constructed the units, and as a result, the units experienced substantial decay and deterioration. Crossmann settled with the homeowners for approximately $16.8 million.

Following the settlement, Crossmann sought coverage for damages arising out of the lawsuit pursuant to their CGL policies issued by Harleysville, but Harleysville denied that coverage was triggered. Crossmann filed a declaratory judgment action to determine whether the policies covered the homeowners' damages. The parties stipulated to the facts and amount of damages and only presented the coverage and allocation questions to the trial court.

The parties' stipulations presented the coverage question on the basis of the presence or absence of an "occurrence." The parties stipulated to, among other things, the amount of damages, that the damage resulting from water intrusion constituted "property damage," that the damage began within thirty days after the certificate of occupancy was issued for each building, that the damage progressed

until repaired or until Beazer Homes paid to settle the homeowners' claims, and that the parties would not argue the applicability of any policy exclusions.

Relying on L-J, Inc. v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 123 n.4, 621 S.E.2d 33, 36 n.4 (2005), and the ambiguity in the language of the CGL policies, the trial court ruled that the progressive damage "that resulted from, and was in addition to, the subcontractors' negligent work itself" was caused by an "occurrence." The trial court issued its order prior to our recent decision in Auto Owners Insurance Co. v. Newman ("Newman"), 385 S.C. 187, 684 S.E.2d 541 (2009). However, as discussed below, Newman further supports this result. The trial court also ruled that Harleysville was jointly and severally liable and was not entitled to a set-off based on other insurers' pre-trial settlements with Crossmann.[2] Additionally, the trial court found that Crossmann was entitled to an award of post-judgment interest but not prejudgment interest. Both parties have appealed the trial court's order.

## II.

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Newman, 385 S.C. at 191, 684 S.E.2d at 543. "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Id. "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Id. In this case, the parties have stipulated to the facts, and thus we are presented with a question of law. Where the action presents a question of law, as does this declaratory action, this Court's review is plenary and without deference to the trial court. J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Authority, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

[2] Prior to trial, Crossmann settled with their other insurance companies for $8.6 million.

## III.

## Commercial General Liability Policies and the Coverage Question in a Progressive Damage Case

### A.

We affirm the trial court's finding of coverage based on an "occurrence." An occurrence was once simply defined as an "accident." However, in 1966, the occurrence definition was expanded to include "continuous or repeated exposure to substantially the same general harmful conditions."[3] This Court, among others, has struggled to discern the meaning of the expanded occurrence definition in the context of progressive damage cases. The lack of a clear meaning, we believe, leaves us with an ambiguity, which we must construe against the insurer. See Super Duper, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 385 S.C. 201, 210, 683 S.E.2d 792, 796 (2009) ("Ambiguous terms must be construed in favor of the insured."). Accordingly, we construe the ambiguous definition of occurrence in favor of the insured, Crossmann, and find the insuring language of the policies was triggered by the damages caused by repeated water intrusion.[4]

### B.

While we adhere to the result in Newman, because progressive damage cases often are highly complex and involve many stakeholders,

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[3] Although not necessary to the disposition of this appeal, we note that language included in the 1966 occurrence definition requiring the property damage to be neither expected nor intended was eliminated from the definition during the 1986 CGL revisions. However, the unexpected and unintended concept was retained in a policy exclusion.

[4] We are aware that this construction may be at odds with a more limited nature of coverage actually intended by policyholders and the insurance industry. However, if insurers intend to preclude this construction, it is incumbent upon them to include clear language accomplishing this result. See United States Fire Ins. Co. v. J.S.U.B, Inc., 979 So. 2d 871, 884 (Fla. 2007) (finding it is incumbent upon insurers to include clear language expressing the parties' intent regarding the scope of coverage and noting the availability of particular endorsements to address or clarify the parties' intent).

we elect to clarify the applicable legal framework for determining whether coverage is triggered.

In Newman, a homeowner brought a suit against a builder alleging breach of warranty, breach of contract, and negligence. The homeowner established that a subcontractor negligently applied stucco to the side of her house and, as a result, progressive damage ensued as water seeped into the home causing damage to the home's framing and exterior sheathing.

We held that the costs of replacing the defective application of the stucco were not covered by the builder's CGL policy, but the damage caused by the continuous moisture intrusion resulting from the subcontractor's negligence did fall within the CGL's expansive definition of an occurrence. We analyzed Newman solely through the lens of whether there was an occurrence, specifically a "continuous or repeated exposure to substantially the same harmful conditions." 385 S.C at 194, 684 S.E.2d at 544-45 (citing Travelers Indem. Co. of America v. Moore & Assocs., Inc., 216 S.W.3d 302, 309 (Tenn. 2007)).

We believe a more complete understanding of the coverage issue in this kind of progressive property damage case should involve the policy term "property damage." The standard CGL policy defines "property damage" in two different ways, as follows:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.[5]

[5] Harleysville's policies employed these standard definitions, with the exception that some of its policies omitted the second sentence from definition "a."

With respect to the first quoted definition of "property damage," the critical phrase is "physical injury," which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter. We emphasize the "difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" See United States Fire Ins. Co., 979 So. 2d at 889-90 (citing cases adopting this approach); see also Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999) ("[T]he property allegedly damaged has to have been undamaged or uninjured at some previous point in time."), aff'd, 213 F.3d 634 (4th Cir. 2000) (unpublished table decision); L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 124, 621 S.E.2d 33, 36 (2005) ("In the present case, the complaint did not allege property damage beyond the improper performance of the task itself."); Travelers Indem. Co. of America, 216 S.W.3d at 311 ("[W]e hold that claims alleging only damages for replacement of a defective component or correction of faulty installation do not allege 'property damage.'").

Further, we note it is only after "property damage" has been alleged that the question of "occurrence" is reached. With respect to the components of a project that sustained physical injury, we look to the definition of occurrence, which is ambiguous and must be construed in favor of the insured, and find coverage was triggered.

Returning to Newman and viewing those facts through the lens of both "property damage" and "occurrence," we clarify that the costs to replace the negligently constructed stucco did not constitute "property damage" under the terms of the policy. The stucco was not "injured." However, the damage to the remainder of the project caused by water penetration due to the negligently installed stucco did constitute "property damage." Based on those allegations of property damage and

construing the ambiguous occurrence definition in favor of the insured, the insuring language of the policy in Newman was triggered by the property damage caused by repeated water intrusion.[6]

In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute "property damage," but the defective construction would not. We find the expanded definition of "occurrence" is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulated not to raise the issue, we do not address any policy exclusions and exceptions.

## IV.

Harleysville next challenges the trial court's decision to impose "joint and several"[7] liability. We adopt the "time on risk" framework, and therefore overrule our decision in Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002). In our view, the "time on risk" approach best conforms to the terms of a standard CGL policy and to the parties' objectively reasonable expectations. In particular, the "time on risk" approach requires a policyholder to bear a pro rata portion of the loss corresponding to any portion of the progressive damage period during which the policyholder was not insured or purchased insufficient insurance. The parties entered the following stipulations relevant to this issue:

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[6] In disposing of this appeal, we elect to adhere to our precedent in Newman. We do not address recent legislation that seeks in part to impose a construction on existing insurance policies in pending actions. See Act No. 26, 2011 S.C. Acts.

[7] The term "joint and several" is a misnomer. While each insurer is fully responsible for indemnifying its policyholder, this result does not stem from any kind of shared duty to the policyholder as the term might suggest in a tort setting. Rather, the duties of each insurer are contractual in nature, and are defined by the terms of each policy. Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 301 n.24 (Mass. 2009).

> 8. The parties agree that the following matters are the only issues of law to be addressed by [the trial court]:
>
> . . . .
>
> b. In the event the Court finds that there was an occurrence or occurrences, how shall the $7.2 million in insured damages referred to in paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk;"
>
> c. In the event judgment is entered for Plaintiffs, and that the Court determines that "time on the risk" is the proper allocation method, what is the proper period over which the "time on the risk" should be calculated. All parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any pro rata time on the risk allocation period. Alternatively, in the event that judgment is entered for the Plaintiffs and the Court determines that "joint and several" is the proper allocation method, whether Harleysville or Cincinnati is entitled to any set-off under South Carolina law in light of Plaintiffs' settlement with other insurers and, if set-off is appropriate, the amount of any such set-off.

The trial court found the allocation issue was controlled by Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002). The trial court determined that Century Indemnity mandated a "joint and several" approach and, therefore, ordered Harleysville to indemnify the full $7.2 million in stipulated damages. We reverse and remand for further proceedings.

An analysis of the proper method for allocating a loss among successive insurers must begin with the threshold question of what

must happen in order to trigger the potential for coverage under a particular policy. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 913 P.2d 878, 880 n.2 (Cal. 1995) (en banc) (explaining that "trigger of coverage" is a description of "what must take place within the policy's effective dates" in order for there to be a potential of coverage (emphasis omitted)). Only after determining *how* policies are triggered will it be possible to decide *which* policies were triggered by a progressive injury[8] and, correspondingly, *how much* of the loss caused by the injury is covered by each. The threshold issue of the trigger of coverage was resolved in South Carolina by the case of Joe Harden Builders, Inc. v. Aetna Casualty & Surety Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

Following Joe Harden, we were confronted in Century Indemnity with a question regarding the scope of a triggered insurer's obligation to its insured. In Century Indemnity, only one policy was at issue, and we were asked to determine whether it would cover "only the amount of property damage that occurred during the policy period" or "*all* sums [the policyholder] becomes legally obligated to pay[,] if property damage occurs during the policy period." 348 S.C. at 564, 561 S.E.2d at 357 (emphasis in original). These two alternatives are a classic statement of the difference between a "time on risk" and a "joint and several" approach to allocating losses in progressive property damage cases. We determined that the policy must cover "damage that occurred during the policy period *and* . . . any continuing damage." Id., 561 S.E.2d at 358 (emphasis in original). This result was consistent with the "joint and several" approach to allocation because it made one policy responsible for the entire loss caused by a progressive injury.

The question addressed in Century Indemnity was one which has caused much consternation among the courts of this country. Because Century Indemnity gave only a conclusory analysis to this complex issue and because it relied on an incorrect interpretation of Joe Harden in doing so, we overrule Century Indemnity and confront the allocation

[8] A progressive injury is an injury that results from an event or set of conditions that occurs repeatedly or continuously over time, such as long-term exposure to asbestos fibers or the continual intrusion of water into a building.

issue anew. After a detailed review of the policy language and the relevant case law, we find that each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period. Accordingly, we adopt a "time on risk" approach to the allocation of damages caused by progressive injuries.

## A. Harleysville's CGL Policies

We begin with the basic principle that insurance policies are contracts to be interpreted in accord with contract law. Accordingly, our discussion begins with the language of the policies themselves. Harleysville's CGL policies provided, in relevant part, that they would cover "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The insurance applied "only if: (1) The 'bodily injury' or 'property damage' [was] caused by an 'occurrence' . . .; and (2) The 'bodily injury' or 'property damage' occur[red] during the policy period."[9]

This policy language, or language that is substantially the same, is typical of a standard CGL policy. Accordingly, the interpretation of Harleysville's policies would be controlled by Joe Harden and Century Indemnity. See Century Indemnity Co., 348 S.C. at 561, 561 S.E.2d at 356 ("We accepted the following question[] certified by the United States Fourth Circuit Court of Appeals: 1. Does a standard commercial general liability insurance policy . . . provide coverage for continuing damage that begins during the policy period?"); Joe Harden Builders, Inc., 326 S.C. at 232, 486 S.E.2d at 89 ("This case is before us on certification from the United States District Court to interpret the language of a standard occurrence insurance policy."). We turn now to an analysis of those cases.

[9] Some of Harleysville's policies used slightly different wording to define when the insurance applied, but the differences were non-substantive.

## B. Joe Harden

In Joe Harden, we were asked to answer the following certified question: "Where defective construction causes progressive property damage that is otherwise covered by insurance, is the property damage deemed to occur: 1. When the concrete frame is constructed out of plumb; 2. When the masonry contractor knowingly builds the defective brick wall; 3. When the failure of the brick wall is manifest; 4. When the owner actually discovers the failure of the brick wall; or 5. At some other time?" 326 S.C. at 232-33, 486 S.E.2d at 89-90. Clearly, this question focused on what must happen in order to trigger coverage under a particular policy. We surveyed four common theories.

First, we looked to the theory that coverage is triggered at the time of the "injury-causing event." We explained that, "[u]nder this theory, coverage is triggered at the time of the underlying injury-causing event, even though no damage has yet occurred, and the policy in effect at the time of this underlying event covers all the ensuing damage." Id. at 234, 486 S.E.2d at 90. The final phrase of this explanation—"covers all the ensuing damage"—is the logical result of the theory itself. If coverage results from the injury-causing event, and there is only one event, responsibility for full coverage would rest with a single policy. Coverage responsibility could only be spread among multiple policies if the court considered the "underlying event" to have been ongoing or repetitive, such that it spanned multiple policy periods.

The next theory we considered was that coverage is triggered "when [the] injury manifested." We said, "[u]nder this theory, damage is deemed to occur at the time it is manifested or discovered, thus triggering coverage for all the ensuing damage under the policy in effect at the time of manifestation, even if some damage actually occurred earlier but was undetected." Id. Like the first theory, the logical result here would be to place full responsibility on a single policy, unless the manifestation of an injury could somehow be construed as ongoing or repetitive.

The third theory—which we ultimately adopted—was different from the first two. We explained:

> Under this [third] theory, coverage may be triggered at any point from the time of the underlying injury-causing event until the damage is complete, **allowing coverage under any policy in effect during this entire time.** Some courts have adopted this theory to give effect to the language in the standard occurrence policy which provides coverage for a "continuous or repeated exposure to conditions."

Id. at 235, 486 S.E.2d at 91 (emphasis added). What makes this theory unique versus the first two is that it is logically consistent with indemnity under multiple policies: it "allow[s] coverage under any policy in effect during th[e] entire" progression of the damage. Notably missing from our explanation, then, was the mention of any one policy covering "all ensuing damage."

Though we adopted this continuous trigger theory, thereby allowing coverage under ***multiple*** policies, we expressed disapproval regarding the aspect of the theory that allowed coverage under policies that ***preceded*** the first actual injury:

> We find this trigger gives effect to the policy provision regarding a continuous or repeated exposure **but that it suffers from the same problem as the first theory** discussed above **because it triggers coverage** from the time of the injury-causing event **even if no damage has yet occurred**. Again, such an interpretation conflicts with the plain language of the policy which provides that damage must occur during the policy period. **Accordingly, we adopt a continuous trigger theory but modify it** as discussed below.

Id. at 236, 486 S.E.2d at 91 (emphasis added). For that reason, we adopted what we called a "modified" continuous trigger. The modification was that, rather than defining the damage period as beginning with the injury-causing event and ending with manifestation, we defined the damage period as the term during which actual injuries occurred.

Before we made this modification, however, we described the fourth general theory regarding the trigger of coverage—that coverage is triggered "at the time of an injury-in-fact"—as follows: "Under this theory, coverage is triggered whenever the damage can be shown in fact **to have first occurred**, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages." Id. (emphasis added). Like the first two theories we discussed and rejected, this theory is logically consistent with indemnity only by a ***single*** policy: an injury can only have "first occurred" on a single occasion. See Montrose Chemical Corp., 913 P.2d at 895 n.17 (noting an insurer's argument that "once an injury-in-fact is established, even retrospectively, all potential coverage is cut off . . . and only the insurer on the risk at the time the injury-in-fact first 'occurs' is liable to indemnify the insured").

In order to make an injury-in-fact trigger consistent with coverage under multiple policies, we had to recognize the ongoing or repetitive nature of the injuries in a progressive damage case. We did precisely that by (a) adopting the continuous trigger theory (theory three), and (b) modifying it to require an injury-in-fact during each policy period. Thus, we stated:

> Because we find the injury-in-fact trigger consistent with the policy's requirement that damage occur during the policy period, **we adopt it in conjunction with a continuous trigger of coverage**. *See U.S. Gypsum Co. v. Admiral Ins. Co.,* 268 Ill.App.3d 598, 205 Ill.Dec. 619, 643 N.E.2d 1226 (1994) (injury-in-fact trigger and continuous

> trigger are on the same continuum and are complementary); *Industrial Steel Container[] Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 (Minn. [Ct.] App.1987) (rejecting argument that there can be only one occurrence in continuous injury case and applying actual injury rule).

326 S.C. at 236, 486 S.E.2d at 91 (emphasis added). The Industrial Steel Container Co. case we cited in support explains that where a court considers there to have been ongoing injuries-in-fact, there is the potential for coverage under more than one policy. 399 N.W.2d at 159 ("We view this 'actual injury' rule to be sufficiently broad to recognize that in cases involving long exposure to a toxic substance there can be damage with more than one manifestation and more than one insurance policy can afford coverage. We reject the argument that there can be only one occurrence in a case where property damage results from continuous or repeated conditions of exposure.").

Our holding in Joe Harden was this: "We hold coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage." 326 S.C. at 236, 486 S.E.2d at 91. This statement was a complete answer to the certified question before the Court. Unlike theories one, two, and four—which contemplated that a single policy would cover "all ensuing damage"—theory three included no statement as to the scope of coverage that would be provided by each triggered policy. Thus, the holding in Joe Harden did not answer the allocation question with which we are now presented.

Yet the Joe Harden Court then went one step further, making a statement in dictum that has been the source of much confusion. We said: "[T]his theory of coverage will allow the allocation of risk among insurers when more than one insurance policy is in effect during the progressive damage." Id. at 237, 486 S.E.2d at 91. This statement could be taken as a mere summation of the fact that theory three allows coverage under multiple policies. Nevertheless, it may be mistakenly construed to mean that (1) risk can *only* be allocated among insurers, and no portion of the risk can be borne by policyholders who allow

insurance to lapse during some portion of the damage period; and (2) where there is only one insurance policy in effect during the progressive damage, that policy must bear the full risk. We attribute no such weighty meaning to this dictum.

We turn now to Century Indemnity, in which we were squarely presented with a question as to *how much* coverage each triggered insurer must provide.

## C. Century Indemnity

In Century Indemnity, we accepted the following certified question:

> Does a standard commercial general liability insurance policy that explicitly provides coverage only for property damage occurring during the policy period provide coverage for continuing damage that begins during the policy period?

348 S.C. at 561, 561 S.E.2d at 356. In Century Indemnity, the policyholder purchased coverage from December 7, 1989, to December 7, 1990. The parties stipulated that moisture began to cause property damage prior to the end of the policy period, and that the damage was "continuous since that time." Id. at 562, 561 S.E.2d at 356. The CGL policy at issue was identical in all relevant respects to the policies in this case. Id. at 563, 561 S.E.2d at 357. We reasoned:

> The issue is whether the policy should cover (1) only the amount of property damage that occurred during the policy period, *i.e.*, between December 7, 1989, and December 7, 1990; or (2) *all* sums Insured becomes legally obligated to pay if property damage occurs during the policy period.
>
> We believe this issue can be resolved solely by reference to *Joe Harden Builders, Inc. v. Aetna Cas. & Sur.*

> *Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997). In *Joe Harden*, the Court adopted a modified continuous trigger theory for determining when coverage is triggered under a standard occurrence policy. "Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages." *Id.* at 236, 486 S.E.2d at 91. Coverage is also triggered under every policy applicable thereafter.
>
> Because the policy at issue here contains substantially the same language as the policy at issue in *Joe Harden*, the modified continuous trigger theory applies in the instant case. As a result, the insurance policy provides coverage for property damage that occurred during the policy period *and* for any continuing damage.

Id. at 564, 561 S.E.2d at 357-58 (emphasis in original).

This analysis fundamentally misinterpreted Joe Harden and is profoundly at odds with the insurance contract. The Joe Harden language relied upon in Century Indemnity was taken from the description of theory four, treating theory four as if it was the holding in Joe Harden. The actual holding in Joe Harden, adopting theory three and then modifying it using the injury-in-fact trigger from theory four, was that "coverage is triggered at the time of an injury-in-fact and continuously thereafter **to allow coverage under all policies** in effect from the time of injury-in-fact during the progressive damage." 326 S.C. at 236, 486 S.E.2d at 91 (emphasis added). The fundamental difference is this: while the theory quoted in Century Indemnity would make a single policy responsible for full indemnity, the modified continuous trigger theory adopted in Joe Harden makes multiple policies responsible.

The error in Century Indemnity is further evident in its statement that "property damage **relates back in time** to the time of the

occurrence, that is, when the first injury occurred to the property." 348 S.C. at 563, 561 S.E.2d at 357 (emphasis added). Again, a "first injury" can only occur once. Thus, Century Indemnity would collapse all property damage into a single policy period. This would leave no logical basis for finding that later policies were also triggered. Joe Harden, on the other hand, expressly contemplated that property damage would span multiple policy periods, triggering coverage under each policy.

In sum, the actual holding in Joe Harden gave no guidance as to how much coverage would be provided by each triggered policy. Because Century Indemnity relied on a single trigger theory, rather than on the modified continuous trigger theory adopted in Joe Harden, the Century Indemnity opinion gave short shrift to this complex issue. For this reason, we overrule Century Indemnity and confront the issue anew. We turn now to an analysis of the two theories regarding the scope of coverage advocated by the parties in this case.

### D. "Joint and Several" vs. Pro Rata/"Time on Risk"

In this case, Crossmann argues in favor of a "joint and several" approach to the allocation of damages, while Harleysville advocates a pro rata/"time on risk" approach. We adopt the pro rata/"time on risk" approach.

Courts adhering to the "joint and several" theory require each triggered insurer to indemnify its policyholder for the entire loss caused by the progressive injury, up to the policy limit, even if the majority of the loss occurred after the policy period expired. A key feature of this approach is that a policyholder may be indemnified in full despite its failure to purchase CGL coverage throughout the entire progressive damage period. Further, under this theory, where multiple insurance policies are triggered, the policyholder often is permitted to choose the policy from which it will seek indemnity. The chosen insurer may then seek partial reimbursement from any other insurers triggered by the

progressive injury.[10] Because "joint and several" jurisdictions typically allow a selected insurer to bring a separate lawsuit seeking such reimbursement, many have criticized the theory as inefficient and wasteful of judicial resources. E.g., Boston Gas Co., 910 N.E.2d at 311.

