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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leisel Paradis, Petitioner,

v.

Charleston County School District, James Island Charter High School, and Robert Bohnstengel and Stephanie Spann, in their individual capacities, Respondents.

Appellate Case No. 2018-002025

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 28030
Heard December 12, 2019 – Filed May 19, 2021
Refiled August 18, 2021

REVERSED AND REMANDED

J. Lewis Cromer and J. Paul Porter, both of Cromer Babb Porter & Hicks, LLC, of Columbia, for Petitioner.

Rene Stuhr Dukes, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent Robert Bohnstengel; and Caroline Cleveland, Bob J. Conley, and Emmanuel Joseph Ferguson, all of Cleveland & Conley, LLC, of Charleston, for Respondent Stephanie Spann.

CHIEF JUSTICE BEATTY: A civil conspiracy claim brought by Leisel Paradis ("Petitioner") was dismissed by the circuit court for failing to plead special damages, and the dismissal was upheld by the court of appeals. We granted a petition for a writ of certiorari to consider the narrow question whether South Carolina's requirement of pleading special damages should be abolished. We conclude that it should. South Carolina is the only state with this unique requirement as an element, and we find it resulted from a misinterpretation of law. We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state. Consequently, we reverse the decision of the court of appeals and remand the matter to the circuit court for proceedings consistent with this opinion.

I. FACTS

Petitioner, a teacher, filed a complaint asserting a defamation claim against the Charleston County School District and James Island Charter High School (respectively, "the District" and "the High School"). In addition, Petitioner asserted a civil conspiracy claim against the High School's principal and assistant principal, Robert Bohnstengel and Stephanie Spann ("Respondents"),[1] in their individual capacities. Petitioner alleged Respondents targeted her for an unwarranted and invasive performance evaluation because they were unhappy with her desire to report a student's misconduct to the police, causing her to be blacklisted and ostracized and, ultimately, terminated from her teaching position.

The circuit court dismissed both the defamation and the civil conspiracy claims. The circuit court ruled, *inter alia*, that Petitioner failed to plead special damages as required to advance her civil conspiracy claim. The court of appeals affirmed. *Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 819 S.E.2d 147 (Ct. App. 2018). Petitioner sought a writ of certiorari, raising several issues regarding the civil conspiracy claim. This Court granted the petition for a writ of certiorari as to Petitioner's first question, which asks the Court to abolish the rule imposing a special pleading requirement for civil conspiracy claims—i.e., requiring a plaintiff to plead special damages—which evolved after the Court's decision in *Todd v. South*

[1] The District and the High School participated in the appeal below and filed a response to the petition for a writ of certiorari. However, they did not file briefs with this Court, presumably because they were not parties to the civil conspiracy action that is the subject of the appeal to this Court. As a result, "Respondents" shall be used to refer to the individual parties who submitted briefs, Bohnstengel and Spann.

Carolina Farm Bureau Mutual Insurance Co., 276 S.C. 284, 278 S.E.2d 607 (1981). This pleading requirement has been informally referred to as the *Todd* rule.

II. DISCUSSION

Petitioner contends this Court should overrule precedent requiring the pleading of special damages for civil conspiracy claims, which arose after the issuance of the *Todd* decision in 1981. We agree.

Civil conspiracy has long given rise to uncertainty as to its elements and proper application. *See* 4 James Lockhart, *Cause of Action for Civil Conspiracy*, Causes of Action § 4, at 530 (2d ed. 1994) ("The elements of civil conspiracy are not always defined in exactly the same way."). Over 100 years ago, a law professor analyzed the emerging action, noting its varying definitions and the distinction between civil and criminal conspiracy, and he distilled the following core principles:

> A combination between two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, subjects the confederates to criminal prosecution; and, if injury ensues to an individual therefrom, it subjects them to a civil action by their victim.

Francis M. Burdick, *Conspiracy as a Crime, and as a Tort*, 7 Colum. L. Rev. 229, 246 (1907).

South Carolina employed similar language in defining civil conspiracy. In an early case involving motions to strike and to make the pleadings for civil conspiracy more definite and certain, this Court stated:

> [A] definition of conspiracy has been given as the conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.

Charles v. Texas Co., 192 S.C. 82, 101, 5 S.E.2d 464, 472 (1939) (*Charles I*).

The Court reiterated this description in the appeal from the verdict in the same case, finding no error in a jury charge defining a civil conspiracy in these terms. *See Charles v. Texas Co.*, 199 S.C. 156, 176, 18 S.E.2d 719, 727 (1942) (*Charles II*)

("Ordinarily a conspiracy is where two or more persons combine or agree to do something to the detriment or hurt of another. If they agree to do an unlawful thing for the detriment or hurt of another or if they agree to do a lawful thing but agree to do it in an unlawful manner that would be a conspiracy."); *cf. Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 387, 9 S.E.2d 796, 803–04 (1940) (observing "the second cause of action [failed to] allege the required elements of a conspiracy to accomplish an unlawful purpose or a lawful purpose unlawfully").