The seminal case advocating a "joint and several" approach is Keene Corporation v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981). Keene rested primarily on the view that a policyholder's purchase of insurance entitled it to certainty that it had limited its liability to the cost of the policy itself. Id. at 1047-48. Advocates of a "joint and several" approach typically contend that the plain language of the insuring agreement requires an insurer to pay "all sums" or "those sums" the insured becomes legally obligated to pay, as long as *some* property damage occurs during the policy period. See, e.g., Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 841 (Ohio 2002).[11] As we detail below, we believe this

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[10] In this way, an allocation ***among insurers*** based on each insurer's time on the risk can be consistent with a "joint and several" approach. In this context, "time on risk" is simply an equitable method of spreading the loss among several insurers, each of whom is liable ***to the insured*** for the loss in full. See Sentinel Ins. Co. v. First Ins. Co. of Hawai'i, 875 P.2d 894, 919 (Haw. 1994) ("Equity, under the circumstances of this case, dictates that the court allocate contribution among the liable insurers in proportion to the time periods their policies covered."). As we will discuss, under the "time on the risk" theory of the scope of each insurer's obligation to its insured, each insurer's initial obligation to its insured is limited to a pro rata portion of the loss. The loss could not then be redistributed among the insurers based on simple notions of equity.

[11] The Goodyear Court explained its position as follows:

> There is no language in the triggered policies that would serve to reduce an insurer's liability if an injury occurs only in part during a given policy period. The policies covered [the insured] for "all sums" incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence.

769 N.E.2d at 841.

interpretation ignores critical language limiting the insurer's obligation to pay to sums that are attributable to property damage that occurred during the policy period.

In contrast to the "joint and several" approach, courts adhering to a "pro rata" theory of the scope of each triggered insurer's obligation to its insured hold each insurer responsible only for some pro rata portion of the loss caused by a progressive injury, regardless of whether there are other triggered insurers available to cover the remainder. Thus, unlike jurisdictions using a "joint and several" theory, courts subscribing to a pro rata theory generally require the policyholder to bear the portion of the loss attributable to the policyholder's assumption of the risk. Boston Gas Co., 910 N.E.2d at 303 ("One important feature of a pro rata allocation is that courts adopting this type of allocation generally require the policyholder to participate in the allocation . . . for those periods of no insurance, self-insurance, or insufficient insurance." (alteration in original) (quoting J.M. Seaman & J.R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims § 4:3[c], at 4-21 (2d ed. 2008))). As a result, for those periods of "no insurance, self-insurance, or insufficient insurance" during the progressive damage period, a portion of the loss will be borne by the policyholder.

Pro rata theorists have developed several different methods for calculating each insurer's pro rata portion of the loss, each supported by its own notions of fairness and the nature of CGL insurance. "Time on risk" is one such method, and in our opinion, is the method most consistent with the language of a standard CGL policy.[12]

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[12] Another common method is a "years and limits" allocation, whereby shares are determined by each insurer's proportion of the total available coverage. This is accomplished by dividing the sum of the insurer's policy limits by the sum of all policy limits purchased during the damage period. Thus, if insurer A issued two policies at $1 million each and insurer B issued four policies at $4 million each, the total available coverage would be $18 million, and insurer A would be responsible for 2/18 of the loss while insurer B would be responsible for 16/18 of the loss. In this way, a court applying a "years and limits" method attempts to allocate the loss in proportion to the amount of risk assumed by the insurer over the course of the damage period. See, e.g., Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998) (Part II); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994) (Parts IV through VI). The effect of a "years and limits" allocation is to assign greater shares of the loss to insurers that offered

Our approach relies heavily on the opinion of the Supreme Judicial Court of Massachusetts in Boston Gas Company v. Century Indemnity Company, which provides the reading of the relevant policy language that we believe is correct:

> Once the policy is triggered . . . the insuring agreement provides that [the insurer] will indemnify [the insured] only for the "ultimate net loss" that [the insured] is "legally obligated to pay [as damages] '*because of*' . . . '*property damage*' . . . '*to which this policy applies*.'" [The insurer] then looks to the "Policy Period, Territory" provision as supplying a definition of the phrase "to which this policy applies." That provision states that "[t]his policy applies to . . . *property damage* . . . which occurs anywhere *during the policy period*." [The insurer] concludes that the policy provides coverage only for [the insured's] liability resulting from property damage occurring during the policy period.

910 N.E.2d at 305 (emphasis in original); id. at 306-07 (adopting this interpretation of the policy language). This interpretation is consistent with various other courts around the country, including, among others, the Second and Sixth Circuit Courts of Appeal and the courts of Minnesota, New York, and Vermont. Id. at 307 n.34 (citing cases).

While Boston Gas dealt with an excess insurance policy, rather than a standard CGL policy, the key language is the same. As in Boston Gas, Harleysville agreed to pay for damages incurred "because of 'bodily injury' or 'property damage' **to which this insurance applies**." The insurance applies "**only if** . . . [t]he 'bodily injury' or 'property damage' occur[red] during the policy period." In other words, the insurance **does not apply** to property damage that did not occur during the policy period. Though the insurer in Boston Gas agreed to pay the "ultimate net loss" above a certain threshold amount while a

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higher policy limits. Because we believe the language of a standard CGL policy requires each insurer to bear only that portion of the loss attributable to damage that occurred during its policy period, we reject the "years and limits" approach.

standard CGL policy promises payment for "those sums that the insured becomes legally obligated to pay as damages," both phrases are modified by the requirement that covered damages must be "**because of** . . . 'property damage' to which th[e] insurance applies." This requirement limits the promise of payment, obligating the insurer to pay only those damages caused by property damage that "occurs during the policy period."

Not only does the Boston Gas interpretation give effect to each part of the insuring agreement (rather than focusing solely on the terms "all sums" or "those sums"), it is consistent with the objectively reasonable expectations of the contracting parties. As the Boston Gas Court explained:

> [W]e doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property damage occurring outside the policy period. . . . No reasonable policyholder could have expected that a single one-year policy would cover all losses caused by [a progressive injury] over the course of several decades. Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year.
>
> "[T]here is no logic to support the notion that one single insurance policy among 20 or 30 years worth of policies could be expected to be held liable for the entire time period. Nor is it reasonable to expect that a single-year policy would be liable, for example, if the insured carried no insurance at all for the other years covered by the occurrence."

910 N.E.2d at 309-10 (quoting Public Service Co. of Colorado v. Wallis & Cos., 986 P.2d 924, 940 (Colo. 1999) (en banc)).

Further, this interpretation forwards important policy goals. Specifically, it preserves the incentive for businesses to purchase sufficient insurance, which in turn promotes stability in the marketplace. See id. at 311 ("[T]he pro rata allocation method . . . engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result."). By contrast, the "joint and several" theory "creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage." Id. (quoting Public Serv. Co. of Colo., 986 P.2d at 939-940).

For these reasons, we reverse the trial court's order allocating the entire $7.2 million in stipulated damages to Harleysville and hold that the proper method for allocating damages in a progressive property damage case is to assign each triggered insurer a pro rata portion of the loss based on that insurer's time on the risk.[13] We remand for further proceedings consistent with a "time on risk" approach. To aid the trial court in applying the "time on risk" framework, we provide guidance in the section below.

### E. Application of the "Time on Risk" Approach

An ideal application of the "time on risk" approach would require the finder of fact to determine precisely how much of the injury-in-fact occurred during each policy period and precisely what quantum of the damage award in the underlying suit was attributable to *that* injury. Unfortunately, it is often "both scientifically and administratively impossible" to make such determinations. Boston Gas Co., 910 N.E.2d at 301 (quoting Michael G. Doherty, Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.

[13] The parties have also raised the issue of whether Harleysville is entitled to any set-off against the amounts already paid by other insurers. The parties have couched this as an alternative argument, applicable only if the Court chooses to follow a "joint and several" approach to allocation. Given our disposition, we need not reach the set-off issue.

Rev. 257, 257-58 (1997)). This unique difficulty has been described as follows:

> "Most liability policies are designed to respond to losses, such as automobile accidents, which occur instantaneously. Losses of this nature are relatively easy to identify because damages are both immediate and finite, and can be measured quite simply against the limits of the policy or policies in effect on the date of the accident.
>
> On the other hand, losses where damage develops unrecognized over an extended period of time, such as bodily injury claims for toxic exposures and property damage claims for environmental contamination, are more difficult to pinpoint both in time and in degree. In these cases, correlating degrees of damage to particular points along the loss timeline may be virtually impossible. This has led to substantial uncertainty as to how responsibility for such losses should be allocated where multiple insurers have issued successive policies to the insured over the period of time the damage was developing."

Id. at 300 n.20 (quoting William R. Hickman & Mary R. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L. Rev. 291, 292 (1990)).

In cases where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy, courts have looked to the total loss incurred as a result of all of the property damage and then devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed.[14] This

[14] By making the denominator the total number of years during which the damage progressed, a policyholder who chose not to purchase coverage for certain years will be left with the responsibility for whatever portion of the total loss is attributed to those

fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.[15]

This formula is not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default.

In this case, a strict application of the basic "time on risk" formula might be inappropriate. There were numerous buildings involved in the underlying lawsuit against Crossmann, each with its own certificate of occupancy, and the parties have stipulated that the damage began "within 30 days after the Certificate of Occupancy was issued for each building." Further, the parties stipulated that the damage "progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first." Accordingly, it may be that, as to each building, each policy was "on the risk" for a slightly different proportion of the total damage period. We leave it to the sound discretion of the trial court to determine whether it is necessary to apply the "time on risk" formula separately to each individual building or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case. Thus, we

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uninsured years.

[15] Because this formula allocates the total loss caused by a progressive injury in equal shares across all policy periods, there might arise a situation in which the portion of the loss attributed to a particular policy exceeds that policy's limit of coverage. The portion of the loss that exceeds the policy limit would either fall back onto the policyholder or be covered by an excess insurance policy. This result is equitable and in line with the policyholder's objectively reasonable expectations: the policyholder could only have expected each policy to indemnify up to its limit of coverage and, as we have explained above, should have expected that each policy would cover only the damage that occurred during its policy period.

emphasize that trial courts employing the "time on risk" approach may alter the default formula set forth above where a strict application would be unduly burdensome or otherwise inappropriate under the circumstances of a particular case. However, any such alterations must remain within the bounds of a pro rata/"time on risk" approach: the formula must result in a reasonable approximation of the amount of property damage that occurred during each insurer's policy period.[16]

In sum, we construe the standard CGL policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the formula above as the default method for allocating shares of the loss. Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, but they must remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk.

## CONCLUSION

We affirm the trial court's finding that coverage was triggered by an "occurrence." We overrule Century Indemnity and impose a "time on risk" approach to defining the scope of each CGL insurer's obligation to its insured in a progressive damage case. This equitable approach best harmonizes with policy language limiting coverage to the "policy period." Moreover, the "time on risk" framework lends itself to a logical default formula that is easily applied when the actual quantum of damage incurred during each policy period is not known. We

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[16] Some courts have created an "unavailability" exception to the "time on risk" rule and therefore altered the default formula to exclude years during which coverage was either not offered by the insurance industry or not offered to the particular policyholder. See Boston Gas Co., 910 N.E.2d at 315 & n.41 (citing cases). Alterations of this kind would exceed the trial court's authority, as the effect is to shift losses from one policy period to another in order to create coverage where none was purchased. As observed in Boston Gas, an unavailability exception "effectively provides insurance where insurers made the calculated decision **not** to assume risk and not to accept premiums." Id. at 315 (emphasis added).

remand to the trial court for further proceedings consistent with this opinion.[17]

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

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

[17] Crossmann has cross-appealed from the denial of its request for prejudgment interest. We affirm the trial court's denial of prejudgment interest pursuant to Rule 220(b)(1), SCACR. See Great Games, Inc. v. South Carolina Dep't of Revenue, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (stating that where the trial court fails to address a nonprevailing party's argument, and the party fails to bring the omission to the court's attention in a Rule 59, SCRCP, motion, the argument is not preserved for review).

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Craig J. Poff, Respondent.

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Opinion No. 27028
Heard June 8, 2011 – Filed August 22, 2011

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**DEFINITE SUSPENSION**

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Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard and Harvey MacLure Watson III, both of Ballard, Watson and Weissenstein, of W. Columbia, for Respondent.

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**PER CURIAM:** In this attorney discipline matter, both Craig J. Poff (Respondent) and the Office of Disciplinary Counsel (ODC) take exception to the findings and recommendations of the hearing panel of the Commission on Lawyer Conduct (Panel). After a full hearing, two Panel members recommended a six month suspension, and two Panel members recommended a ninety day suspension of Respondent from the practice of law. The Panel additionally recommended Respondent be required to pay the costs of the proceedings, an appropriate fine, and complete the South Carolina Bar's Legal Ethics Practice Program and Trust Account School (LEAP program) prior to reinstatement to the practice of law. We order Respondent's suspension from the practice of law for a period of six months,

and additionally require Respondent to complete the LEAP program and reimburse the ODC for the costs of the proceedings prior to reinstatement. However, we decline to impose a fine.

## PROCEDURAL BACKGROUND

The ODC filed formal charges against Respondent on January 21, 2010, alleging the violation of a variety of Rules of Professional Conduct (RPC) arising out of his dealings with a former assistant (Assistant). The ODC alleged Respondent aided Assistant in committing Medicaid Fraud, failed to specify and memorialize a fee agreement with Assistant for representing her in a divorce proceeding, disclosed confidential information about that divorce settlement with a third party, paid Assistant on several occasions out of his trust account, and sent a series of e-mails to a third party containing unauthorized photographs of Assistant and language objectifying Assistant in a sexual manner during the time she was his client. Respondent denied the majority of the allegations, but acknowledged he revealed confidential information about Assistant's divorce settlement to a third party. On May 11 and 12, 2010, the Panel heard testimony and arguments relating to the formal charges. The Panel issued its report on January 4, 2011 with the recommendations listed above.

## FACTS

Respondent is a sole practitioner in Beaufort, South Carolina and has been a member of the South Carolina Bar since 1990. Respondent was admitted to the Maryland Bar in 1979. In 1993, Respondent opened his own practice, renting space from another attorney. While working out of this office, Respondent came to know Assistant, who was then working as a legal assistant for the other attorney. Respondent moved offices in 1995 and did not have contact with Assistant until June 2005, when Assistant made an appointment to meet with him to discuss obtaining a divorce from her husband.

## The Fee Agreement

Prior to meeting with Respondent, Assistant consulted two other attorneys about her divorce, but was unable to pay the retainer fee they required. At their initial meeting on June 4, 2005, Respondent quoted Assistant a retainer fee of $1,500, but she informed him she could not pay that amount without an alternative arrangement. Because Assistant was not working during the month of June, Respondent suggested she come to work for him on a part-time basis to pay off the retainer fee. The parties did not execute a written retainer agreement. The terms of their verbal agreement were uncertain. Assistant believed she would be working the entire summer, while Respondent testified the arrangement was for her to work for two weeks to pay off the fee. On June 23, 2005, after two weeks of work, Respondent began paying Assistant a regular pay check. Shortly thereafter, he asked her to work for him permanently, and Assistant agreed. Over the next two years, Respondent represented Assistant in her divorce action and in alimony and child support collection efforts without requesting payment for the services.

## Respondent's Trust Account and Payments to Assistant

During Assistant's employment with Respondent, he wrote checks to her directly from his trust account on four occasions. Respondent testified one of these checks was for child support, given to him by Assistant's former mother-in-law. Assistant denies the check was for child support. Respondent's trust account records indicate two checks were for "wages," and a third check was for a "bonus." In his Response to Formal Charges, Respondent admitted to paying Assistant bonuses directly from his trust account, but asserted there was no "meaningful difference between that needlessly convoluted process" of disbursing money first to his operating account before writing a bonus check to employees and the shortcut he employed by paying Assistant directly from the trust account. At the hearing, Respondent admitted this action was an improper "shortcut." Respondent further admitted he most likely gave Assistant these three checks as a share of fees from a personal injury settlement. Respondent also paid Assistant periodic bonuses based on a percentage of outstanding fees she collected or

as a percentage of any retainer fees Respondent collected when Assistant referred clients.

## Assistant's Medicaid Benefits

During their initial consultation meeting on June 4, 2005, Assistant testified she told Respondent her income with the local school district qualified her for Medicaid, and that she needed to maintain that insurance for herself and her two children. Respondent denies they discussed Medicaid at this meeting. Respondent did not provide Assistant health insurance benefits because the premium quotations Respondent received were too expensive. Assistant testified Respondent knew it was important for her to remain a part-time employee so she could qualify for Medicaid benefits. From June 7, 2005 until January 31, 2006, Respondent reported Assistant's income using a 1099 form.[1] In December, 2005, Assistant began working full-time for Respondent. Assistant testified she and Respondent discussed that her increased hours and pay could jeopardize her ability to receive Medicaid benefits. She claims Respondent proposed the idea of splitting her income between an IRS 1099-Misc Form and a W-2 form.[2] According to Assistant, Respondent suggested that her assistance with his bankruptcy practice could be reported as 1099 income and her secretarial work could be reported as W-2 income. She testified that during this discussion she relayed her fear of going to jail if DHHS became aware of her actual income, and he told her, at worst, she would have to pay the money back and that she would get a letter stating she was disqualified from ever receiving Medicaid again.

Respondent denies all of Assistant's claims that he initiated and assisted her in defrauding DHHS to receive Medicaid benefits. Respondent maintains he paid Assistant in this fashion at her request and he naively assumed she

[1] The IRS's 1099 Miscellaneous form is used to report the income of non-employees, typically independent contractors. Income distributed on a 1099 basis is not subject to federal or state income tax withholding.

[2] Because the Department of Health and Human Services (DHHS) only reviews an applicant's W-2 income, splitting her income in this fashion would allow Assistant to maintain her Medicaid benefits.

preferred to split her compensation this way for tax purposes. The record indicates that Respondent reported all of Assistant's income to the IRS, and paid all required taxes on her wages.

On at least two occasions, Assistant submitted letters understating her income to DHHS for the continued receipt of Medicaid benefits. These letters were written on Respondent's letterhead and purportedly bore his signature, but Assistant admitted she signed Respondent's name to resemble his signature on both letters. Assistant maintains Respondent authorized her to sign his name to the letters and approved the letters before she sent them to DHHS. Respondent, on the other hand, alleges Assistant submitted these letters on her own accord, without his knowledge, and he first learned of the letters from an Attorney General investigator after Assistant left his employment.

The first letter was dated December 19, 2005, when Respondent was in Florida attending to matters related to his father's death. Assistant claims that on December 19th, she discussed with Respondent by phone that her verification was expiring soon, and he told her to draft the letter, sign it, and mail it because they did not have the time to wait. She testified she nevertheless held the letter until the next day when he returned, and he again reiterated she should mail it as soon as possible so her Medicaid benefits would not be interrupted. She stated he even made a comment about how close the signature looked to his. Respondent denies all of Assistant's testimony regarding this letter.

Assistant printed these letters on letterhead containing only Respondent's name, although the printed letterhead used in the office during Assistant's employment was embossed with her name, as legal assistant. Assistant claims the office kept supplies of both letterheads. Respondent asserts Assistant altered the letterhead to remove her name to prevent any perception she was a full-time employee.

On July 30, 2007, two months after Assistant left Respondent's employment, Respondent replied by letter to a DHHS questionnaire, notifying the agency that Assistant may have underreported her income to continue receiving Medicaid benefits. Notably, in early May, Respondent

received notice that Assistant planned to file a malpractice suit against him. On August 27, 2007, Respondent made a complaint to the Office of the Attorney General that Assistant engaged in Medicaid fraud. On September 24, 2007, and again on October 9, 2007, Respondent sent letters to the Attorney General's investigator detailing the amount he paid Assistant over the course of her employment, and denying that he had any knowledge of the renewal letters sent to DHHS. Authorities arrested Assistant for Medicaid fraud and detained her on October 19, 2007. She acknowledged wrongdoing and entered an agreement for pre-trial intervention.

## Disclosure of Confidential Client Information

Respondent admits to violating Rule 1.6(a), RPC, Rule 407, SCACR, by disclosing private details of the circumstances surrounding Assistant's divorce action to his friend through e-mail. These disclosures included intimate details about Assistant's marital relationship and the financial settlement Respondent secured for her.

## Details of Assistant's Departure from Employment

Assistant worked for Respondent from June 7, 2005 until May 4, 2007. During this time, they shared a good working relationship and Assistant considered them to be friends. Assistant claims she was unaware that Respondent had feelings beyond friendship until May 2, 2007, when Respondent gave her a romantic birthday card coupled with a typed note that revealed his feelings for her.

On May 4th, while looking in Respondent's office for a client file, Assistant noticed an e-mail on Respondent's computer of which she was the subject. The e-mail referenced Assistant in a sexually explicit manner. Assistant immediately printed the e-mail and left the office with the intention of never returning.

At home, Assistant used Respondent's password to access his e-mail and printed the e-mails Respondent exchanged with his friend during the time she worked for Respondent. These e-mails contained offensive and objectifying language about Assistant, unauthorized photographs of

Assistant, and confidential information about her divorce settlement. It is undisputed she accessed Respondent's e-mails for her own purposes and not in furtherance of any duty she owed Respondent as an employee.

## Other Relevant Legal Proceedings

After Assistant quit working for Respondent, the South Carolina Employment Security Commission (SCESC) awarded Assistant unemployment benefits upon finding she had been sexually harassed at work. Additionally, Assistant filed a legal malpractice suit against Respondent and settled the suit for $300,000, $25,000 of which Respondent paid personally. Finally, during the pendency of this lawsuit, Assistant executed a deed transferring her interest in her home to a third party. This deed included a handwritten notation, "Prepared by Law Office of C.J. Poff." Respondent did not prepare the deed and testified the notation was made in Assistant's handwriting. Assistant denies making the notation. The deed was subsequently corrected.

## The Panel's Findings

The Panel found Respondent in violation of the following Rules of Professional Conduct, Rule 407, SCACR:

- Rule 1.6(a) (Confidentiality of Information)
- Rule 1.15(a) (Safekeeping of Property)
- Rule 5.4(a) (Professional Independence of a Lawyer)
- Rule 8.4(a), (d), and (e) (Misconduct)

The Panel additionally found Respondent in violation of the following Rules of Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR:

- Rule 7(a)(1) (violating or attempting to violate the RPC)
- Rule 7(a)(5) (conduct intending to pollute administration of justice)
- Rule 7(a)(6) (violating lawyers' oath of office)

Respondent does not take exception to the Panel's finding that he violated Rules 1.6(a) and 1.15, RPC. However, Respondent takes exception to the remaining Rule violations as found by the Panel.

The Panel found that Respondent did not violate the following Rules of Professional Conduct, Rule 407, SCACR:

- Rule 1.2(d) (Scope of Representation)
- Rule 1.5(b) (Fees)
- Rule 1.7(a)(2) (Conflict of Interest: Current Clients)
- Rule 1.8 (a) and (b) (Conflict of Interest: Specific Rules)
- Rule 1.16(a)(1) (Declining or Terminating Representation)

The ODC does not take exception to the Panel's finding that Respondent did not violate Rules 1.5(b) and 1.8(b). However, the ODC takes exception to the Panel's findings on the remaining Rules listed.

## Aggravating Factors

The Panel considered Respondent's prior disciplinary history an aggravating factor in recommending a sanction. This Court suspended Respondent for a period of sixty days in connection with his handling of a real estate closing. *In re Poff*, 336 S.C. 542, 623 S.E.2d 642 (2005). Additionally, the Panel determined Respondent made false statements and engaged in deceptive practices during the disciplinary process. Finally, the Panel found Respondent failed to acknowledge the wrongful nature of his conduct.

## Mitigating Factors

The Panel considered in mitigation of the charges the character testimony of Felix "Butch" Clayton that Respondent is "a hard worker and he has a good reputation as an attorney throughout," and Respondent's personal contribution of $25,000 toward a malpractice settlement with Assistant.

## ISSUES

**I.** Whether the Panel had sufficient evidence to support its finding that Respondent knowingly aided Assistant in misrepresenting her income, in violation of Rules 8.4(d) and (e), RPC, Rule 407, SCACR.

**II.** Whether the Panel properly considered aggravating circumstances.

**III.** Whether Respondent had sufficient notice he was subject to discipline under Rule 5.4, RPC, Rule 407, SCACR.

**IV.** Whether the Panel's finding that Respondent violated Rules 7.4(a)(5) and (6), RLDE, Rule 413, SCACR lacked sufficient definiteness.

**V.** Whether the Panel erred in finding Respondent did not violate Rules 1.2(d), 1.7(a)(2), 1.8(b), and 1.16(a)(1), RPC, Rule 407, SCACR.

**VI.** Whether the Panel's recommendation of a ninety day or six month suspension is a sufficient penalty for Respondent's actions.

## STANDARD OF REVIEW

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.* Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Id*.

## ANALYSIS

Respondent has not taken exception to the Panel's finding he violated the Rules relating to the disclosure of confidential client information, Rule 1.6(a); the safekeeping of a lawyer's trust account, Rule 1.15(a); and violating the Rules of Professional Conduct, Rule 8.4(a). The Panel found Respondent's failure to reduce his fee agreement with Assistant to writing did

not violate Rule 1.5(b) because the Rule does not require a fee agreement to be in writing. The Panel also found the ODC failed to establish Respondent violated Rule 1.8(a) by entering into a business transaction with his client. The ODC does not take exception to these findings. By not taking exception, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations as to these Rules. Rule 27(a), RLDE, Rule 413, SCACR. Therefore, as an initial matter, we find Respondent violated Rules 1.6 (a), 1.15(a), and 8.4(a), RPC, Rule 407, SCACR, but that he did not violate Rules 1.5(b) and 1.8(a), RPC, Rule 407, SCACR, as charged.

## I. Rules 8.4(d) and (e), RLDE (Misconduct)

Respondent takes exception to the Panel's finding that he violated Rules 8.4(d) and (e) by knowingly aiding Assistant in committing Medicaid fraud. In an attorney discipline action, the ODC is required to establish by clear and convincing evidence a violation of the charged Rule. Rule 8, RLDE, Rule 413, SCACR. In our opinion, the hearing testimony and admissible exhibits, as a whole, establish that Respondent knowingly aided Assistant in misleading DHHS as to Assistant's income.

This issue presents a classic case of "he said, she said." Assistant gave detailed testimony of the conversations she and Respondent had regarding her need to maintain Medicaid coverage, his suggestion that they split her income between a 1099 and W-2 form, and their exchanges about the verification letters to be sent to DHHS. Respondent denies ever having these conversations and maintains Assistant asked him to split her income and he naively complied. The Panel found Assistant's testimony to be more credible than Respondent's. A reading of the record as a whole convinces us of the same. Although the Panel held inadmissible the e-mails and pictures exchanged between Respondent and his friend, the ODC read them into evidence for impeachment purposes. The evasive and patently dishonest manner in which Respondent answered questions about the documents, in our view, denigrates his credibility in this factual determination. For instance, the ODC asked Respondent about pictures taken of Assistant in the office, a space only they shared, and taken of her walking outside the office from the vantage point of Respondent's office window. Respondent testified he did

not recall taking any of the pictures, although he knew of no one else who could have taken them. The ODC produced over seventy e-mails ostensibly exchanged between Respondent and his friend. Respondent testified he could not recall writing any of the content of the e-mails. Although it is conceivable that one might not specifically recall writing every word of past correspondence, we believe it unlikely that Respondent does not remember taking *any* of the pictures or writing *any* of the content included in approximately eighty exhibits. Respondent's testimony regarding the e-mails and pictures calls his credibility into question.

Furthermore, Respondent had a personal interest in assuring Assistant maintained her Medicaid benefits because he wished to bring her on full time, but he was either unwilling or unable to pay the costs of her health insurance. The record establishes their close relationship and Respondent's desire to help Assistant in her personal matters. Respondent's interest in assuring Assistant maintained health coverage weighs in our factual determination that Respondent aided Assistant in misrepresenting her income to the government.

Although Respondent testified he was unaware of the specifics of Assistant's Medicaid coverage, we believe he was fully apprised of her coverage, having represented her during her domestic case. With knowledge of her dependence on Medicaid, Respondent testified he believed Assistant requested the split in income for legitimate tax planning purposes, and that it suddenly "dawned on him" a month after Assistant left his employment, and shortly after he was notified she planned to pursue a legal malpractice suit against him.

In its entirety, we find Assistant's rendering of the facts regarding the representation of her income more credible than Respondent's. Therefore, we conclude Respondent violated Rules 8.4(d) and 8.4(e), RCP, Rule 407, SCACR.

## II. Sufficient Notice of Discipline

Respondent argues he did not receive sufficient notice he was subject to discipline under Rule 5.4(a), which prohibits a lawyer from sharing fees with

non-lawyers, because the ODC did not include this Rule in its list of Rule violations in the Notice of Formal Charges, and the issue was not raised at the hearing. Formal charges must give the lawyer fair and adequate notice of the nature of the alleged misconduct. Rule 22, RLDE, Rule 413, SCACR. We believe Respondent had adequate notice he could be sanctioned under Rule 5.4(a). The ODC's formal charges included the allegation that Respondent committed misconduct by providing "[Assistant] with periodic bonuses based on a percentage of any outstanding fees collected or a percentage of the retainer fee paid to Respondent from any referrals she brought into Respondent's office." (Notice of Formal Charges at 3.) Respondent denied that allegation in his reply, explaining the bonuses were discretionary and given on an *ad hoc* basis, and stating the bonuses "cannot be reasonably categorized as any sort of 'fee-sharing' beyond the common sense notion that general firm proceeds create funds for general employee compensation." (Resp. to Formal Charges at 6.) The ODC's allegation of fee sharing in its Notice of Formal Charges, and Respondent's subsequent denial of that claim is enough to establish he had fair and adequate notice of potential sanctions for violating this Rule.

As to the merits of this issue, the record includes clear and convincing evidence Respondent violated the fee sharing prohibition by sharing a portion of settlement and retainer fee proceeds with Assistant. The only exception to the prohibition against fee sharing that might apply is under subsection 4, which states, "a lawyer . . . may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." Rule 5.4(a)(4), RPC, Rule 407, SCACR. Respondent stated in his Response to Formal Charges he converted the fees to a "one-time bonus," and that the bonuses were "arbitrary" and "discretionary." This type of bonus does not fall within the exception of Rule 5.4(a)(4), which allows fee sharing as part of a compensation plan. Therefore, we find Respondent in violation of Rule 5.4(a), RPC, Rule 407, SCACR.

## III. Aggravating Factors

Respondent takes issue with two of the aggravating factors considered by the Panel when determining appropriate sanctions: Respondent's

submission of false evidence, statements, or other deceptive practices during the disciplinary process and his refusal to acknowledge the wrongful nature of his conduct. Respondent denies his involvement with the Medicaid fraud, and argues the Panel's finding that he lied on the stand is a direct incorporation of its finding he committed the fraud. He additionally argues the Panel improperly considered his evasive and indirect responses to questioning about the e-mails and photographs because this evidence was excluded. The ODC read the e-mails into evidence and referenced the photographs for impeachment purposes, so in our opinion, it was within the Panel's purview to consider the veracity of Respondent's responses an aggravating factor. Regardless, this Court has the sole authority to decide an appropriate sanction for Respondent, and considering only Respondent's disciplinary history as an aggravating factor, a sanction of six months suspension from the practice of law is merited for his misconduct.

## IV. Definiteness of Findings under Rules 7.4(a)(5) and (6), RLDE

Respondent argues the Panel Report lacked sufficient definiteness when finding Respondent in violation of Rules 7.4(a)(5) and (6), and therefore Respondent had no basis upon which to take exception to those findings. Rule 7, RLDE, merely enumerates the grounds on which a lawyer may be disciplined. Rule 7.4(a)(5) provides a venue for discipline when a lawyer engages in conduct tending to pollute the administration of justice or conduct that brings disrepute to the legal profession. Respondent's assistance in deceiving the government, engagement in fee sharing, mishandling of his trust account, and improper disclosure of confidential client information to a third party certainly brought disrepute to the legal profession. Rule 7.4(a)(6) provides a ground for discipline when a lawyer violates the oath of office. Respondent's actions caused him to violate his oath that he would "respect and preserve inviolate the confidences of my clients" and would "maintain the dignity of the legal system." Rule 402(k), SCACR. We do not believe it was necessary for the Panel to expound upon its reasoning for finding these grounds for discipline, as they are commensurate with its finding that Respondent committed numerous violations of the Rules of Professional Conduct. Like the Panel, we find Respondent in violation of Rule 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR.

## V. Exceptions taken by the ODC to the Panel's findings

### *A. Rule 1.2(d), RPC, Rule 407, SCACR (Scope of Representation)*

The ODC argues the Panel erred in finding that Rule 1.2(d) was inapplicable to Respondent. We agree.

Rule 1.2(d) states that a lawyer may not counsel or otherwise assist a client in conduct the lawyer knows is criminal or fraudulent. The Panel found that the scope of Respondent's representation of Assistant was limited to the domestic matter, and because she was not his client for purposes of qualifying for Medicaid benefits, this Rule did not apply. We do not interpret Rule 1.2(d) as narrowly. The Rule seeks to prevent attorneys from perpetuating fraud or crime by leveraging the influence and knowledge gained through an attorney-client relationship. There is nothing in the Rule limiting its application to criminal or fraudulent activity that spawns from the underlying representation. Given our belief that Respondent aided Assistant in misrepresenting her income to DHHS during the time Assistant was Respondent's client, we find him in violation of Rule 1.2(d), RPC, Rule 407, SCACR.

### *B. Conflict of Interest and Terminating Representation under Rules 1.7(a)(2) and 1.16(a)(1), RPC, Rule 407, SCACR*

The ODC takes exception to the Panel's finding that Respondent's romantic feelings toward Assistant did not create a conflict of interest under Rule 1.7(a)(2). In this case, a violation of Rule 1.7(a)(2) necessarily invokes a violation Rule 1.16(a)(1), which provides that a lawyer should discontinue representation of a client if continued representation will result in a violation of the Rules. The Panel found there was no evidence that Respondent's personal feelings toward Assistant negatively affected his representation of her in the domestic case. We believe it is ill-advised to represent, or to continue to represent, a client for whom the lawyer harbors romantic feelings. However, we agree with the Panel's finding that Respondent did not violate these Rules. Respondent's unrevealed romantic interest in Assistant, in the absence of any evidence of its effect on his representation, does not, in our view, represent a conflict that rises to the level of a Rule violation.

Therefore, we accept the Panel's finding that Respondent did not violate Rules 1.7(a)(2) and 1.16(a)(1).

*C. Conflict of Interest under Rule 1.8(b), RPC, Rule 407, SCACR*

The ODC takes exception to the Panel's finding that Respondent's action of reporting Assistant's Medicaid fraud to authorities did not violate Rule 1.8(b), which prohibits a lawyer from using "information *relating to representation* of a client to the disadvantage of the client . . . ." Rule 1.8(b), RPC, Rule 407, SCACR (emphasis supplied). We believe this Rule speaks for itself. Although Respondent's report to the authorities may be considered retaliatory, in our opinion, this Rule is not applicable to Respondent's conduct because Assistant's receipt of Medicaid benefits was not related to Respondent's representation of her in the domestic matter. Therefore, we find that Respondent did not violate Rule 1.8(b), RPC, Rule 407, SCACR, as charged.

## VI. The Panel's Recommendation

The ODC takes exception to the Panel's recommendation that Respondent should receive a definite suspension of only ninety days or six months. The ODC urges this Court to impose, at a minimum, a nine month suspension so that, prior to his reinstatement, Respondent must appear before the Committee on Character and Fitness. We believe Respondent's conduct, aggravated by prior disciplinary history, warrants a six month suspension from the practice of law.

Respondent admitted to sharing with his friend confidential information about Assistant's domestic matter. This included intimate information about Assistant's finances, as well as her physical relationship with her husband. We believe the nature of Respondent's disclosure to be the most offensive type. Additionally, Respondent engaged in the practice of fee sharing, aggravated by paying those shared fees to Assistant directly out of his trust account. This trust account mishandling, if unchecked, could put other clients' money at risk. Finally, we believe Respondent knew of Assistant's

plan to underrepresent her income to DHHS, and aided her in doing so by splitting her income between W-2 and 1099 forms. Therefore, we believe Respondent's egregious conduct warrants a six month suspension.

## CONCLUSION

In sum, we find Respondent improperly disclosed confidential client information to a third party, mishandled his trust account, engaged in fee sharing with a non-lawyer, and aided Assistant in misrepresenting her income to the government. For these offenses, we find Respondent violated Rules 1.2(d), 1.6(a), 1.15(a), 5.4(a), 8.4(d), and 8.4(e), RPC, Rule 407, SCACR, and Rules 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR. Considering this misconduct, and Respondent's prior disciplinary history, we order Respondent's suspension from the practice of law for a period of six months. We accept the Panel's additional recommendations that Respondent be required to pay the costs of these proceedings and complete the LEAP program prior to reinstatement into the practice of law. However, we decline to impose a fine.

**DEFINITE SUSPENSION.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Theresa Charlene Clea, individually and as Guardian ad Litem for Trevon C., a minor under 18 years of age, Appellant,

v.

Lana Odom, Personal Representative of the Estate of Edward Carter and Essix Shannon, Respondents.

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Appeal From Sumter County
George C. James, Jr., Circuit Court Judge

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Opinion No. 27029
Heard May 3, 2011 – Filed August 22, 2011

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**AFFIRMED IN PART; REVERSED IN PART**

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Stephen Benjamin Samuels, of Samuels Law Firm, of Columbia, for Appellant.

Adam Tremaine Silvernail, of Law Office of Adam T. Silvernail, of Columbia, for Respondents.

**JUSTICE PLEICONES:** Appellant filed suit to recover for personal injuries sustained by her son (Trevon) after he was bitten by respondent Essix Shannon's dog.[1] The circuit court granted summary judgment in favor of respondent. We affirm in part and reverse in part, finding there is a material question of fact whether the landlord is liable under the theories of strict liability and common law negligence.

## FACTS

Respondent owned an apartment complex consisting of two buildings. Shannon, one of respondent's tenants, owned a dog that he kept chained to a tree in a common area near the back of the complex. At the time of the incident, Shannon had kept the dog chained to the tree for nearly ten years. Shannon never kept the dog inside of his apartment. According to Shannon, respondent would occasionally "come over there and sit down and . . . give [the dog] a little – a handful [of food], sit and play with him." Respondent never otherwise cared for the dog.

On the day of the incident, appellant had taken her three children to visit her sister, who lived at the apartment complex. Appellant's aunt also lived in the apartment complex in the building opposite appellant's sister's residence. At some point during the day, appellant agreed to take her aunt to the store and began walking with her three children to the aunt's building. As she walked, appellant was carrying her baby and talking on a cordless phone. As they approached the aunt's apartment, two-year-old Trevon saw the dog and ran over to it. The dog ran to the end of its chain and began attacking Trevon. Neither Shannon nor respondent were present at the complex at the

[1] Appellant settled the case with respect to respondent Shannon. Shannon's co-defendant, Edward Carter, died after the action was instituted. Although the personal representative of Carter's estate is technically the respondent here, for simplicity, we refer to Carter himself as "respondent."

time of the incident. Trevon suffered numerous injuries, for which his medical bills totaled approximately $17,000.

After the incident, appellant discovered the dog had previously attacked a six-year-old-boy. Appellant's sister told her respondent had threatened to require Shannon get rid of the dog after the previous attack, but never did so.

Appellant instituted this action, arguing respondent was liable for Trevon's injuries under three theories: (1) strict liability under S.C. Code Ann. § 47-3-110 (1987); (2) common law negligence; and (3) attractive nuisance. The circuit court granted summary judgment in favor of respondent as to all causes of action.

## ISSUES

I. Did the circuit court err in granting summary judgment in favor of respondent as to appellant's strict liability claim?

II. Did the circuit court err in granting summary judgment in favor of respondent as to appellant's common law negligence claim?

III. Did the circuit court err in granting summary judgment in favor of respondent as to appellant's attractive nuisance claim?

## STANDARD OF REVIEW

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

I. Strict Liability

Appellant first argues the circuit court erred in granting summary judgment in favor of respondent as to appellant's strict liability claim. We agree.

Our state's "dog bite" statute imposes strict liability against the owner of the dog or any other person having the dog in its care or keeping:

> Whenever any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, the owner of the dog **or other person having the dog in his care or keeping** is liable for the damages suffered by the person bitten or otherwise attacked.

S.C. Code Ann. § 47-3-110 (1987) (emphasis supplied).

"The Legislature's use of the phrase 'care or keeping' clearly requires that the 'other person' act in a manner which manifests an acceptance of responsibility for the care or keeping of the dog." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 364, 673 S.E.2d 423, 427 (2009). "To this degree, the Legislature retained the common law principle of duty in determining the liability of the 'other person.'" Id. The presence or absence of a duty determines liability in situations that involve a statutory claim against a person having the dog in his care or keeping. Id. at 365, 673 S.E.2d at 427. There are three scenarios under § 47-3-110 when the attack is unprovoked and the injured party is lawfully on the premises:

> First, the dog owner is strictly liable and common law principles are not implicated. Second, a property owner is liable when he exercises control over, and assumes responsibility for, the care and keeping of the dog. Third, a property owner is not liable

under the statute when he has no control of the premises and provides no care or keeping of the dog.

Id. at 365-66, 673 S.E.2d at 427.

The circuit court granted summary judgment in favor of respondent as to appellant's claim for strict liability, finding respondent was neither the dog's owner, nor was the dog in respondent's care or keeping.

We find the circuit court erred in granted summary judgment in favor of respondent as to the strict liability claim. Because respondent was not the dog's owner, in order to be liable as a property owner, respondent would have to have exercised control over the premises and assumed some duty to care for or keep the dog before liability could attach. Harris, supra. It is clear respondent exercised exclusive control over the common area where the dog was kept. Moreover, viewing the evidence in the light most favorable to appellant, we find there was a genuine issue of material fact whether respondent assumed responsibility for the keeping of the dog. Fleming, supra. Respondent knew the dog was chained to the tree in the common area over which he had control. Because the dog was continuously kept in this area, we find there was a genuine issue of material fact whether respondent had the dog in his keeping and reverse the circuit court's grant of summary judgment as to appellant's strict liability claim. Cf. Nesbitt v. Lewis, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999) (partial owner of the residence at which a minor child was attacked by dogs who had not lived at the residence for over five years and did not care for the dogs did not owe a duty to the injured child because she lacked possession over the house and the dogs).

II. Common law negligence

Appellant also argues the circuit court erred in granting summary judgment in favor of respondent on appellant's claims of common law negligence. Specifically, appellant argues the circuit court erred in dismissing her complaint on the basis that a landlord is not liable for injuries caused by a tenant's dog kept on leased property. We agree.

Under the common law of our state, a landlord is not liable to a tenant's invitee for injuries inflicted by an animal kept by a tenant on leased property. See Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003) (circuit court granted summary judgment on negligence claim, finding landlord was not liable where one tenant's dog attacked another tenant); see also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000) (landlord was not liable where a dog kept on tenant's leased property bit a child).

In Fair v. United States of America, 334 S.C. 321, 513 S.E.2d 616 (1999), the Court discussed whether the Residential Landlord Tenant Act (RLTA) altered the common law rule that a landlord is not liable to a tenant's invitee for an injury caused by a tenant's dog. The Court held that under the "fit and habitable"[2] provision of the RLTA, a landlord is liable only for defects relating to the inherent physical state of the leased premises. Fair, 334 S.C. at 323-24, 513 S.E.2d at 617. The Court therefore held the RLTA does not alter the common law rule. Id.

The RLTA further provides that a landlord shall "keep all common areas of the premises in a reasonably safe condition . . . ." S.C. Code Ann. § 27-40-440(a)(3) (2007).

Whether a landlord can be liable for injuries inflicted upon an invitee or licensee where the attack occurs in the *common area* of an apartment complex, i.e. whether § 27-40-440(a)(3) alters the common law rule, is a novel issue in this state. We therefore turn to other jurisdictions for guidance on this issue.

In Lidster v. Jones, 176 Ga.App. 392, 336 S.E.2d 287 (Ga. App.1985), the Georgia Court of Appeals reversed the grant of summary judgment as to the appellant's negligence action, holding a landlord could be liable where a tenant's dog bit a child. The appellant alleged the landlord had actual

[2] S.C. Code Ann. § 27-40-440(a)(2) (2007) ("a landlord shall . . . make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition").

knowledge of the dog's vicious propensities because he knew the dog had previously attacked another child, and that the landlord did nothing to keep the dog out of the complex's common area. The court held that summary judgment was improper because a landlord who retains control over the common areas of a complex to which tenants and others were allowed access had a duty under a statute similar to the RLTA[3] to keep the common areas safe. Further, the court distinguished that case from another case in which the court determined a landlord was not liable because he did not own or maintain the dog that bit the victim, noting that the case did not involve a landlord's obligation to keep the common areas of the leased premises safe.

In Gentle v. Pine Valley Apartments, 631 So.2d 928 (Ala. 1994), the Alabama Supreme Court held the presence of a tenant's vicious dog in a common area constituted a dangerous condition and that a landlord must exercise reasonable care to prevent injuries from such a dangerous condition, but only to the extent he was aware of its existence.

Here, the circuit court found respondent could have no liability for common law negligence because a landlord is not liable for injuries caused by an animal kept by a tenant on leased property. The court further found the fact that the dog was kept in a common area did not affect respondent's liability since "leased property" includes common areas.

We find the circuit court erred in granting summary judgment in favor of respondent as to appellant's common law negligence claims. While it is true that a landlord is typically not liable to someone attacked by a tenant's dog while that person is on the leased property, this case is distinguishable from other cases in our jurisdiction because those cases did not involve attacks occurring in common areas. We find this case is consonant with those cases from other jurisdictions where the landlord could be liable where the attack occurred in a common area. There was evidence respondent had actual knowledge of the dog's vicious propensity as it had previously attacked

[3] OCGA § 51-3-1.

a child, and respondent failed to remedy the situation. Accordingly, we find the circuit court erred in finding respondent could not be liable for the attack under a common law negligence theory.

III. Attractive nuisance

Appellant finally argues the circuit court erred in granting summary judgment in favor of respondent as to appellant's attractive nuisance claim. We disagree.

The attractive nuisance doctrine provides that where the owner or occupier of land brings or artificially creates something which, from its nature, is especially attractive to children, he is bound to take reasonable pains to see that the dangerous thing is so guarded that children will not be injured in coming into contact with it. Henson ex rel. Hunt v. International Paper Co., 374 S.C. 375, 381, 650 S.E.2d 74, 77 (2007).

The circuit court found there was no genuine issue of material fact as to whether the presence of the dog in the common area constituted an attractive nuisance. Specifically, the circuit court found the presence of the dog was not an "artificial condition" on the land.

Whether a dog can be considered an "artificial condition" for the purposes of determining a property landowner's liability under the attractive nuisance theory is a novel issue in this state. We are persuaded by the jurisprudence of several other states that have determined dogs and other domesticated animals cannot be considered an artificial condition. See Hartsock v. Bandhauer, 158 Ariz. 591, 764 P.2d 352 (Ariz. App. 1988) (dogs are not considered an "artificial condition" as required for liability under the attractive nuisance doctrine); see also Aponte v. Castor, 155 Ohio App.3d 553, 802 N.E.2d 171 (Ohio App. 2003) (finding no authority in Ohio law that establishes a horse is an artificial condition); Gonzalez v. Wilkinson, 68 Wis.2d 154, 227 N.W.2d 907 (Wis. 1975) (a dog cannot qualify as an attractive nuisance because "[a]lthough such a condition need not be permanently erected upon the land, it must be 'artificially construed.'").

We hold the circuit court properly found a dog cannot be considered an "artificial condition" under an attractive nuisance theory.

## CONCLUSION

We find the circuit court erred in granting summary judgment as to appellant's strict liability and common law negligence claims. We find the circuit court properly granted summary judgment as to appellant's attractive nuisance claim. Accordingly, the circuit court's order is

**AFFIRMED IN PART AND REVERSED IN PART.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Nationwide Mutual Insurance Company, Inc., and Gilliam Construction Company, Inc., Appellants,

v.

Eagle Windows & Doors, Inc., American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman and Gary Churchill, Defendants,

Of which Eagle Windows & Doors, Inc. is Respondent.

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Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

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Opinion No. 27030
Heard March 15, 2011 – Filed August 22, 2011

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**REVERSED**

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Jason Michael Imhoff, of The Ward Law Firm, of Spartanburg, for Appellants.

Ashley Dantzler Wright, of Warren & Sinkler, of Charleston, for Respondent.

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**JUSTICE PLEICONES:** This is an appeal from an order dismissing this contribution suit finding it was barred by a prior bankruptcy order. We reverse.

## FACTS

In May 2002, respondent's predecessor purchased the assets of Eagle & Taylor Company, d/b/a Eagle Windows & Doors, Inc. (Eagle I), from Eagle I's bankruptcy estate.[1] In 2000, homeowners constructed a residence using defective windows manufactured by Eagle I. In 2006, homeowners settled their construction claims against the appellant contractor.

The contractor and its insurer (appellants) then brought this contribution[2] suit against respondent as successor to Eagle I. The circuit court granted respondent's motion to dismiss, holding (1) dismissal was required under Rule 12(b)(6) because the bankruptcy order expressly precluded any state law successor liability actions since the sale was "free and clear" under 11 U.S.C. § 363(f) of the Bankruptcy Code;[3] and (2) that

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[1] The chain through which respondent came to own Eagle I is irrelevant to the issues raised on appeal.

[2] See Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 et seq. (2005 and Supp. 2010).

[3] This section reads:

dismissal was proper under Rule 12(b)(1), SCRCP, because the bankruptcy court in Ohio which issued the Eagle I order retained jurisdiction over any claims against respondent for successor liability

I. Free and Clear Sale

The circuit court held that, because the Ohio bankruptcy order allowed the sale of Eagle I's assets free and clear under § 363(f), this suit should be dismissed. We disagree.

The Eagle I bankruptcy order's "free and clear" provisions are:

> I. The sale, conveyance and assignment of the Assets under the Final Agreement, except as otherwise specified in the Final Agreement, are free and clear of all liens, claims, encumbrances, and interests, including without limitation, mortgages, deeds of trust, security interests, conditional sale or title retention agreements, pledges, liens, judgments,

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(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

demands, encumbrances, easements, restrictions, constructive or resulting trusts, or charges of any kind, including but not limited to any restriction on the use, voting, transfer, receipt of income, or other exercise of any attribute of ownership and all debts arising in any way in connection with any acts of the Debtors, claims (as that term is defined in Bankruptcy Code § 101(5)), obligations, demands, guarantees, options, rights, contractual commitments, claims related to the design, manufacture, sale or distribution of products sold by the Debtors or their predecessors, and claims related to pollution or other adverse effects on human health or the environment, including but not limited to the release in connection with any of the Debtors' (or their predecessors') operations or any of the Assets or a hazardous substance, pollutant, contaminant, or other substance regulated under any local, state, or federal law, ordinance, or regulation, and claims related to the Debtors' (or their predecessors') failure to comply with any such law, statute, regulation, or ordinance restrictions, interests in matters of any kind or nature, arising before closing of the sale of the Assets (the "**Effective Time**," as further defined in the Final Agreement), and whether imposed by an agreement, understanding, law, equity, or otherwise (collectively, "**Interests**"), with all such Interests released, terminated, and discharged as to the Assets and EWD Acquisition and to attach and be satisfied from the proceeds for the sale of the Assets authorized by this Order.

. . . .

K. EWD Acquisition [respondent's predecessor] is only a purchaser of the Assets and is not a successor in interest to Eagle or any other Debtor, nor does EWD Acquisition's purchase of the Assets reflect a substantial continuity of the operations of the Debtors' businesses. Accordingly, except as otherwise specifically and expressly

> provided in the Final Agreement, transfer of the Assets to EWD Acquisition and assumption and assignment to EWD Acquisition of the Assigned Contracts, will not subject EWD Acquisition to any liability whatsoever with respect to the operation of Eagle's business before the Effective Time based, entirely or partly, directly or indirectly, on any theory of law or equity including without limitation any theory of antitrust or successor or transferee liability.
>
> (Emphasis in original).

Paragraph I of the Eagle I bankruptcy order first discharged respondent from all claims "arising before the sale of the Assets" directing that any such claims "attach" to the sales proceeds. This paragraph refers to an action *in rem* against the proceeds paid to the debtor, while a post-sale tort action against the successor entity is not an action against the sale proceeds received by the debtor, but rather an *in personam* action against the successor itself. See In re Grumman Olson Indus. Inc., 445 B.R. 243 (Bkrtcy. S.D.N.Y. 2011). Nothing in Paragraph I bars this suit.

In Grumman, the bankruptcy court explained that under a § 363(f) "free and clear" sale, the purchaser of a bankrupt's assets need not fear that a creditor of the bankruptcy estate can enforce its claim against those assets because the effect of the free and clear sale is to limit that creditor to *in rem* relief against the sale proceeds. Whether a party is limited to proceeding *in rem* against these proceeds, or is one whose claim lies against the purchaser, is determined first by 11 U.S.C. § 101(5) of the Bankruptcy Code. If the creditor does not have a § 101(5) claim, then his right to proceed against the purchaser is determined by state law.

The test to determine the type of claim a party has is:

> [A]n individual has a § 101(5) claim [which is limited by the free and clear sale to *in rem* against the sale proceeds held by the Debtor] against a debtor manufacturer if (i)

> events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. The debtor's prepetition conduct gives rise to a claim to be administered in a [bankruptcy] case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct.

Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995). (Piper).

Here, appellants, standing in the shoes of the homeowners, are not barred by § 101(5). Specifically, the homeowners dealt with the contractor, not the window manufacturer, and there was no preexisting relationship between the manufacturer and the homeowner giving rise to a claim within the meaning of the asset sale order. Piper, *supra*; see also Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235 (Spring 2002). Compare e.g. In re Leckie Smokeless Coal Co., 99 F.3d. 573 (4th Cir. 1996) (existing creditors of bankrupt company with § 101(5) status unsuccessfully contested § 363 "free and clear" sale). Paragraph I does not bar this suit.

The Eagle I bankruptcy order provides in Paragraph K that respondent "is only a purchaser of the Assets and is not a successor in interest" and thus is not subject "to any liability whatsoever with respect to the operation of [Eagle I's] business . . . based . . . on any theory of law or equity including . . . successor . . .liability." While this sentence facially appears to support the circuit court's decision, it does not. Having established that they are not § 101(5) claimants, whether appellants will be able to hold respondent liable under a successor liability theory is a question of state law. See Simmons v. Mark Lift Indust., Inc., 366 S.C. 308, 622 S.E.2d 213 (2005).

Simmons decided three certified questions:

> 1) May a South Carolina plaintiff pursue a products liability action under a successor liability theory against a defendant which purchased the predecessor's assets out of a bankruptcy sale?
>
> 2) What is the test for determining successor liability of a company which purchased the assets of an unrelated company?
>
> 3) May the South Carolina plaintiff maintain such a suit where there are one or more other viable defendants?

The Simmons majority answered question 2 first, holding that the test for successor liability is that found in Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). Simmons held that if the plaintiff could establish successor liability under one of the Brown tests, then it could maintain a suit against the successor corporation.

Brown establishes four tests for determining whether a successor corporation may be liable for the debts of its predecessor:

> (1) there was an agreement to assume these debts; or
>
> (2) the circumstances surrounding the transaction support a finding of consolidation or merger of the two corporations; or
>
> (3) the successor is a mere continuation of the predecessor; or
>
> (4) the transaction was fraudulent, that is, to wrongfully defeat the predecessor's creditors' claims.

Here, Paragraph K provides only that respondent is not liable under a successor liability theory for the conduct of Eagle I, but does not absolve respondent of liability for its own conduct. See Grumman, *supra*. If appellants can establish that respondent's conduct meets one or more of the Brown tests, then respondent may be liable to them. Simmons, *supra*.

We reverse the finding that the Ohio bankruptcy order's "free and clear" sale of Eagle I's assets deprived the appellants of the ability to bring this state court action.

II. Reservation of Jurisdiction

The circuit court also dismissed this action, finding that the Ohio bankruptcy order had expressly retained jurisdiction over all successor liability claims related to Eagle I in this paragraph:

> 22. The Court retains jurisdiction to enforce and implement the terms and provisions of the Final Agreement, all amendments to it, any waivers and consents under it, and of each of the agreements executed in connection with it in all respects, including but not limited to retaining jurisdiction to resolve any disputes arising under or related to the Final Agreement (except as provided otherwise in the Final Agreement) and interpret, implement, and enforce the provisions of this Order.

Appellants' claim does not arise under either the Agreement or the order, nor does their claim arise under § 101(5) or relate to Eagle I. Rather, it is predicated upon respondent's post-sale conduct which, appellants contend, exposes it to successor liability under South Carolina state law. See Simmons, *supra*. The circuit court erred in dismissing this suit under Paragraph 22.

## CONCLUSION

The order dismissing appellants' claim under Rule 12(b) is

**REVERSED**.

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Betty Ann Allison, as Personal Representative of the Estate of Benjamin Allison, Respondent,

v.

W. L. Gore & Associates, Appellant.

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Appeal from Beaufort County
Marvin Dukes, Master-in-Equity

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Opinion No. 27031
Heard June 9, 2011 – Filed August 22, 2011

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**VACATED**

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Carmelo B. Sammataro, of Turner, Padget, Graham & Laney, of Columbia, and O. Shayne Williams, of Turner, Padget, Graham & Laney of Greenville, for Appellant.

Marion Clyde Fairey, Jr., of Hampton, for Respondent.

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**JUSTICE PLEICONES:** This is a direct appeal in a workers' compensation case from a master's order reversing the Full Commission and finding respondent's decedent[1] is totally disabled as the result of an occupational disease. On appeal, appellant (Employer) contends this matter should have been dismissed because respondent's admittedly untimely appeal to the Commission deprived the Commission of jurisdiction. We agree that the untimely appeal to the Commission requires that we vacate both the master's order and the decision of the Full Commission.

## ISSUE

> Did respondent's failure to file a Form 30 with the Commission within fourteen days of receiving notice of the single commissioner's order deprive that body of appellate jurisdiction?

## ANALYSIS

South Carolina Code Ann. § 42-17-50 (Supp. 2010) provides for an appeal to the Commission from the decision of a single commissioner if the "application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given. . . ." 25A S.C. Reg. 67-701 (Supp. 2010) provides that such review shall be done by a Form 30, and that "the fourteen day period is jurisdictional." Reg. 67-701 A. Here, respondent did not file his Form 30 within fourteen days of receiving notice of the single commissioner's order, and Employer moved before the Commission to dismiss the appeal arguing the Commission lacked subject matter jurisdiction. The Commission denied the motion, emphasizing the appeal was only two days late and that it resulted from respondent's attorney's error. The Commission upheld the single commissioner's denial of benefits.

Employer took no immediate appeal from the interlocutory order denying its motion to dismiss, but raised the denial in respondent's appeal to

[1] Respondent's decedent (Benjamin Allison) died in 2008 and his estate has been substituted.

the circuit court. The master determined that by Employer's failure to take an immediate appeal, the ruling that the Commission had "subject matter" jurisdiction over respondent's appeal was rendered the law of the case. This was error.

Employer argues, and we agree, that it could not immediately appeal the order denying the motion to dismiss. Pursuant to S.C. Code Ann. § 42-17-60 (1990), an appeal from the Commission may be taken to circuit court "under the same terms and conditions as govern appeals in ordinary civil actions." This statutory language has been interpreted to allow an immediate appeal from an interlocutory order of the Commission only where the order "affects the merits." Chastain v. Spartan Mills, 228 S.C. 61, 88 S.E.2d 836 (1955); see also King v. Singer Co. Power Tool Div., 276 S.C. 419, 279 S.E.2d 367 (1981); Brunson v. Am. Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005). A circuit court order denying a motion to dismiss for lack of subject matter jurisdiction is not directly appealable because, among other things, it does not affect the merits. Woodward v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995) *overruled in part on other grounds* Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). The master erred in holding that the Commission's denial of Employer's motion to dismiss was immediately appealable.

The master also held that the Commission had "subject matter" jurisdiction to hear respondent's appeal despite the untimeliness of the Form 30. We now clarify that this issue is properly couched as one of appellate jurisdiction rather than subject matter jurisdiction. See Great Games, Inc. v. S.C. Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000). A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question. E.g., Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). This same principle applies to administrative agencies. The Commission has the authority to review decisions of a single commissioner, and under the Gold Kist standard, there is no subject matter jurisdiction issue here. We now clarify that the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction, see In re November 8, 2008 Bluffton County Election, 385 S.C.

632, 686 S.E.2d 685 (2009), and overrule prior decisions to the extent they pose the question of an executive agency's authority to hear an appeal as one of subject matter jurisdiction. E.g., Bursey v. S.C. Dep't of Health and Envtl. Control, 369 S.C. 176, 631 S.E.2d 899 (2006); S.C. Dep't of Corrections v. Tomlin, 387 S.C. 652, 694 S.E.2d 25 (Ct. App. 2010); Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999) *modified on other grounds* 339 S.C. 68, 528 S.E.2d 667 (2000).

On the merits, we hold that the Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner. See Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995) (construing a *pro se* letter sent within fourteen days as satisfying the notice requirements of § 42-17-50 and Reg. 67-701). This holding is consistent with the general rule that an appellate body may not extend the time to appeal. E.g., Rule 263(b), SCACR; S.C. Code Ann. § 1-23-380(A)(1) (Supp. 2010); S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 669 S.E.2d 849 (Ct. App. 2008) *overruled on other grounds* 390 S.C. 418, 702 S.E.2d 246 (2010); Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000).

## CONCLUSION

Since the Full Commission lacked jurisdiction to hear respondent's appeal, the decision of that Commission as well as the master's order are

**VACATED**.

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

# The Supreme Court of South Carolina

In the Matter of Rose Marie Cooper, Respondent.

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ORDER

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On July 14, 2011, respondent was arrested and charged with criminal domestic violence of a high and aggravated nature in violation of S.C. Code Ann. § 16-25-65 (2003). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect respondent's clients' interests 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 the Court.

IT IS FURTHER ORDERED that Robert Michael Drose, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Drose shall take action as required by Rule 31, RLDE, Rule 413,

SCACR, to protect the interests of respondent's clients. Mr. Drose may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Robert Michael Drose, 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 Robert Michael Drose, 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 Mr. Drose's office.

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

IT IS SO ORDERED.

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

Columbia, South Carolina

August 17, 2011

# The Supreme Court of South Carolina

In the Matter of
Charles E. Johnson, Petitioner.

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ORDER

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On February 16, 2010, the Court definitely suspended petitioner from the practice of law for one (1) year. In the Matter of Johnson, 386 S.C. 550, 689 S.E.2d 623 (2008). In addition, the Court ordered petitioner to pay the costs of the proceedings and complete the South Carolina Bar's Legal Ethics and Practice Program (LEAPP). Id. Petitioner has now filed a petition for reinstatement.

The Committee on Character and Fitness (the CCF) recommends the Court grant the petition subject to the condition that petitioner be mentored by a member of the South Carolina Bar for a period of two (2) years. Neither the Office of Disciplinary Counsel (ODC) nor petitioner has filed exceptions to the CCF's recommendation.

The Court grants the petition for reinstatement subject to the following conditions:

1. petitioner shall enter into a mentoring agreement with an active member of the Bar for two years during which petitioner and the mentor shall meet on a monthly basis to discuss petitioner's law office management systems; and

2. the mentor shall submit quarterly reports concerning petitioner's law office management systems to the Commission on Lawyer Conduct.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

August 19, 2011

# The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Professional Conduct, Rule 407 of the South Carolina Appellate Court Rules (SCACR)

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ORDER

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The South Carolina Bar's Commission on Lawyer Advertising has proposed a comprehensive set of amendments to the South Carolina Rules of Professional Conduct. While we appreciate the time and effort given to this project by the Commission, and its dedication to protecting the public and maintaining the integrity of the legal profession, in light of recent court decisions and our desire to retain some consistency with the pre-2002 or current version of the Model Rules of Professional Conduct as well as the rules of other states, we decline to adopt a majority of the changes proposed by the Commission. However, some of the proposed amendments are necessary and beneficial for purposes of compliance with recent court decisions and for consistency, as previously mentioned. Accordingly, pursuant to Article V, §4 of the South Carolina Constitution, we hereby amend Rules 7.1, 7.2 and 7.3 of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, as follows:

- The term "unfair" is deleted from Rule 7.1;

- The ban on testimonials is deleted from Rule 7.1(d) and replaced with language allowing testimonials under certain conditions;

- Comments [1] and [3] to Rule 7.1 are amended to address the change in the ban on testimonials;

- Rule 7.2(a) is amended to provide that all advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication. A new Comment [4] has been added to address the amendment to Rule 7.2(a). The remaining Comments have been renumbered;

- Rule 7.2(c)(2), and new Comment [8] to Rule 7.2, are amended to require that the legal service plan or not-for-profit lawyer referral service not be acting in violation of any Rules of Professional Conduct;

- Rule 7.2(f) is deleted and sections (g), (h), and (i) of the rule are re-designated as sections (f), (g), and (h);

- New Comment [6] to Rule 7.2 is amended to state that it is the responsibility of the lawyer who disseminates or causes the dissemination of the advertisement to review it for compliance with the South Carolina Rules of Professional Conduct.

- The requirement that solicitations be filed with the Commission on Lawyer Conduct, together with a $50 filing fee, is deleted from Rule 7.3(c) and electronic solicitations are added to the types of solicitations for which lawyers must maintain a file;

- Rule 7.3(d)(1) is amended to require that email solicitations be labeled as advertising material in the subject line and at the beginning and end of the message in capital letters and prominent type;

- Rule 7.3(d)(2)(A) is amended by adding directories and the advice of others as alternative methods for obtaining information about other lawyers;

- Rule 7.3(d)(2) and (d)(3) is amended to apply to "solicitations" and "communications," instead of being limited to "written or recorded solicitations"; and

- Rule 7.3(i) is amended to require a lawyer who reasonably believes a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles the case or matter, or that the case or matter will be referred to another lawyer or law firm, to notify a potential client.

These amendments shall be effective immediately. The rules, as amended, are available at www.sccourts.org/courtReg.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
August 22, 2011

## RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make false, misleading, or deceptive~~, or unfair~~ communications about the lawyer or the lawyer's services. A communication violates this rule if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(d) contains a testimonial about, or endorsement of, the lawyer

(1) without identifying the fact that it is a testimonial or endorsement;

(2) for which payment has been made, without disclosing that fact;

(3) which is not made by an actual client, without identifying that fact; and

(4) which does not clearly and conspicuously state that any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients.

(e) contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter.

### Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to

make known a lawyer's services, statements about them must be truthful. ~~The prohibition in paragraph (b) of statements that may create "unjustified expectations" and the prohibition in paragraph (d) of testimonials would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.~~

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

<u>For instance, the prohibition in paragraph (b) on statements likely to create "unjustified expectations" may preclude, and the limitations in paragraph (d) on testimonials and endorsements does preclude, advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, unless they state clearly and conspicuously that any result the lawyer or law firm may have achieved on behalf of clients in other matters does not necessarily indicate similar results can be obtained for other clients. Such information may create the unjustified</u>

expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

[4] Paragraph (e) precludes the use of nicknames, such as the "Heavy Hitter" or "The Strong Arm," that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers. See also Rule 8.4(f)(prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

## RULE 7.2: ADVERTISING

(a) Subject to the requirements of this Rule and Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. All advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct. The lawyer shall keep a copy or recording of every advertisement or communication for two (2) years after its last dissemination along with a record of when and where it was disseminated.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content.

(e) No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether

the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

~~(f) A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.~~

(~~g~~f) Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses.

(~~h~~g) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or fee range for at least ninety (90) days following dissemination of the advertisement, unless the advertisement specifies a shorter period; provided that a fee advertised in a publication which is issued not more than annually, shall be honored for one (1) year following publication.

(~~i~~h) All advertisements shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

## Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about

legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule, but see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real time electronic exchange that is not initiated by the prospective client.

[4] Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in an objective and understandable fashion so as to facilitate a prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without the use of techniques intended solely to gain attention and which demonstrate a clear and intentional lack of relevance to the selection of counsel, as such techniques hinder rather than facilitate intelligent selection of counsel. A lawyer's advertisement should reflect the serious purpose of legal services and our judicial system. The state has a significant interest in protecting against a public loss of confidence in the

legal system, including its participants, and in protecting specifically against harm to the jury system that might be caused by lawyer advertising. The effectiveness of the legal system depends upon the public's trust that the legal system will operate with fairness and justice. Public trust is likely to be diminished if the public believes that some participants are able to obtain results through inappropriate methods. Public confidence also is likely to be diminished if the public perceives that the personality of their advocate, rather than the legal merit of their claim, is a key factor in determining the outcome of their matter. It is necessary to ensure that lawyer advertisements do not have these detrimental impacts. This rule is intended to preserve the public's access to information relevant to the selection of counsel, while limiting those advertising methods that are most likely to have a harmful impact on public confidence in the legal system and which are of little or no benefit to the potential client.

[4~~5~~] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

**Record of Advertising**

[5~~6~~] Paragraph (b) imposes upon the lawyer who disseminates an advertisement or causes its dissemination the responsibility for reviewing each advertisement prior to dissemination to ensure its compliance with the Rules of Professional Conduct. It also requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

**Paying Others to Recommend a Lawyer**

[6~~7~~] Lawyers are not permitted to pay others for channeling professional work. Paragraph (c)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public relations personnel, business development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[~~7~~8] A lawyer may pay the usual charges of a legal service plan or a not for profit lawyer referral service, which is itself not acting in violation of the Rules of Professional Conduct. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service. The "usual charges" may include a portion of legal fees collected by a lawyer from clients referred by the service when that portion of fees is collected to support the expenses projected for the referral service.

[~~8~~9] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. See also Rule 7.3(b).

## RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by direct written, recorded or electronic communication or by in person, telephone, telegraph, facsimile or realtime electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation or undue influence;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person unless the accident or disaster occurred more than thirty (30) days prior to the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person solicited is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) ~~Every written or recorded communication subject to this Rule, except those directed only to other lawyers, family members, close personal friends, or persons with whom the sender has a prior or existing professional~~

~~relationship, shall be filed with the Commission on Lawyer Conduct within ten (10) days after any written communication is sent or any recorded communication is made together with a fee of $50.00. If a written communication is sent or a recorded communication is made generally to persons similarly situated, a representative copy may be filed with a listing of those persons to whom the communication was sent.~~ Any lawyer who uses written, ~~or~~ recorded, or electronic solicitation shall maintain a file for two years showing the following:

(1) the basis by which the lawyer knows the person solicited needs legal services; and

(2) the factual basis for any statements made in the written, ~~or~~ recorded, or electronic communication.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family, close personal or prior professional relationship, shall conform to Rules 7.1 and 7.2 and, in addition, must conform to the following provisions:

(1) The words "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such recorded or electronic communication shall clearly state both at the beginning and at the end that the communication is an advertisement. If the solicitation is made by computer, including, but not limited to, electronic mail, the words "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear in any subject line of the message and at the beginning and end of the communication.

(2) Each ~~written or recorded~~ solicitation must include the following statements:

(A) "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or ~~the Yellow Pages or by~~ calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or

toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer" and

(B) "The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary."

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each ~~written or recorded~~ solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS COMMUNICATION ~~LETTER (OR RECORDING)~~ OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201 – TELEPHONE NUMBER 803-734-2037." Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

(e) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted or certified delivery.

(f) Written communications mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents.

(g) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(h) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self mailing brochure or pamphlet, the nature of the client's legal problem.

(i) If a lawyer reasonably believes ~~knows~~ that a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles ~~actually handle~~ the case or matter, or that the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the potential client.

(j) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. A lawyer may participate with a prepaid or group legal service plan only if the plan is established in compliance with all statutory and regulatory requirements imposed upon such plans under South Carolina law. Lawyers who participate in a legal service plan must make reasonable efforts to assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b).

**Comment**

[1] There is a potential for abuse inherent in direct in person or, live telephone or real time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] The use of general advertising and written recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in person live telephone or real time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can

be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false, misleading, deceptive, or unfair communications, in violation of Rule 7.1. The contents of direct in person live telephone or real time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[3] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(d) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[4] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false, misleading, deceptive or unfair within the meaning of Rule 7.1; which involves coercion, duress, harassment, fraud, overreaching, intimidating or undue influence within the meaning of Rule 7.3(b)(2); which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1); which involves contact with a person the lawyer reasonably should know is represented by another lawyer in the matter; or which involves contact with a prospective client the lawyer reasonably should know is physically, emotionally or mentally incapable of exercising reasonable judgment in choosing a lawyer under Rule 7.3(b)(5) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further

effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[5] The public views direct solicitation in the immediate wake of an accident as an intrusion on the personal privacy and tranquility of citizens. The 30-day restriction in paragraph (b)(3) is meant to forestall the outrage and irritation with the legal profession engendered by crass commercial intrusion by attorneys upon a citizen’s personal grief in a time of trauma. The rule is limited to a brief period, and lawyer advertising permitted under Rule 7.2 offers alternative means of conveying necessary information about the need for legal services and the qualifications of available lawyers and law firms to those who may be in need of legal services without subjecting the prospective client to direct persuasion that may overwhelm the client’s judgment.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(d) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Requiring communications to be marked as advertisements sent only by regular U.S. mail and prohibiting communications from resembling legal documents is designed to allow the recipient to choose whether or not to read

the solicitation without fear or legal repercussions. In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of this information source will help the recipient understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

[9] Paragraph (j) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (j) must not be owned by or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, paragraph (j) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, and Janette H. Robinson, Respondents,

v.

Stonington Development, LLC, Appellant.

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Appeal From Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 4869
Heard March 9, 2011 – Filed August 17, 2011

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**AFFIRMED AS MODIFIED**

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Timothy G. Quinn, of Columbia, for Appellant.

H. Freeman Belser and Clinch H. Belser, Jr., both of Columbia, for Respondents.

**FEW, C.J.:** The primary issue in this appeal is whether the trial court erred in imposing punitive damages of $3.5 million against Stonington Development, LLC. We find the trial court properly denied Stonington's motion for a directed verdict as to punitive damages, and we find no reversible error in the charge given to the jury. However, we find the amount

of punitive damages is excessive and therefore that due process requires the amount of the award to be reduced. As to all other issues, we affirm.

## I. Facts

The plaintiffs are brothers Glenn and John Hollis; Janette Robinson, who is Glenn's daughter; and Janette's husband, Joseph Robinson. The Hollises and Robinsons jointly own approximately nineteen acres of land that has been in the Hollis family for generations. The Robinsons live on the property with their son in a house overlooking two ponds that Glenn, John, and their father built over fifty years ago. The only driveway to the Robinsons' home crosses an earthen dam that divides the three-acre upper pond from the five-acre lower pond.

In 1999, Stonington purchased property directly upstream from the Hollis and Robinson property for the purpose of developing a residential subdivision. The Hollises and Robinsons proved at trial that over the next five years Stonington ignored the recommendations of its own stormwater management engineers; violated State regulations and local laws regarding erosion control and stormwater runoff; and misled them, perhaps even lied, about Stonington's intention to remedy the problems. The result was severe flooding on the Hollises and Robinsons' property, which inhibited the Robinsons' access to their home and filled the ponds with as much as four feet of sediment. The estimated cost to restore the property is over $250,000.00. The jury awarded $400,000.00 in actual damages and $3.5 million in punitive damages. The trial court reduced the actual damages award to $315,000.00 as a setoff to account for funds paid by other settling defendants.

The troubles between the parties began in 2000, shortly before Stonington began construction. At their first meeting, Stonington asked the Robinsons to relinquish easement rights for their driveway and asked if it could put a sewer line through their front yard to serve the development.

When the Robinsons refused both requests, Stonington threatened to condemn the land and install the sewer line anyway.[1]

Before beginning construction, Stonington hired Power Engineering to prepare stormwater management plans for the subdivision. The Hollises and Robinsons' expert testified that stormwater management is a field of engineering that prevents the type of severe flooding, erosion, and sediment accumulation that eventually occurred on the Hollis and Robinson property. The plans Power Engineering prepared for Stonington included protective measures such as silt fences and detention ponds to catch eroding soil and sediment runoff. Stonington failed to follow the plans, despite its admitted responsibility to do so.

By late 2002, the Hollises and Robinsons started to see silt and sediment coming from the development and accumulating in the ponds. Around the same time, Stonington received its first notice of violation from Richland County, requiring it to alleviate the accumulation in the ponds to avoid penalties. By the spring of 2003, the runoff worsened to the point of causing the ponds to flood the Robinsons' yard and cover part of their driveway with rushing water. The Hollises and Robinsons continually complained to Stonington and asked it to fix the problem. Stonington assured them the problem would be fixed, but failed to take action.

A Stonington employee testified that, as part of its attempt to compromise with the Hollises and Robinsons, Stonington placed a fifty-foot-wide conservation easement on the part of its property bordering the Hollises and Robinsons to provide them with a buffer for protection from the runoff. Stonington told them the buffer increased the size of their property because it could never be used for anything but trees. In direct contravention of that statement, Stonington then removed all of the trees in the "buffer" to install a sewer line for its subdivision. Stonington received a $1 million tax deduction for creating the easement.

[1] Stonington is a nongovernmental entity with no power to condemn private property.

After numerous other State and County violation notices and no action from Stonington to alleviate the damage, the Hollises and Robinsons finally filed suit against Stonington and Power Engineering[2] on July 29, 2005, for negligence, trespass, private nuisance, and violation of the Unfair Trade Practices Act. By then, the runoff from Stonington caused the back of the dam on the upper pond to collapse, and the sediment in the pond had accumulated as deep as four feet in some locations. Even after the lawsuit was filed, Stonington received violation notices from Richland County directing it to protect the ponds from stormwater runoff.

At trial, the Hollises and Robinsons' expert in stormwater management testified that Stonington did not follow Power Engineering's stormwater management plans and failed to maintain the limited stormwater management system it did build. Stonington's only representative to testify at trial admitted it was responsible for complying with the stormwater management plans. The Hollises and Robinsons' expert testified that while the Hollises and Robinsons may still have experienced some problems if Stonington had followed the plans and maintained the system, the problems would have been "significantly" less serious. The expert gave an example of Stonington's failure to follow the plans. He explained that the stormwater system as designed includes a temporary check dam to catch sediment after a rainstorm. The system then requires the check dam be cleaned out and the sediment hauled elsewhere. The expert said Stonington cleaned out the sediment, but then "piled it right on the slope right above it[,] . . . obviously making it available for a source of erosion the next time it rains."

The Hollises and Robinsons presented evidence that the cost of repairing the damage caused by Stonington and restoring the ponds to their previous condition is $254,384.00,[3] in addition to the $9,813.76 in expenses

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[2] The Hollises and Robinsons also sued Ecological Associates, Inc., Newman Construction, Inc., and C.G.D. Developers, Inc. They settled with these defendants for a total of $85,000.00 and proceeded to trial against only Stonington and Power Engineering.

[3] This includes the cost of obtaining necessary permits, removing the silt, restoring the dam, and restocking the fish.

they incurred before the trial. They also established damages for loss of use and enjoyment of the ponds. For example, Glenn testified the fishing in the ponds is now bad, the children cannot swim in the mud, and they can no longer access areas of the ponds due to the sediment accumulation.

## II. Procedural History

At the end of a five-day trial, the jury returned a defense verdict for Power Engineering, but found for the Hollises and Robinsons against Stonington for negligence, trespass, and private nuisance.[4] The jury awarded $400,000.00 in actual damages and $3.5 million in punitive damages. After the verdict, the Hollises and Robinsons elected the private nuisance cause of action. Stonington filed a post-trial motion for judgment notwithstanding the verdict or, in the alternative, new trial absolute or new trial nisi remittitur. The trial court denied the motion and, after conducting a review of the punitive damages award, upheld the constitutionality of the amount of the award. Stonington appeals alleging the trial court erred in (1) denying its motion for a directed verdict on punitive damages, (2) giving an erroneous jury charge on punitive damages, (3) imposing a punitive damages award that violates Stonington's due process rights, and (4) denying its post-trial motion for judgment or a new trial. We affirm the award of punitive damages and the denial of Stonington's post-trial motion. However, we find the amount of the punitive damages award to be excessive, and reduce the award to $2 million.

## III. Directed Verdict on Punitive Damages

When ruling on a directed verdict motion as to punitive damages, "the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005) (finding sufficient evidence to submit the issue of punitive damages to the jury). "In reviewing the denial of a motion for directed verdict . . . , the appellate court applies the same standard as the circuit

[4] The trial judge granted a directed verdict in favor of Stonington on the unfair trade practices cause of action.

court." Id. "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." 366 S.C. at 201, 621 S.E.2d at 366.

The record contains evidence that Stonington ignored regulations regarding erosion control, stormwater runoff, and even its own engineer's plans; took no action to prevent or correct damage it knew it was causing to the ponds; and used threats and deception to avoid the consequences of its misconduct. The trial judge, who had the benefit of observing the witnesses and the presentation of evidence first-hand, summarized the evidence of punitive damages in his post-trial order as follows:

> [T]he Court finds that there was ample evidence presented at trial . . . upon which the jury could have based its award of punitive damages, such as (1) the testimony by the plaintiffs about pre-construction meetings between Stonington and the plaintiffs where the plaintiffs expressed concern about the potential environmental impact of Stonington's development on their properties and ponds, (2) the testimony by the plaintiffs about meetings between the plaintiffs and Stonington after construction activities began expressing concern for damage actually occurring at that time, (3) the DHEC and Richland County inspection reports and correspondence demonstrating that Stonington failed to maintain its stormwater management plan, even after being put on notice by the County and by DHEC of the offsite impact, (4) the testimony of Dr. Meadows about the extreme inadequacies of Stonington's maintenance of the stormwater management system even after the lawsuit was filed, and (5) the testimony from the plaintiffs of Stonington's attempted bullying and threats to the plaintiffs about the location of the development's sewer line and the relocation of the plaintiffs' ingress/egress easement.

We find the trial judge correctly denied the motion because, viewing the evidence in the light most favorable to the Hollises and Robinsons, the jury had ample evidence from which to find Stonington acted in reckless disregard of the rights of others.

## IV. Punitive Damages Jury Charge

Stonington objected to a portion of the beginning of the jury charge on damages in which the trial judge said:

> Now, members of the jury, I'm going to talk to you a little bit about damages. And in this case we have actual damages and we have punitive damages as to both Defendants.

Stonington argued the charge required the jury to find actual and punitive damages as to both defendants. We find no reversible error.

"When an appellate court reviews an alleged error in a jury charge, it 'must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (quoting Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Keaton, 334 S.C. at 497, 514 S.E.2d at 575.

Throughout the damages charge, the trial court made numerous statements indicating that the jury was not required to award actual or punitive damages.

> Members of the jury, if actual damages are found, . . . exemplary or punitive damages will be allowed . . . . [I]n this case, the Plaintiff is seeking punitive damages in addition to actual damages.
>
> . . . .

> [P]unitive damages can only be awarded when the Plaintiff proves by clear and convincing evidence the Defendant's actions were willful, wanton, malicious, or in reckless disregard of the Plaintiff's rights.
>
> . . . .
>
> Before you can award punitive damage, members of the jury, you must first find that the Plaintiff is entitled to actual or nominal damages.

Considered in isolation, the sentence to which Stonington objected might be misleading. However, considering the charge as a whole, the trial court adequately explained to the jury that it could not award actual or punitive damages unless the plaintiffs met the applicable burden of proof. In the context of the entire charge, we find the sentence at issue was merely transitional, serving as an introduction to the damages portion of the charge.[5] See Wells v. Halyard, 341 S.C. 234, 239, 533 S.E.2d 341, 344 (Ct. App. 2000) (finding a statement which "potentially could mislead the jury if taken out of context, . . . was merely introducing [a] concept"). Accordingly, we find no reversible error.

## V. Constitutionality of the Punitive Damages Award

Stonington challenges the constitutionality of the amount of punitive damages. Therefore, we are required to determine whether the award of punitive damages in this case is consistent with due process. James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006); see Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (holding an appellate court must conduct a de novo review of a trial court's determination of the constitutionality of a punitive damages award). This requires us to determine whether the award was reasonable in light of the following guideposts:

[5] The jury found neither actual nor punitive damages against Power Engineering, refuting Stonington's argument that the charge required the jury to find actual and punitive damages "as to both Defendants."

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

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010) (citing Mitchell, 385 S.C. at 585, 587-88, 686 S.E.2d at 184-86; BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996)). We affirm the award of punitive damages, but reduce the amount to $2 million.

**a. Reprehensibility**

Our discussion of the facts of this case demonstrates that Stonington's misconduct was reprehensible. In order to evaluate the reasonableness of the amount of the award, however, we must determine the degree of reprehensibility. Austin, 387 S.C. at 53, 691 S.E.2d at 151; see also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); Gore, 517 U.S. at 575 (describing reprehensible conduct sufficient for an award of punitive damages as reflecting "'the enormity of [the] offense'" and "the accepted view that some wrongs are more blameworthy than others" (quoting Day v. Woodworth, 13 U.S. (1 How.) 363, 371 (1852))). In doing so, we must consider whether

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Mitchell, 385 S.C. at 587, 686 S.E.2d at 185.

Our analysis of the first two of these considerations indicates Stonington's misconduct involved a lesser degree of reprehensibility. First, although the Hollises and Robinsons incurred significant monetary damages, they did not suffer any physical harm. Finding only economic harm "would typically weigh against [] reprehensibility." 385 S.C. at 589, 686 S.E.2d at 186; see also Duncan v. Ford Motor Co., 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (finding the existence of only economic harm weighs in favor of the defendant).

Second, while Stonington's conduct did demonstrate an indifference to the property rights of others, it did not evince an indifference to or reckless disregard for the health or safety of people. Reckless disregard for the property rights of others can be sufficient misconduct to support an award of punitive damages. See Harris v. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973) (explaining in a tort action for property damages that "punitive damages are allowable in tort actions, not only as a punishment for wrong, but as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated"). However, when evaluating the degree of a defendant's reprehensibility in a post-trial review of the award, the defendant's reprehensibility is not enhanced pursuant to this second consideration unless it involves the reckless disregard for the health or safety of people.

As to the third consideration, the record does not indicate, and neither of the parties argues, whether the Hollises and Robinsons were financially vulnerable. Thus, the third consideration does not favor a lesser or a higher degree of reprehensibility.

The fourth and fifth considerations, however, indicate a higher degree of reprehensibility. As to the fourth consideration, no evidence was presented as to whether Stonington or its members had engaged in similar conduct on other development projects. However, Stonington's conduct involved repeated actions towards the Hollises and Robinsons, and thus was not an isolated incident. In the face of repeated requests from the Hollises

and Robinsons to fix the ongoing problems, and despite repeated official notices of regulatory violations, Stonington continued for over four years[6] to engage in conduct the jury determined to be reckless. See Mitchell, 385 S.C. at 589-90, 686 S.E.2d at 186 (finding the defendant's "conduct involved repeated acts of deliberate indifference" without considering its conduct on other policies or claims). Finally, as to the fifth consideration, the Hollises and Robinsons' harm was to some extent the result of intentional deceit, rather than mere accident. Stonington made repeated promises to the Hollises and Robinsons that it would fix the problems caused by its development, but failed to take any meaningful steps to fulfill those promises. As a particular example of its deceitful conduct, Stonington told them it would provide a conservation easement so that they would have a fifty-foot buffer of trees to protect their property from runoff. Stonington then clearcut the trees, leaving itself with a tax deduction of $1 million and the Hollises and Robinsons with no protection from stormwater runoff.

Considering the entire record in this case in light of the five factors discussed above, we find that Stonington's misconduct was moderately reprehensible.

[6] We mention that the conduct lasted over four years in recognition of the supreme court's statement that it is no longer necessary to consider the duration of the conduct as a separate factor. Mitchell, 385 S.C. at 587 n.7, 686 S.E.2d at 185 n.7. In this case, however, the duration of the conduct helps us to understand whether the conduct was an isolated incident or involved repeated actions. See 385 S.C. at 589, 686 S.E.2d at 186 (noting in considering this fourth factor that "Fortis's conduct involved repeated acts of deliberate indifference for more than two years").

### b. Disparity Between Actual or Potential Harm and the Punitive Damages Award

The ratio of punitive damages awarded by the jury in this case to actual damages is 8.75 to 1.[7] We find this to be an excessive disparity between the punitive damages awarded and the harm actually suffered by the Hollises and Robinsons.[8] In making this determination, and in setting the amount to which punitive damages must be reduced, we have considered "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." Mitchell, 385 S.C. at 588, 686 S.E.2d at 185.

We note initially that the parties have given us little information to use in evaluating the first and third considerations. As to the first consideration, deterrence, the record does not clearly indicate whether Stonington is an ongoing entity in the development business or whether it was created solely for this one project. Therefore, it is difficult to analyze the deterrent effect the punitive damages award will have on Stonington. The record indicates that Stonington still owns large tracts of undeveloped land in the subdivision and is developing the subdivision in phases. Thus, the jury's award will likely have a deterrent effect as to Stonington's future work on this development.

In upholding the award, the trial court relied on the deterrent effect this award may have on others in the development business. In its post-trial order the court stated: "The jury's punitive damages award will send a strong message to developers that such a way of doing business is not acceptable to the people of Richland County." We significantly discount the importance of

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[7] In calculating the ratios in this case, we have used actual damages of $400,000.00 rather than the actual damages judgment amount of $315,000.00.

[8] This is not a case in which it is appropriate to consider potential harm over and above the actual harm suffered by the plaintiff. See Mitchell, 385 S.C. at 590, 686 S.E.2d at 187 ("[I]n certain cases [a court] may compare [the punitive damages award] to the potential harm suffered by the plaintiff.").

this consideration in evaluating the constitutionality of the award. The deterrent effect the imposition of punitive damages may have on others cannot be used as a significant basis for upholding an award of punitive damages.

Deterrence has long been an important consideration in the imposition of punitive damages. In Mitchell, the supreme court began its discussion of the history of due process limitations on punitive damages awards by stating "[t]he practice of awarding punitive damages originated in principles of common law 'to deter the wrongdoer and others from committing like offenses in the future.'" 385 S.C. at 584, 686 S.E.2d at 183 (quoting Laird v. Nationwide Ins. Co., 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964)). Summarizing its decision reducing the award of punitive damages in Mitchell, the supreme court stated: "We are also certain that a $10 million award will adequately vindicate the twin purposes of punishment and deterrence that support the imposition of punitive damages." 385 S.C. at 594, 686 S.E.2d at 188.

The concept of deterrence includes the specific effect on the party against whom the award is imposed and the general effect the award will have on others similarly situated. In Gamble, the supreme court listed as one of the factors a trial court may consider in its post-trial review of punitive damages the "likelihood the award will deter the defendant or others from like conduct." 305 S.C. at 112, 406 S.E.2d at 354 (emphasis added). In Mitchell, the supreme court stated, "Gamble remains relevant to the post-judgment due process analysis," 385 S.C. at 587, 686 S.E.2d at 185, and repeated the "or others" language in its discussion of Gamble. 385 S.C. at 586, 686 S.E.2d at 184. However, listing deterrence as a specific consideration in the analysis of the "ratio" guidepost under Gore, the Mitchell court omitted the "or others" language. 385 S.C. at 588, 686 S.E.2d at 185.

Because of the trial court's consideration of the deterrent effect on other developers to justify this punitive damages award, the omission of the "or others" language is significant in our review of the trial court's decision. The Mitchell court noted that "much of the [United States] Supreme Court's punitive damages jurisprudence has focused on the type of evidence that may be used to support a punitive damages award." 385 S.C. at 585-86, 686

S.E.2d at 184. In support of the point that "the Supreme Court has continued to . . . delineate the contours of punitive damages awards that 'run wild,'" the court cited Campbell, 538 U.S. at 421-22, for the proposition that "punitive damages awards may not be based on out-of-state conduct," and Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007), for the proposition that "a punitive damages award that is based on evidence of harm to persons other than the plaintiff . . . will violate due process." Mitchell, 385 S.C. at 586, 686 S.E.2d at 184. Just as these decisions have limited the use of harm "to others" as a basis of a punitive damages award, we believe there are significant concerns associated with using a punitive damages award's deterrent effect "on others" to justify the amount of an award. Thus, although the deterrent effect on the specific defendant must be considered, the general deterrent effect on others who are not connected to the case is not a significant factor in analyzing the constitutionality of an award.

This case, however, presents a "deterrence" consideration somewhere in the middle. Stonington's only representative to testify at trial described the members of Stonington Development, LLC. In particular, the witness's testimony indicates that the managing member of Stonington is heavily involved in the development business, not only with Stonington, but with several other corporate entities doing development work in the area. In considering the deterrent effect the punitive damages award will have on Stonington, we find it appropriate to consider the fact that its managing member is independently involved in the development business, and the punitive damages award is highly likely to deter him from similar misconduct in the future.

The second consideration is "whether the award is reasonably related to the harm likely to result from such conduct." Mitchell, 385 S.C. at 588, 686 S.E.2d at 185. In making this comparison, we note that the award of actual damages was substantial. Both our supreme court and the United States Supreme Court have stated that when the actual damages awarded are substantial, "'a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee.'" Mitchell, 385 S.C. at 592, 686 S.E.2d at 187 (quoting Campbell, 538 U.S. at 425). The fact that the actual damages award in this case is substantial helps us to evaluate whether the punitive damages award is reasonably related to the harm likely

to result from similar conduct. We find the award of $3.5 million is not reasonably related to the likely harm.

We must also consider whether the amount to which we reduce the award is reasonably related to the likely harm. While a $2 million award results in a ratio of 5 to 1, considerably higher than the actual damages, such an award is reasonably related to the harm likely to result from ignoring stormwater management regulations on large residential development projects such as the subdivision created by Stonington.

As to the third consideration, other than evidence that Stonington still owns large portions of the original development, the record contains no direct evidence of Stonington's ability to pay a punitive damages award.

### c. Comparative Penalty Awards

The third guidepost is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Austin, 387 S.C. at 52, 691 S.E.2d at 151. There are two civil penalties that could be applied to Stonington's misconduct. First, the South Carolina Department of Health and Environmental Control, other State agencies regulating stormwater, and even local governments may impose a civil penalty of $1,000.00 a day against any person violating the "Standards for Stormwater Management and Sediment Reduction" contained in Chapter 72 of the South Carolina Code of Regulations. 26 S.C. Code Ann. Regs. 72-315(A) (Supp. 2010). The regulation provides the penalty may be imposed for any violation of a stormwater management or sediment control ordinance or regulation, and it specifically allows a separate penalty for each day the violation continues. Id. The record indicates that Stonington was required on June 4, 2001, to construct a detention pond and had not yet adequately constructed it by January 30, 2004. Stonington was first officially notified it was in violation of stormwater management or sediment control regulations on November 6, 2002, and it received numerous additional violation notices related to the detention pond and other aspects of its stormwater management

responsibilities between then and March 15, 2006.[9] While the record does not allow a precise calculation of the total number of days Stonington remained in violation, we have determined it to be a minimum of 857 days. Viewing the evidence in the light most favorable to the Hollises and Robinsons, however, Stonington had not cured the violations as of the jury's verdict on April 6, 2007, which is 1,612 days from November 6, 2002. Thus, the maximum daily fine that could have been imposed on Stonington ranged from $857,000.00 to $1.612 million.

Under federal law, the Administrator of the Environmental Protection Agency may seek a civil penalty of up to $25,000.00 per day for misconduct similar to that engaged in by Stonington. 33 U.S.C. § 1319(d) (Supp. 2010). Applicable federal regulations require that sediment and erosion controls must "[a]t a minimum . . . be designed, installed, and maintained to: . . . (2) Control stormwater discharges . . . to minimize downstream channel and streambank erosion; . . . (5) Minimize sediment discharges from the site. . . . ; (6) Provide and maintain natural buffers around surface waters . . . ." 40 C.F.R. § 450.21(a)(2), (5)-(6) (2010). Stonington's violations of these regulations could have resulted in a total penalty that far exceeds the punitive damages figures we are considering in this case.

**d. The Court's Role in Reducing the Amount of Punitive Damages**

Because we find the award of $3.5 million in punitive damages is excessive and violates due process, we must reduce the award.[10] In reducing

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[9] Stonington received official violation notices on November 6, 2002, April 18, 2003, October 13, 2003, January 30, 2004, December 28, 2004, January 26, 2005, February 8, 2006, and March 15, 2006.

[10] We have the option of ordering a new trial. See EEOC v. Fed. Express Corp., 513 F.3d 360, 376 (4th Cir. 2008) ("If a punitive damages award is unconstitutionally excessive, it is our obligation to order a remittitur or award a new trial."). However, after finding the award to be excessive, South Carolina appellate courts have uniformly reduced the punitive damages award over the option of ordering a new trial. But see Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 166, 604 S.E.2d 385, 390 (2005) (reversing

the amount of the punitive damages, we are not permitted to make the determination independent of the jury of what we think the appropriate amount of punitive damages should be in this case. Rather, in deference to the jury, we may do no more than determine the upper limit of the range of punitive damages awards consistent with due process on the facts of this case, and set the amount of punitive damages accordingly. See Mitchell, 385 S.C. at 590-94, 686 S.E.2d at 187-88 (reducing punitive damages award to the upper limit of due process).[11]

Additionally, Mitchell's holding that appellate courts must conduct the review of punitive damages awards de novo is consistent with this deferential approach. We do not conduct a de novo review of the jury's determination of the proper amount to award as punitive damages. Rather, we use "a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards." Mitchell, 385 S.C. at 583, 686 S.E.2d at 182; see also Austin, 387 S.C. at 52, 691 S.E.2d at 151 ("[A]n appellate court reviews de novo the trial judge's application of these guideposts."). This entitles us only to review the determination of the constitutionality of the award. Both the plaintiffs and the defendant have a federal and state constitutional right to a trial by jury on the question of punitive damages. See U.S. Const. amend. VII; S.C. Const. art. I, § 14; see also Defender Indus. Inc. v. Northwestern

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and remanding punitive damages because the trial court improperly admitted prejudicial evidence). In Mitchell, the supreme court implicitly rejected the option of a new trial. After finding the award "exceeds due process limits," the court stated: "There is ample evidence in the record to support the imposition of punitive damages, and there is no need for further findings of fact." 385 S.C. at 592, 686 S.E.2d at 187. We have noted some considerations as to which the record gives us little or no information. Nevertheless, as the supreme court did in Mitchell, we find the record here is adequate for us to conduct our review of the award, and we find no reason to remand for a new trial.

[11] See also CBG Occupational Therapy, Inc. v. RHA Health Servs., Inc., 499 F.3d 184, 193 (3d Cir. 2007) (according deference to the jury's award in decreasing punitive damages only to constitutional upper limit); Bach v. First Union Nat'l Bank, 486 F.3d 150, 156-57 (6th Cir. 2007) (same).

Mut. Life Ins. Co., 938 F.2d 502, 507 (4th Cir. 1991) ("[W]e hold that the seventh amendment guarantees the right to a jury determination of the amount of punitive damages . . . ."). We may not usurp the jury's function and set the amount we believe to be appropriate. If we find the jury's award unconstitutionally excessive, we may reduce it only to the upper limit of what would be acceptable under due process.

### e. Conclusion as to the Amount of Punitive Damages

Therefore, reviewing de novo the trial court's determination of constitutionality, but deferring to the jury's constitutional role as factfinder, we find the upper limit of the range of punitive damages awards consistent with due process on the facts of this case to be $2 million, and we reduce the award accordingly.

## VI. Failure to Grant Stonington's Motions for JNOV, New Trial Absolute, or New Trial Nisi Remittitur

Finally, Stonington appeals the denial of its motion for judgment notwithstanding the verdict or for a new trial based on the trial judge entering the jury room to answer a juror's question. We find this issue unpreserved for our review.

At one point during a witness's testimony, the judge interrupted and said to a juror, "You need a break?" to which the juror responded, "Is it possible for me to get a pen and a piece of paper? I have a question for you." The judge instructed everyone to "Stop" and said to the jury, "Go to the jury room. If you have a question, as the Forelady and members of the jury, write it down for me. I'll take a look at it." After the break, the judge explained on the record:

> I spoke to the jury in the room. The note that the Forelady wrote me was: Can jurors ask questions? And I think I was polite about it, the answer was, no, of course. And of course that's the job of the lawyers as I explained to y'all in the jury room.

Stonington's counsel neither objected nor asked for any clarification as to the conversation between the judge and the jurors.

"[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved." RRR, Inc. v. Toggas, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008).

We recognize that our supreme court has held a trial judge entering the jury room is reversible error. State v. Elmore, 279 S.C. 417, 421-22, 308 S.E.2d 781, 784-85 (1983) ("Although we find no actual prejudice in this instance, we hold this conduct to be reversible error regardless of the presence of counsel."). However, Elmore is not controlling in a civil case. The ruling in Elmore was based in part on the right of a criminal defendant to "be present at all stages of a trial." 279 S.C. at 422, 308 S.E.2d at 785. Further, Elmore was a death penalty case decided before the supreme court abrogated *in favorem vitae* in State v. Torrence, 305 S.C. 45, 60, 406 S.E.2d 315, 324 (1991) (Toal, J., concurring). We make no comment on the continued viability of this holding from Elmore in death penalty or other criminal cases. However, such an exception to the rules of issue preservation is not warranted on the facts of this civil case.

As to the remainder of Stonington's allegations that the trial court erred in refusing to grant its post-trial motions for JNOV, new trial absolute, or new trial nisi remittitur, we deem them abandoned and decline to address the merits. See Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (finding appellants abandoned an issue on appeal where they failed to cite any case law for a proposition and made only conclusory arguments in support).

## VII. Conclusion

We affirm the denial of a directed verdict on punitive damages, the jury charge on punitive damages, and the denial of Stonington's post-trial motions.

We also affirm the imposition of punitive damages, but because we find the amount excessive, in violation of due process, we reduce the award from $3.5 million to $2 million.

**AFFIRMED AS MODIFIED.**

**THOMAS and KONDUROS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Peter D. Grant, Trustee, Appellant,

v.

State of South Carolina, Defendant.

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Appeal From Charleston County
Roger M. Young, Circuit Court Judge

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Opinion No. 4870
Heard May 3, 2011 – Filed August 17, 2011

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**AFFIRMED**

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J. Kirkland Grant, of Charleston, for Appellant.

J. Emory Smith, Jr., of Columbia, for Respondent.

**LOCKEMY, J.:** In this action to declare title to tidelands, Peter D. Grant, Trustee, (Grant) argues the trial court erred in concluding he failed to rebut the State of South Carolina's presumptive title to the tidelands adjacent to his property. We affirm.

## FACTS

Grant initiated this action against the State of South Carolina pursuant to section 48-39-220 of the South Carolina Code (2008) to determine ownership of the tidelands[1] adjacent to his property. Grant's property, known as The Fort, is 3 acres of highland on the northwest side of the island of Folly Beach. Grant's property is bordered by approximately 9 acres of saltwater marsh. Grant claimed ownership of the marshland based upon a 1696 grant abstract and a 1786 surplus grant and plat. The State asserted it held prima facie fee simple title to the marshland in the public trust. After a bench trial, the trial court determined Grant failed to overcome the State's presumptive ownership and found the State held title to the marshland. This appeal followed.

## ISSUE ON APPEAL

Did the trial court err in determining Grant failed to rebut the State's presumptive ownership of the marshland adjacent to his property?

## STANDARD OF REVIEW

An action to determine ownership of tidelands pursuant to section 48-39-220 is an action at law. See Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). In an action at law, tried without a jury, our scope of review extends to the correction of errors of law. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). Furthermore, "the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the [court's] findings." Id.

[1] Section 48-39-220 defines tidelands as "all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters."

## LAW/ANALYSIS

The State of South Carolina holds presumptive title to all land below the high water mark in trust for the benefit of its citizens. McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). To rebut the State's presumptive title, a claimant must show (1) its predecessor in title possessed a valid grant, and (2) the grant's language was sufficient to convey land below the high water mark. Lowcountry Open Land Trust v. State, 347 S.C. 96, 103, 552 S.E.2d 778, 782 (Ct. App. 2001); State v. Holston Land Co., 272 S.C. 65, 66, 248 S.E.2d 922, 923 (1978).

Because the State is presumed to hold title to tidelands in trust for the benefit of the public, a grant of private ownership must contain specific language in the grant or on the plat demonstrating an intent to convey land below the high water mark. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979). A grant which names a navigable tidal stream as a boundary conveys land to the ordinary high water mark. State v. Pinckney, 22 S.C. 484, 492 (1885). Title to land between the high and low water marks remains in the State and is held in trust for the benefit of the public. State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972). A grant of tidelands by the State or a predecessor sovereign is construed strictly in favor of the State and the general public and against the grantee. Id.

There is no dispute regarding the validity of Grant's chain of title. Thus, the issue before us is whether the grants and plat at issue are sufficient to convey land below the high water mark.

### I. The 1696 Grant

Grant argues the trial court erred in determining the 1696 grant did not convey the whole of Folly Island including the adjacent tidelands. We disagree.

Grant established a chain of title to a 1696 grant of Folly Island from the Lords Proprietors to William Rivers. The original grant and plat are not known to exist and the record contains only the grant abstract which states:

> William Rivers had a grant out of the Secretary's Office for Seven Hundred Acres of Land or thereabouts which said Land in Situate in Berkeley County known by the name of Folly Island which butts and bounds Southeasterly on the Sea, Northwesterly on marsh and back of the Sound on South side of James, Northwesterly on a creek that comes out of the South Channel of Ashley River.

The grant abstract names only tidal navigable water ways as boundaries and contains no language indicating an intent to convey land below the high water mark. In fact, the only mention of tidelands is the use of word "marsh" to delineate the northwest boundary of the property conveyed: "butts and bounds . . . Northwesterly on marsh." Black's Law Dictionary 1080 (9th ed. 2009) (defining "butts and bounds" as the territorial limit of real property, or in other words a boundary line). Such language is insufficient to convey land below the high water mark.

Grant submits that under English common law in 1696, the grant of an island conveyed the entire island including the adjacent tidelands.[2] We find Grant's contention without merit. In Shively v. Bowlby the Supreme Court of the United States noted:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a

[2] In support of this contention Grant introduced expert testimony from Professor William Cook and the publication Marsh Granting Practices in South Carolina for the purpose of "interpretation of grants and plats and titles." Although the trial court allowed Grant to offer this evidence during the bench trial, the court ultimately excluded the evidence. Grant has not appealed this ruling; therefore it is law of the case. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 174-75, 525 S.E.2d 869, 871 (2000) (noting an unchallenged ruling is law of the case).

> corporation has acquired rights in it by express grant, or by prescription or usage . . . and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right, jus publicum, of navigation and fishing . . . .
>
> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

152 U.S. 1, 13 (1894) (citations omitted). These rules were applied in South Carolina for the first time in State v. Pacific Guano Co., 22 S.C. 50 (1884). There, the State sought to enjoin the Pacific Guano Company from mining phosphate from several tidal creek beds near Beaufort. Id. at 52. In determining the State held title to the creek beds at issue, the court noted: "'It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark; and the shore below common, but not extraordinary high water mark, belongs to the public.'" Id. at 79-80. The Pacific Guano court also noted the unique character of the State's title to tidelands:

> The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform.

Id. at 83-84. Because of the unique character of such lands, English common law and South Carolina law developed special rules regarding the granting of tidelands.

Under English common law, a grant of tidelands was to be "construed strictly[] and it will not be presumed, that the King intended to part from any portion of the public domain, unless clear and special words are used to denote it." Martin v. Waddell's Lessee, 41 U.S. 367, 406 (1842) (emphasis added). The Pacific Guano court outlined a similar rule: "In all grants [of tidelands] from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor." 22 S.C. at 86. Further, pursuant to English common law the upper boundary of tidelands was the "ordinary high-water mark." U.S. v. Pacheco, 69 U.S. 587, 590 (1864). Thus, when "the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." Id. The Pacific Guano court noted and applied the English common law rule to the creek beds at issue in that case: "These are all channels in which the tide ebbs and flows, and as to such the well established rule is, that a grant of the shore gives title only to the high water mark, the mean between extreme high and low tides." 22 S.C. at 79.

Grant's argument that Trapier v. Wilson, 13 S.C.L. (2 McCord) 191 (1822) stands for the proposition that a grant of an island included the adjacent tidelands is misplaced. Our supreme court addressed Trapier in State v. Pinckney, 22 S.C. 484 (1885). After discussing the rules outlined above, the Pinckney court stated:

> By his great industry, the counsel for the defendants found and cited the case of Trapier v. Wilson (2 McCord, 191), which he urged had changed the rule[s regarding grants of tidelands]. That was a contest between John T. Wilson and Paul Trapier as to whether there was any vacant land on "'North Island'—meaning vacant highlands. The case itself states that "the question was whether the grant to Laroche (under which Mr. Trapier claimed) covered the whole of the island except the salt water marsh, or

> was it to be located according to the courses and distances set forth in the plat?" It was a simple question of location, the only point being whether the grant covered the upland of the whole island. It was held that the whole island was covered by the grant, and from this it is sought to draw an inference that the court held the doctrine that Trapier, as riparian proprietor, had title down to low-water mark. We cannot perceive that any such decision was involved in the case. The doctrine we are considering was not broached, and neither the common law rule nor the words "high" or "low-water" mark were referred to in the opinion. Judge Richardson, in delivering the judgment, again excepts the marshes. He says: "By the description set forth in the grant, the location is plain and unquestionable. The whole island (unless the marsh be so called) is clearly within it." It seems that in those days, before the discovery of phosphates, salt marsh went for nothing.

22 S.C. at 508. In sum, we find no merit to Grant's contention English common law provided that a grant of an island included the adjacent tidelands. Because the 1696 grant abstract lacks any indication of an intent to convey land below the high water mark, we find the trial court's determination Grant failed to rebut the State's presumptive title is supported by evidence in the record.

## II. The 1786 Grant and Plat

Grant argues the trial court erred in determining the 1786 surplus grant did not convey the tidelands at issue. We disagree.

Included in Grant's chain of title is a 1786 surplus grant from the State of South Carolina to Martha Samways. The grant states:

> We have granted, and by these Presents do grant unto the said Martha Samways her Heirs and Assigns, a

> Plantation or Tract of Land containing one thousand nine hundred forty acres being the surplus contained in grant for the Folly Island heretofore granted to William Rivers on the 9th of September 1696 for seven hundred acres or thereabouts but upon a Resurvey found to contain within the lines of the same two thousand six hundred and forty having such shape, form, and marks, as are represented by a plat hereunto annexed, together with all woods, trees, waters, watercourses, profits, commodities, appurtenances, and hereditaments, whatsoever thereunto belonging; To have and to hold Said Tract of one thousand nine hundred and forty Acres of Land, and all and singular other the premises hereby granted unto the said Martha Samways her Heirs and Assigns for ever, in free and common Soccage.

The grant also states Martha Samways paid forty-five pounds sterling for the surplus acreage. The surplus grant is accompanied by a hand drawn plat which describes the land surveyed as

> an Island, situate in the District of Charleston, Granted to William Rivers the 9th September 1696 for the Folly Island, for Seven hundred acres, or thereabouts, but upon the said resurvey found to contain, within the lines of the same, two thousand, six hundred and forty acres, nineteen hundred and forty acres thereof being surplus, and hath such form, mark, buttings and boundings as the above plat represents.

The plat includes a drawing of Folly Island displaying the Atlantic Ocean to the southeast, the Folly River to the northwest, Bird Keys to the southwest, and Lighthouse Island to the northeast. The drawing also depicts marshland on the northwest side of Folly Island with a stippled pattern. Folly Island and the marshland are circumscribed by a line. The 1786 surplus grant and plat

include no additional boundary description and instead refer to the 1696 grant.

Dr. Charles Lesser, a historian and archivist with the South Carolina Department of Archives and History, testified surplus grants were used to convey additional land discovered to be within the boundaries of a prior grant upon a resurvey. According to Lesser, when a resurvey revealed more land existed within the boundaries of a grant than previously estimated, the owner could pay for the additional land and be granted the surplus.

Here, the 1696 grant abstract indicates the 1696 grant conveyed 700 acres "or thereabouts" known as Folly Island. The 1786 surplus grant and plat state Folly Island was resurveyed and determined to be 2,640 acres. The 1786 surplus grant conveyed the difference between the 700 acres granted in the 1696 grant and the 2,640 acres discovered by the resurvey. In other words, the 1786 surplus grant conveyed the 1,940 acres found to be within the lines of the 1696 grant upon a resurvey. By definition the 1786 surplus grant could not convey land outside the boundaries of the 1696 grant. See Thomson v. Gaillard, 37 S.C.L. (3 Rich.) 418, 421 (1832) (defining a surplus grant as a "grant within the lines of an elder one"). Accordingly, we conclude the trial court's determination that the 1786 surplus grant conveys only the extra acreage discovered within the boundaries of the 1696 grant is reasonably supported by the evidence in the record. [3]

Assuming the 1786 surplus grant and plat could convey additional acreage outside the boundaries of the 1696 grant, nothing in either the grant or the plat indicates an intent to convey tidelands. In fact, the stated acreage in the grant and the high land acreage depicted on the plat indicate the

[3] Grant argues the 1786 surplus grant and plat conveyed vacant lands, which included the tidelands at issue, pursuant to the Act of 1784, 4 Stat. 627, No. 1206. Grant draws support for this assertion from the 45 pounds Martha Samways paid for the 1,940 acres conveyed by the 1786 surplus grant. However, the Act expressly states vacant lands are to be sold for the sum of 10 pounds per 100 acres. If the 1,940 acres conveyed in the 1786 surplus grant was for vacant land, Martha Samways would have paid 194 pounds. Thus, Grant's argument in this regard is without merit.

opposite. The 1786 surplus grant states the land conveyed in the 1696 grant was resurveyed and found to be 2,640 acres. The State presented the expert testimony of surveyor Frederick Quinn who calculated the high ground acreage depicted on the 1786 plat using two methods: a computer scan and a planimeter. Quinn's computer scan calculation indicated the high ground was 2,596 acres, while the planimeter calculation indicated the high ground was 2,610 acres. Grant's expert surveyor, Thomas Bessent, also calculated the high ground acreage and determined it was approximately 2,614 acres. Bessent explained his figures agreed with Quinn's "very closely" and were "well within expected tolerance." The high degree of similarity between the acreage stated in the grant and the acreage of high ground depicted on the plat indicate an intent to convey only the high ground.

Grant argues the line circumscribing Folly Island and encompassing the tidelands at issue on the 1786 plat evidences an intent to convey the tidelands at issue. Strictly construing the grant and plat in the State's favor, more is required.

In State v. Holston Land Co., our supreme court found the plat at issue evinced an intent to convey land below the high water mark. 272 S.C. 65, 68, 248 S.E.2d 922, 924 (1978). There, the plat's legend indicated the property conveyed was a 200 acre tract of marshland. Id. at 67, 248 S.E.2d at 923. The plat depicted the marsh with a stippled pattern across which was written "two hundred acres marsh[]land." Id. The plat also included several small islands and adjacent marsh with an accompanying legend stating "all pieces of marsh that[ are] commonly covered at high water." Id. at 67, 248 S.E.2d at 924. In Lowcountry Open Land Trust v. State, this court found a grant and plat were sufficient to convey land below the high water mark where the plat contained a surveyor's note which indicated a 1,102 acre tract of marshland was surveyed and the drawing of the tract included the word "marsh" on its face in two locations. 347 S.C. 96, 104-05, 552 S.E.2d 778, 782-83 (Ct. App. 2001). Finally, in Hobonny Club, Inc. v. McEachern our supreme court found two "exceptional" plats were sufficient to convey the tidelands at issue. 272 S.C. 392, 398, 252 S.E.2d 133, 136-37 (1979). The court described the plats as follows:

> They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are accurately relocatable on the ground by contemporary engineering methods.

Id. at 398, 252 S.E.2d at 136. Because the plats were drawn with such a high degree of precision and encompassed tidelands, the court found the grant and plats were sufficient to convey the tidelands. Id. at 398, 252 S.E.2d at 137. Although the plat at issue here depicts tidelands, it lacks the other indicators of intent to grant land below the high water mark present in Holston and Lowcountry Open Land Trust. Additionally, in contrast to the plats in Hobonny Club, Grant's expert land surveyor, Bessent, testified the 1786 plat is poorly drawn and not capable of being relocated on the ground.

Finally, this court has previously determined a copy of the 1786 surplus grant and plat at issue in this case lacked the requisite intent to convey tidelands. In Query v. Burgess, Query brought suit against his neighbor Burgess and the State to determine title to tidelands adjacent to his property and Query's property on Folly Beach. 371 S.C. 407, 409-10, 639 S.E.2d 455, 456 (Ct. App. 2006). The master examined a copy of the 1786 surplus grant and plat at issue here[4] and determined they lacked evidence of the State's intent to grant tidelands and concluded the State held title to the marsh. Id. at 412, 639 S.E.2d at 457. Query appealed. Id. at 410, 639 S.E.2d at 456. On review, this court noted "[t]he plat roughly delineates Folly Island . . . , contains the bare bones of a survey[,] and is neither precise nor detailed." Id. at 412, 639 S.E.2d at 457. This court also noted the 1786 surplus grant and plat lacked any terms consistent with the intent to grant property below the high water mark and affirmed the master's finding.

[4] The copy of the 1786 surplus grant and plat used in Query are substantively similar to the ones at issue here save one exception. The copy used in Query included a line dividing the marshland from the high ground in addition to the line circumscribing the high ground and the marshland.

For the foregoing reasons, we conclude the trial court's determination the 1786 surplus grant and plat lacked evidence of the requisite intent to convey tidelands is supported by evidence in the record.

## III. Grant's Remaining Issues

Grant argues the trial court erred in relying on Query v. Burgess. We find no improper reliance on Query and therefore decline to address the issue. See Rule 220(b)(2) (providing "[t]he [this court] need not address a point which is manifestly without merit."). Grant argues the trial court erred in adopting the State's revised proposed order without allowing him an opportunity to respond. We find this issue is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

## CONCLUSION

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

**AFFIRMED.**

**FEW, C.J. and PIEPER, J. concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Sandy Burgess, Appellant.

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Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

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Opinion No. 4871
Heard May 4, 2011 – Filed August 17, 2011

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**AFFIRMED**

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Benjamin A. Stitely and Robert T. Williams, Sr., of Lexington, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

**LOCKEMY, J.:** In this Fourth Amendment search and seizure case, Sandy Burgess appeals her convictions and sentences for trafficking crack cocaine, possession with intent to distribute (PWID) cocaine, PWID ecstasy and possession of marijuana. Burgess argues the trial court erred in determining Investigator John Lutz had reasonable suspicion to stop her vehicle. We affirm.

## FACTS

On May 22, 2008, Narcotics Investigator John Lutz drove through the parking lot of the Hardee's on Rosewood Drive in Columbia, South Carolina. According to Lutz, the Hardee's parking lot is a known meeting location for drug sales in Richland County. Lutz explained a manager at the Hardee's complained to another investigator about drug activity "every few months" over the course of a "couple of years." According to Lutz, he personally spoke with the manager regarding the drug activity, and he and other officers had made arrests stemming from activity in the Hardee's parking lot.

As Lutz drove through the lot, he observed a Jeep with lightly tinted windows backed into a parking space at the back of the parking lot. Lutz noticed the passenger was "looking around very intently and smoking a cigarette." Neither the driver nor the passenger appeared to be eating. Based on Lutz's training and experience he believed the pair was waiting to purchase drugs. Lutz explained he formed this belief based on his twenty-two years of law enforcement experience, including nine years in narcotics investigations, and his training at the South Carolina Criminal Justice Academy. According to Lutz, he had overseen "several hundred" undercover narcotics investigations during which an undercover purchaser would typically have to wait for the supplier to arrive in order to conduct a transaction.

After observing the Jeep and its occupants, Lutz parked nearby in order to continue observation of the parking lot and the Jeep and its occupants. A few minutes later, Burgess entered the parking lot in a white car, backed up, and parked her car askew in a parking space a few feet from Lutz's location. The Jeep proceeded toward Burgess's location, waited for her to park, and pulled along the passenger side of her vehicle. The passenger in the Jeep got

out and entered the back passenger seat of Burgess's vehicle while extending his hand toward Burgess. Lutz observed Burgess look over her shoulder while the passenger in Burgess's car looked down towards Burgess's lap. After approximately fifteen seconds, the passenger from the Jeep exited Burgess's car and returned to the Jeep. Lutz explained the complaints of drug activity in the parking lot, his training and experience, and his "prior knowledge of people doing the exact same thing" led him to conclude he had observed a drug transaction.

Burgess and the Jeep exited the Hardee's parking lot traveling west on Rosewood Drive. Lutz followed both vehicles but soon after, the Jeep turned off of Rosewood Drive.[1] Lutz chose to follow Burgess's car because the fact that she arrived at the Hardee's parking lot second led him to believe she was the supplier. Burgess turned onto South Maple Street and after a short distance entered a driveway. Lutz pulled in behind Burgess and initiated his blue lights. Burgess and the passenger quickly exited the vehicle, and Lutz observed a small black bag in Burgess's left hand. Lutz instructed Burgess and the passenger to reenter the vehicle. Lutz explained as Burgess sat down in the driver's seat she leaned over to her left "like she was trying to put something up under the left side of the car." Lutz instructed Burgess to stand up and keep her hands visible. As Burgess stood up she made a kicking motion with her right leg "like she was trying to kick an object under the vehicle." Lutz discovered a black bag containing several types of drugs on the driveway below the driver's seat.[2] Lutz arrested Burgess and the passenger.

Burgess was indicted for trafficking in crack cocaine, PWID marijuana, PWID cocaine, and PWID ecstasy. Prior to the bench trial,[3] Burgess moved to suppress the drug evidence, arguing Lutz lacked reasonable suspicion to

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[1] Lutz requested the aid of another officer; however, none were available to give assistance.

[2] Later testing determined the black bag held 20 tablets containing MDMA and/or BZP, 15.02 grams of crack cocaine, 7.44 grams of cocaine, and 16.69 grams of marijuana. MDMA is commonly known as ecstasy and BZP is a simulant comparable to amphetamine.

[3] Burgess waived her right to a jury trial.

stop her. The trial court denied Burgess's motion and ultimately found Burgess guilty of trafficking crack cocaine, PWID cocaine, and PWID ecstasy. The trial court found Burgess not guilty of PWID marijuana, but found her guilty of the lesser included offense of possession of marijuana. The trial court sentenced Burgess to thirty days for possession of marijuana, and concurrent sentences of eight years for the trafficking and PWID charges. This appeal followed.

## STANDARD OF REVIEW

When reviewing a Fourth Amendment search and seizure issue, this court must affirm if there is any evidence to support the trial court's ruling and will reverse only where there is clear error. State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011); State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). In applying this standard of review, we must determine if the record supports the trial court's assumed findings, and if those findings support the trial court's determination regarding reasonable suspicion or probable cause. State v. Tindall, 388 S.C. 518, 523 n.5, 698 S.E.2d 203, 206 n.5 (2010); State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002) (applying the any evidence standard of review but noting an appellate court may conduct "its own review of the record to determine whether the trial judge's decision is supported by the evidence").

## LAW/ANALYSIS

Burgess argues the trial court erred in determining Lutz had reasonable suspicion to initiate the stop of her vehicle. We disagree.

The Fourth Amendment of the Constitution of the United States prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Evidence seized in violation of the Fourth Amendment must be excluded from trial. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

A vehicle stop constitutes a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006); State v. Rogers, 368 S.C. 529, 533, 629 S.E.2d 679, 681 (Ct. App. 2006). Accordingly, a police

officer may stop a vehicle when the officer has probable cause to believe a traffic violation has occurred, State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001), or when the officer has reasonable suspicion the occupants are involved in criminal activity. Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537-38 (1985).

Generally, a police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 30 (1968). Reasonable suspicion is a specific and objective basis, supported by articulable facts, for suspecting another of criminal activity. U.S. v. Cortez, 449 U.S. 411, 417-18 (1981); Black's Law Dictionary 1585 (9th ed. 2009). In determining whether reasonable suspicion exists, the totality of the circumstances must be considered. Cortez, 449 U.S. at 417-18.

Initially, we note that Burgess does not challenge the admission of the drug evidence on grounds that Lutz exceeded the scope of the Terry stop. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011) ("The scope and duration of [the stop] must be strictly tied to and justified by the circumstances that rendered its initiation proper."). Instead, Burgess maintains Lutz lacked reasonable suspicion to stop her and the drug evidence should have been excluded because it was the result of an illegal seizure. Therefore, our analysis examines whether Lutz had reasonable suspicion to initiate a Terry stop of Burgess and does not address whether the events that occurred after the stop were proper.

We find the evidence in the record supports the trial court's determination that Lutz had reasonable suspicion to stop Burgess. At the time Lutz activated his blue lights, Lutz was aware the Hardee's parking lot was a known meeting location for drug sales and had personal knowledge of frequent complaints of drug activity in the parking lot. Lutz observed the Jeep parked at the back of the parking lot. Its occupants were not eating and appeared to be waiting for someone. Lutz observed Burgess enter the parking lot and park haphazardly. The passenger from the Jeep entered the rear passenger seat of Burgess's car with his hand extended while Burgess

looked in his direction. The events in Burgess's car lasted fifteen seconds. Lutz explained this activity was suspicious because, in his experience with several hundred narcotics investigations, buyers usually arrive at a predetermined location to wait on a supplier in order to complete a drug transaction. Lutz further explained he had prior knowledge of similar drug transactions occurring in the same manner. In short, Lutz had personal knowledge of complaints of drug activity at the Hardee's parking lot and observed Burgess's behavior in the parking lot, which his training and experience informed him was consistent with a drug sale.

Burgess's contention the Hardee's parking lot cannot be a known location for drug activity because Richland County's online arrest database includes only one drug arrest at the Hardee's parking lot is without merit. This fact indicates only the database contains one drug arrest which listed the Hardee's parking lot as the incident location. It does not foreclose the existence of other arrests related to drug activity in the Hardee's parking lot but not designating it as the incident location. For instance, in this case the drug activity occurred in the Hardee's parking lot; however, the incident location is listed as the location where Burgess was arrested. Additionally, in finding Lutz had reasonable suspicion, the trial court relied upon Lutz's personal knowledge of frequent complaints by the Hardee's manager regarding drug activity in the parking lot.

Furthermore, while the activity in the Hardee's parking lot is capable of innocent explanation, "[t]he fact that this activity was taking place in a location well known [for drug sales] alters the landscape of reasonable inferences." See U.S. v. Johnson, 599 F.3d 339, 345 (4th Cir. 2010). Lutz was not required "to ignore the relevant characteristics of [the] location in determining whether the circumstances [were] sufficiently suspicious to warrant further investigation." See Illinois v. Wardlow, 528 U.S. 119, 124 (2000). Furthermore, Lutz's inferences regarding the degree of suspicion to attach to Burgess's conduct are entitled to deference. See Johnson, 599 F.3d at 342. Failing to afford the proper weight to Lutz's inferences "borne out of his experience would be to fail to consider the 'totality of the circumstances.'" See U.S. v. McCoy, 513 F.3d 405, 414-15 (4th Cir. 2008). The Johnson court explained:

> Getting the balance right is never guaranteed, but the chances of doing so are improved if officers, through training, knowledge, and experience in confronting criminality, are uniquely capable both of recognizing its signatures, and by the same token, of not reading suspicion into perfectly innocent and natural acts. In this way, experience leads not just to proper action but to prudent restraint. 'Reasonableness' is a matter of probabilities, and probability in turn is best assessed when one has encountered variations on a given scenario many times before.

Johnson, 599 F.3d at 343. To find as Burgess would have us do would be to discount Lutz's training and experience with similar drug transactions.

Burgess argues United States v. Sprinkle supports a finding Lutz lacked reasonable suspicion. 106 F.3d 613 (4th Cir. 1997). The Sprinkle court found reasonable suspicion lacking where Sprinkle was observed huddling in a car with a known drug offender in a high drug crime area. Id. at 617-19. The court noted that as the officer walked by the car he was able to "actually see that nothing of a criminal nature was happening in the car" thus dispelling his suspicion. Id. at 618. Here, Lutz explained he was not able to see what was exchanged between Burgess and the Jeep's passenger. In other words, unlike the officer in Sprinkle, nothing that occurred before Lutz stopped Burgess served to dispel his suspicion. Therefore, we conclude Sprinkle is distinguishable and lends Burgess no support.

We are mindful of concerns regarding the State "using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and that the State "must do more than simply label a behavior as 'suspicious' to make it so." See U.S. v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). The State must "be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id. Here, the State articulated why the events in the Hardee's parking lot were likely indicative of criminal activity at the time Lutz observed them: (1) the Hardee's parking lot was a known meeting location for

drug sales, and (2) Lutz's training and prior knowledge of similar drug transactions led him to believe the activity he observed in the parking lot was a drug transaction. See Johnson, 599 F.3d at 345 (relying on officer's conclusion, based on his training and experience, that hand-to-hand contact between the defendant and several men in rapid succession in a location known for drug sales was indicative of a drug transaction in finding reasonable suspicion existed).

Finally, a finding that Lutz had reasonable suspicion under the facts present here is consistent with the recent decision by our supreme court in State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (2011). There, Officer Futch observed Corley drive up to a known drug house at 2:50 in the morning, walk to the back of the house, stay for less than two minutes, and return to his car and leave. Id. at 126, 708 S.E.2d at 217. Futch followed Corley a short distance before stopping him after he failed to use his turn signal. Id. Although the court noted the traffic violation formed an independent basis for the stop, the court found the stop was justified based on the presence of reasonable suspicion. Id. at 127-28, 708 S.E.2d at 218. In our view, the facts here are analogous to those in Corley. Both the house in Corley and the Hardee's parking lot are known locations for drug activity. Additionally, Futch and Lutz both observed behavior that was consistent with the criminal activity the location was known for. For the foregoing reasons, we conclude the trial court properly determined Lutz had reasonable suspicion to stop Burgess.

## CONCLUSION

The decision of the trial court is

**AFFIRMED.**

**FEW, C.J and PIEPER, J. concur**.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Kenneth Darrell Morris, II, Appellant.

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Appeal From York County
John C. Hayes, III, Circuit Court Judge

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Opinion No. 4872
Heard March 8, 2011 – Filed August 17, 2011

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**AFFIRMED**

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Johnny Gardner and Jonathan Hiller, both of Conway, for Appellant.

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

**THOMAS, J.:** During a traffic stop, police officers searched the trunk of a car driven by Kenneth Darrell Morris, II, and discovered a quantity of ecstasy pills. A large amount of marijuana was also found during the subsequent inventory search. During his trial for trafficking ecstasy and possession of marijuana with intent to distribute, Morris unsuccessfully moved to suppress the drugs as fruit of an illegal search. A jury convicted Morris of both charges. Morris appeals the trial court's decision not to suppress the drugs. We affirm.

## FACTS

On the afternoon of February 6, 2008, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500. While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely. The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.

Officer Vinesett approached the passenger side of the vehicle where Nichols was sitting. Officer Vinesett asked for Morris's license and registration, and after a rental agreement was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver. Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts[1] in the center console and blunt tobacco in the center console and on the floor.

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans. Morris told him Nichols rented the vehicle the previous day in Greensboro,

[1] Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in order to roll a marijuana cigar.

North Carolina, and they were on their way back from visiting some women in Atlanta, Georgia. Officer Vinesett also asked Morris whether Morris had a drug record. Morris disclosed he had been arrested for a marijuana offense when he was a minor.

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta. Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene. He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband. Morris then went to the restroom under Constable Scott's supervision. Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person. Nichols consented, and again, the search yielded no contraband.

Moments later, Officer Gibson arrived with a drug dog. While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given. Nichols refused to give consent, so Officer Gibson walked the dog around the car twice. The dog did not alert on either lap around the car and was returned to the police cruiser. Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused. Roughly thirteen minutes after the stop had been initiated, Nichols stated he "was ready to go."

Shortly thereafter, the officers held a conversation away from Morris and Nichols. Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments. He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have "swor[n he] could smell some marijuana." Nichols responded that Officer Vinesett was confusing the smell of the Black & Mild he recently

smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment. The emptied blunts contained no marijuana or marijuana residue, and the officers found no other evidence of contraband in the passenger compartment. However, Officer Vinesett searched the trunk and eventually found a plastic bag containing 393 ecstasy pills inside a gift box. The men were arrested slightly over fourteen minutes after the initiation of the stop. The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk. During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car. The trial court found Officer Vinesett's testimony regarding the smell of marijuana credible and held the length of the stop was reasonable in light of the circumstances. Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car. This appeal followed.

## ISSUES ON APPEAL

I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?

II. Did the trial court err in finding the search of the trunk was supported by probable cause?

## STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, our standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).[2]

[2] Tindall articulated the standard of review subsequently repeated in Wright. However, Tindall's ensuing discussion included a footnote explaining that this standard of review requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

## I. Scope and Length of the Stop

Morris argues the trial court erred in failing to suppress the drugs because (1) Officer Vinesett unlawfully extended the traffic stop several times and (2) Officer Vinesett's testimony he smelled burnt marijuana during the detention lacks credibility and is unsupported by the evidence.

Upon a lawful traffic stop, an officer "may order the driver to exit the vehicle . . . [,] request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citations omitted). However, a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see also Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion requires "'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). It "is something more than an inchoate and unparticularized suspicion or hunch." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Therefore, in determining whether reasonable suspicion existed, the totality of the circumstances must be considered. Id.

In this case, the trial court found reasonable suspicion existed to extend the stop based on the hollowed out blunts, the loose tobacco, and the odor of marijuana. The trial court specifically discounted what Officer Vinesett classified as Morris's and Nichols's "inconsistent stories."

First, we address Morris's allegation the evidence does not support the trial court's determination Officer Vinesett smelled marijuana. Admittedly, the record and police video could support a finding Officer Vinesett smelled the marijuana either immediately upon approaching the car or as Nichols subsequently exited the car. When faced with the issue, the trial court failed to make an explicit finding as to when Officer Vinesett actually smelled marijuana. However, the trial court held the officers properly extended the stop based upon both seeing the blunts and smelling marijuana, suggesting the trial court found Officer Vinesett smelled marijuana at some point before he verbalized it and before the purpose of the stop was accomplished. Our deferential standard of review requires us to accept the trial court's decision if it is supported by evidence.

Under the facts of this case, the trial court properly held reasonable suspicion existed to extend the stop because Officer Vinesett testified he smelled marijuana upon approaching the car. Cf. State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (finding that an officer's detection of the odor of alcohol during a traffic stop justified the extension of the stop based on the reasonable suspicion that open containers were located in the vehicle) (per curiam); see also State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (indicating that the sight of Swisher Sweet cigars, the strong odor of marijuana, the defendant's admission he smoked marijuana earlier in the day, and the presence of a gun holster in the back seat amounted to reasonable suspicion of the existence of drugs).

Even if Officer Vinesett did not smell marijuana immediately upon approaching the car, the evidence provided reasonable suspicion to extend the stop for a reasonable investigation of criminal activity. After requesting Morris's license and registration, Officer Vinesett learned Morris was not the authorized driver of the car. More importantly, Officer Vinesett had the authority to order Morris out of the car, and when Officer Vinesett did so, he observed the hollow blunts and loose tobacco. See Pichardo, 367 S.C. at 98, 623 S.E.2d at 847-48 (providing that upon a lawful traffic stop, an officer may order the driver out of the vehicle, "request a driver's license and vehicle registration, run a computer check, and issue a citation"). Because in Officer

Vinesett's experience the presence of blunts and loose tobacco indicated drug use, he had reasonable suspicion Morris and Nichols were using drugs. Thus, Officer Vinesett was permitted to take reasonable steps to confirm or dispel this suspicion, and Officer Vinesett did so by asking both Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (providing that during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011). During that period, Officer Vinesett also noted that he previously smelled marijuana as Morris exited the car. Accordingly, we hold the trial court properly ruled the extension of the duration and scope of the stop was reasonable.

## II. The Search

Morris next argues the trial court erred in declining to suppress the drug evidence as fruit of an illegal search. Morris does not contest Officer Vinesett's search of the passenger compartment, but he argues Officer Vinesett lacked probable cause to search the trunk. We disagree.

The Fourth Amendment prohibits unreasonable searches, and a warrantless search is generally unreasonable. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, the ready mobility of and the lessened expectation of privacy in automobiles endorse an exception to that rule based upon probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity:

> Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.

State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010) (internal citations omitted).

"The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993). Therefore, "[i]f probable cause justifies the [warrantless] search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982); see also State v. Brannon, 347 S.C. 85, 94, 552 S.E.2d 773, 777 (Ct. App. 2001) (Anderson, J., concurring in result only) ("Under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

In this case, the trial court made no separate rulings to support its finding of probable cause beyond those supporting its determination of reasonable suspicion. The trial court stated simply, "He had probable cause to search." In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable

suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

The trial court specifically found that in Officer Vinesett's experience and training blunts were often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, evidence supported the trial court's finding the officers had probable cause to search anywhere in the vehicle where marijuana could be located, and the trial court properly admitted the drug evidence discovered in the trunk.

## CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

**AFFIRMED.**

**FEW, C.J., and KONDUROS, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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MRI at Belfair, LLC, Appellant,

v.

South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center, Respondents.

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Appeal From Richland County
Ralph K. Anderson, III, Administrative Law Judge

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Opinion No. 4873
Heard June 7, 2011 – Filed August 17, 2011

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**AFFIRMED**

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John F. Beach and John J. Pringle, Jr., of Columbia, for Appellant.

Ashley C. Biggers, Carlisle Roberts, and Kristi L. Pawlowski, of Columbia, for Respondent South Carolina Department of Health and Environmental Control; Travis Dayhuff and Holly G. Gillespie, of Columbia, for Respondent Coastal Carolina Medical Center.

**WILLIAMS, J.:** On appeal, MRI at Belfair, LLC (Belfair) contends the Administrative Law Court (ALC) erred in finding Coastal Carolina Medical Center's (Coastal) changes to its proposed MRI project were not substantial, and, therefore, not a new project under South Carolina Code of Regulations 61-15 section 605 (Supp. 2010). Specifically, Belfair contends the ALC (1) failed to properly apply the relevant statutory and regulatory provisions governing the issuance of a certificate of need (CON); (2) erred in finding Coastal's changes were not substantial when Belfair presented substantial evidence to the contrary; (3) failed to apply the proper burden of proof; and (4) erred when it failed to find Coastal's CON for the MRI project was voided by the transfer of ownership from Coastal to another entity. We affirm.

## FACTS

Coastal is a forty-one unit hospital located near Interstate 95 in Jasper County, South Carolina. Belfair is a free-standing imaging facility, located approximately 13.8 miles away in Beaufort County, South Carolina. Belfair provides magnetic resonance imaging (MRI) services for Beaufort and Jasper Counties. Dr. Albert J. Borelli, Jr., a radiologist, is the owner of Belfair. Belfair competes with Coastal for MRI services. Pursuant to the South Carolina Certificate of Need and Health Facility Licensure Act[1] (the CON Act), Belfair is an "affected person"[2] and thus is able to contest the issuance of Coastal's CON pursuant to the CON Act.

On May 7, 2004, Coastal submitted an application for a CON to South Carolina Department of Health and Environmental Control (DHEC) to construct a fixed MRI suite onto its existing hospital in Jasper County pursuant to the 2003 State Health Plan[3] (the Plan). Coastal's application

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[1] See S.C. Code Ann. §§ 44-7-110 to -385 (2002 & Supp. 2010).

[2] Specifically, Belfair is a "person[] located in the health service area in which the project is to be located and who provide[s] similar services to the proposed project . . . ." S.C. Code Ann. § 44-7-130(1) (2002).

[3] The State Health Plan is required by the CON Act. The Plan contains specific standards and information for health care facilities and health care equipment. DHEC may not issue a CON unless an application complies with

proposed that Coastal would purchase a new 1.5 tesla General Electric MRI unit and house it in an addition to be constructed at the hospital. DHEC granted the CON to Coastal on November 22, 2004.

On November 24, 2004, Belfair requested a contested case hearing to challenge DHEC's issuance of the CON to Coastal on the grounds that the MRI project did not satisfy the project review criteria.[4] After an evidentiary hearing, the ALC granted partial summary judgment to Coastal and DHEC in an order dated November 10, 2005. The ALC determined a CON was appropriate because an on-site MRI was necessary to make MRI services "available" to Coastal's inpatients and emergency room patients under the Plan. Belfair appealed to the South Carolina Board of Health and Environmental Control (the Board), which affirmed the ALC's order. After certification from this court, our supreme court held the Board erred when it determined Coastal did not have to establish compliance with the project review criteria. MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 1, 9-10, 664 S.E.2d 471, 475 (2008). The supreme court reversed and remanded for a determination on the sole issue[5] of whether Coastal's application complied with the project review criteria. Id. at 10, 664 S.E.2d at 476. On remand, the ALC consolidated Belfair's initial case with the current case before this court. Upon motion of Belfair and with consent of Coastal and DHEC, Belfair conceded Coastal's MRI project, as set forth in its CON application, satisfied the relevant project review criteria. Accordingly, the ALC dismissed Belfair's initial case and proceeded on

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the Plan, project review criteria, and other regulations. See 24A S.C. Code Ann. Regs. 61-15 § 801 (Supp. 2010).

[4] DHEC considered the following project review criteria in determining whether a CON was appropriate in this case: (1) community need; (2) distribution/accessibility; (3) cost containment; (4) acceptability; (5) financial feasibility; and (6) adverse impact. See 24A S.C. Code Ann. Regs. 61-15 § 802 (Supp. 2010).

[5] The supreme court affirmed the Board's finding that the Plan standards for MRI services did not violate state statutes on CONs. It also affirmed the Board's conclusion that substantial evidence existed to support Coastal's need for an onsite MRI unit. MRI at Belfair, 379 S.C. at 9-10, 664 S.E.2d at 475-76.

Belfair's claim of whether Coastal's amendments[6] to its MRI project were substantial, thereby creating a new project pursuant to section 605 of South Carolina Code of Regulations 61-15.

After hearing from the parties, the ALC concluded the amendments to Coastal's MRI project were not substantial; therefore, the amended project was not a new project under section 605, and Coastal's CON was not void. This appeal followed.

## STANDARD OF REVIEW

Appeals from the ALC are governed by the Administrative Procedures Act (APA).[7] Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5) (Supp. 2010). "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." MRI at Belfair, 379 S.C. at 6, 664 S.E.2d at 474.

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[6] Specifically, Coastal sought a determination from DHEC as to whether its plan to convert its mobile MRI unit to a fixed MRI unit was a substantial change to the originally approved project. DHEC determined this amendment was not a substantial change because the location of the project did not change, the cost of the project decreased, and the 1.5 tesla mobile MRI was substantially the same as the 1.5 tesla MRI proposed in Coastal's CON application. Belfair requested the Board to review DHEC's staff decision, which the Board declined to do, prompting Belfair's request for a contested case hearing before the ALC.

[7] See S.C. Code Ann. §§ 1-23-310 to -400 (2006 & Supp. 2010).

## LAW/ANALYSIS

### I. Application of Statutory and Regulatory Provisions

Belfair contends the ALC erred in applying the project review criteria instead of certain statutory and regulatory provisions as part of its substantial change analysis. Specifically, Belfair claims the ALC improperly considered the project review criteria[8] to approve Coastal's amended MRI project and thereby excused substantial changes to the MRI project that would have otherwise resulted in voiding the CON. We disagree.

Initially, we note the purpose of the CON Act "is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). To help achieve this purpose, an applicant is required to obtain a CON before undertaking a project prescribed by the CON Act. See § 44-7-120(1).

South Carolina Code of Regulations 61-15 section 801 states that "[t]he [project review] criteria listed in Section 802 are to be used in reviewing all projects under the Certification of Need program." Additionally, an application for a CON "must address all applicable standards and requirements set forth in departmental regulations, Project Review Criteria of the department, and the South Carolina Health Plan." S.C. Code Ann. § 44-7-200(A) (Supp. 2010) (emphasis added). Once issued, a CON is "valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations." S.C. Code Ann. § 44-7-230(A) (2002). If modifications occur after DHEC grants a CON, "[DHEC] will decide whether or not the amendment is substantial and thereby constitutes a new project." 24A S.C. Code Ann. Regs. 61-15 § 605 (Supp. 2010).

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[8] The project review criteria DHEC applied and the ALC subsequently considered were (1) need; (2) accessibility/distribution; (3) cost containment; (4) acceptability; (5) financial feasibility; and (6) adverse impact.

Here, the ALC was asked to determine whether Coastal's modifications to the MRI project were substantial. The ALC stated in its final amended order,

> Review of this issue requires a comparison of the amended project to the original project proposed in the CON application to determine whether the amendment is substantial. . . . In making that determination, I find that consideration of the project review criteria is relevant. In other words, whether the amendments to the project substantially change the project's compliance with the relevant project review criteria is pertinent in determining whether amendments to this permit were substantial under Section 605.

Subsequently, in the ALC's order denying Belfair's motion for reconsideration, the court expounded on why consideration of the project review criteria was appropriate. The ALC stated, "In making that determination in this contested case, it is apodictic that the ALC may consider properly admitted relevant evidence. . . . Following that reasoning, this [c]ourt [] included an analysis of whether the amended project meets those same project review criteria it originally met in substantially the same way." (emphasis in original). We construe the above-quoted language as a permissible comparison of the original MRI project's compliance with the project review criteria to the amended MRI project's compliance with the same criteria. We find this comparison proper in determining whether Coastal's changes were "substantial" under section 605.

We are not persuaded by Belfair's argument that consideration of the project review criteria is statutorily prohibited by section 44-7-230(A). First, as a prerequisite to obtaining a CON from DHEC, section 44-7-200 expressly requires an applicant to address how its project will comply with the relevant project review criteria. See § 44-7-200 (2002 & Supp. 2010). Once approved by DHEC, a CON is "valid only for the project described in the application including location, beds and services to be offered, physical plant,

capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations." § 44-7-230(A) (emphasis added). In addition to reviewing certain specific factors enumerated in section 44-7-230(A), we find it logical that a review of "other factors as set forth in the application," which necessarily includes the project review criteria, to also be appropriate when determining whether a CON is valid. Accordingly, if satisfaction of the project review criteria is a statutory prerequisite to obtaining a CON, we find any change that would impact the applicant's ability to comply with the same criteria as relevant evidence on whether the change is substantial enough to create a new project.

Moreover, in addition to the project review criteria, the ALC considered other factors from section 44-7-230(A) to support its conclusion that Coastal's CON was valid despite its amendments to the project. Regarding location, the ALC found despite the MRI unit being located adjacent to the hospital instead of inside the hospital, the MRI unit was "nevertheless built to be an integral part of the hospital" and the "distance between the emergency room and [] Coastal's MRI unit would [not] reduce the standard of care of emergency room patients . . . ." The ALC also considered any differences in the services to be offered as well as the physical layout of the project when it addressed all the clinical and operational issues Belfair claimed were substantial under the amended project. Regarding the services offered by Coastal, the ALC noted the maximum gradient amplitude would be slightly lower under the amended project, which would affect the rate at which the MRI completes a scan. However, this slight decrease in gradient strength would only increase a scan by approximately sixty seconds, which "would not increase the wait time for patients since Coastal's volume is approximately four scans per day." Furthermore, the lack of MRI-safe monitoring equipment would not preclude Coastal from scanning unstable patients "if the radiologist and patient's physician determine the patient can be safely removed from monitoring during the MRI scan." In addition, the ALC addressed the difference in the physical layout of the amended project when it concluded changes in how patients would access the MRI unit would not make the MRI less safe than the proposed MRI.

Last, testimony elicited at the contested case hearing supports the ALC's decision to consider the project review criteria in its substantial change analysis. Ms. Tibshrany, a former CON reviewer for DHEC, testified regarding what DHEC considers in its substantial change analysis. When asked how the project review criteria identified as important in the original CON application factors into the substantial change determination, she stated, "They would still be relevant. We're looking to see that the changes that are being made to the project don't affect the initial criteria that were deemed to be important at the time of review." She also testified the applicant is still required to meet the same project review criteria as in the original application if changes are made. Because DHEC's interpretation in this instance was not contrary to the plain language of section 44-7-230(A) or section 802 of Regulation 61-15, we find the ALC properly deferred to DHEC in this instance. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); see also Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.").

Based on the foregoing, we find the ALC properly considered the appropriate factors, both from section 44-7-230(A) and from section 802 of Regulation 61-15, when it concluded Coastal's changes to its MRI project were not substantial.

## II. Burden of Proof

Next, Belfair contends the ALC placed an impermissible burden of proof upon Belfair when it held Belfair had to prove by a preponderance of the evidence that Coastal's changes were substantial enough to warrant voiding the CON. We find this issue is not preserved for our review.

After the ALC issued its final order, Belfair filed a motion for reconsideration, but it never specifically objected that the ALC placed an impermissible burden of proof upon Belfair. Belfair's failure to do so precludes review of this issue on appeal. See Brown v. S.C. Dep't of Health

& Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the ALJ are not preserved for appellate consideration."). Belfair argues in its reply brief that it was "legally unnecessary" to make this assertion in its motion for reconsideration because it "directly challenged the ALC's test for determining whether [Belfair] had shown that [Coastal's] Amended Project constituted a 'substantial change' under South Carolina law." However, we find Belfair's challenge to the ALC's consideration of the project review criteria is not sufficiently specific to preserve its burden of proof argument for our review. See Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 19, 698 S.E.2d 612, 622 (2010) (finding it is incumbent upon appellant to show it had clearly raised the issue to the ALC and asked for a specific ruling in that regard to preserve the issue for appellate review); see also Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 18-19 (1998) (finding issue of burden of proof must be raised to and ruled upon to be preserved for appellate review).

## III. Substantial Evidence

Belfair argues the ALC's decision was unsupported by substantial evidence, thereby requiring reversal pursuant to the APA. We disagree.

Substantial evidence "is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the [administrative] agency reached." Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the ALC's finding from being supported by substantial evidence. Id. at 130-31, 530 S.E.2d at 650. Pursuant to the APA, this court may reverse the ALC if the appellant's substantial rights have been prejudiced because the administrative decision 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. 2010).

Belfair claims it presented overwhelming evidence Coastal's amended project was substantially different in equipment, location, layout, scale, scope, and services from its original project. While Belfair introduced evidence and testimony to indicate changes were made to the MRI project, as

the fact finder, the ALC could weigh the evidence and assess each witness's testimony and credibility prior to ruling on whether these changes were substantial enough to constitute a new project under section 605. See Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assoc. of S.C., 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact.").

Several witnesses, including Dr. Borelli, the owner of Belfair, testified the original and implemented MRI units have virtually identical equipment with substantially similar scan times and image quality. Dr. Moesch, a radiologist, and Ms. Platt, an expert in health care planning and health care finance, both testified the change in location of the MRI project in relation to the hospital (adjacent to instead of inside the hospital) as well as the minor differences in the "Code Blue" system, the MRI lift and lift opening, and the overall layout of the implemented MRI project did not substantially change the project from a clinical, operational, or patient safety perspective. Further, Coastal presented evidence that the scope of the services is the same under both the original and amended project. Although Coastal cannot scan "unstable patients" who are in need of constant monitoring, Belfair highlights only one instance in Coastal's fifty-page application where it references "unstable patients," and as reflected in its initial application, the vast majority of the patients it seeks to serve are "acutely ill patients" who are not on constant monitoring equipment. Last, while Coastal's project costs decreased significantly under the amended MRI project, this modification was permissible. Although utilizing the fixed MRI unit instead of an in-house MRI unit decreased the operating and capital costs estimated in Coastal's CON application, this change was not substantial in terms of the project's compliance with the CON because it did not negatively affect the project's compliance with the cost containment or financial feasibility factors set forth in the project review criteria. Based on the foregoing, we find substantial evidence in the record exists to support the ALC's conclusion.

## IV. Transfer of Ownership

Last, Belfair claims Coastal's changes to its MRI project were substantial, thus resulting in a new project. Because the new project was

incomplete on the date of the sale of Coastal to Tenet Health Systems, Belfair avers Coastal's CON was void as a result of the sale. Because we find Coastal's changes to the MRI project were not substantial, we decline to address this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate court need not address an issue when disposition of prior issue is dispositive).

## CONCLUSION

Based on the foregoing, the ALC's decision is

**AFFIRMED.**

**HUFF AND THOMAS, JJ., concur.**