In *Charles II*, the Court pointed out the "well known principle" that resulting damages are the gist of any civil conspiracy action and an unexecuted conspiracy does not give rise to a civil cause of action. 199 S.C. at 177, 18 S.E.2d at 727. Thus, the Court emphasized that proof of an overt act and resulting damages were also fundamental elements to sustain a civil claim, and it found these points were adequately conveyed in the trial judge's instructions. The Court further explained, "Each conspirator is liable for all damages naturally resulting from any wrongful act of a co-conspirator in exercising the joint enterprise," and "[w]hether the damages proximately resulted from the wrongful act of the conspirators is ordinarily a question for the jury." *Id.* at 174, 18 S.E.2d at 726 (citation omitted).

Appeals involving civil conspiracy were somewhat infrequent immediately following *Charles I* and *Charles II*, but the two decisions were recognized as authoritative, even when later cases did not fully articulate all of the requisite elements. *See, e.g.*, *Lakewood Water Co. v. Garden Water Co.*, 222 S.C. 450, 453, 73 S.E.2d 720, 721 (1952) ("The two decisions of *Charles v. Texas Company*, 192 S.C. 82, 5 S.E.2d 464, and *Id.*, 199 S.C. 156, 18 S.E.2d 719, rather fully enunciate the principles which govern civil actions for conspiracy and they need not be repeated here.").

The definition of civil conspiracy approved in *Charles I* and *Charles II* is also fairly universal in contemporary tort law.[2] *See generally* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("Although stated variously from jurisdiction to jurisdiction, the basic elements of a civil conspiracy are (1) an agreement between two or more individuals,

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[2] Most states provide by common law for the claim, and a few states have also enacted statutes in this regard. *See* 54 James L. Buchwalter, *Cause of Action for Civil Conspiracy*, Causes of Action § 2, at 603 (2d ed. 2012) ("Civil conspiracy is a claim recognized under the common law of most states. A civil conspiracy may also be actionable under state statutes specifically forbidding various types of concerted action for certain purposes." (citation omitted)).

(2) to do an unlawful act or to do a lawful act in an unlawful way, (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators, and (4) pursuant to a common scheme."); 15A C.J.S. *Conspiracy* § 4 (2012) ("The requisite elements [for civil conspiracy] are: (1) a combination between two or more persons; (2) to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means; (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object; (4) which act results in damage to the plaintiff.").

In 1981, however, the Court issued the *Todd* decision, which has been interpreted as creating a new element for civil conspiracy claims in South Carolina—a requirement that a plaintiff plead special damages. In *Todd*, the plaintiff alleged five causes of action stemming from the termination of his employment, and each cause of action incorporated all of the prior allegations: "(1) intentional interference with contractual relations, (2) extreme and outrageous conduct, (3) bad faith termination of the employment contract, (4) invasion of privacy, and (5) conspiracy to so damage the plaintiff." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 287, 278 S.E.2d 607, 608 (1981). One of the issues considered by the Court was whether Todd's fifth cause of action stated a claim for civil conspiracy. *Id.* at 292, 278 S.E.2d at 610.

The *Todd* Court began by citing, *inter alia*, *Charles I*, and stating: "Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Id.* at 292, 278 S.E.2d at 611. The Court generally observed the difference between a criminal conspiracy and a civil conspiracy is that the agreement is the gravamen of the offense of criminal conspiracy, whereas "the gravamen of the tort [of civil conspiracy is] the damage resulting to [the] plaintiff from an overt act done pursuant to the common design." *Id.* (citing a former version of *Corpus Juris Secundum*).[3] The Court reiterated that a civil conspiracy becomes actionable only once overt acts occur that proximately cause damage to the plaintiff; therefore, "conspiracy in and of itself is not a civil wrong." *Id.* (citation omitted).

The Court found Todd did not plead overt acts in furtherance of the conspiracy, so the complaint failed to state a claim for civil conspiracy as a matter of law:

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[3] Similar language is in the updated version. *See* 15A C.J.S. *Conspiracy* § 104 (2012) (distinguishing civil and criminal conspiracy).

> As noted, the fifth cause of action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. *No additional acts in furtherance of the conspiracy are plead*. The only alleged wrongful acts plead are those for which damages have already been sought. . . .
>
> The trial judge erred by overruling the demurrer to the conspiracy cause of action in the complaint, since Todd can recover no additional damages for the alleged fifth cause of action. The rule applicable to these pleadings is stated at 15A C.J.S. Conspiracy § 33, at 718.
>
>> "Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong."
>
> Todd seeks damages in his first four causes of action *for the same acts* incorporated by the fifth cause. He is therefore precluded from seeking damages *for the same acts yet again*. As such, the fifth cause fails to state an action.

Id. at 293, 278 S.E.2d at 611 (emphasis added). Although *Todd* ostensibly spoke in terms of the failure to plead *additional acts* to support the civil conspiracy claim and not allowing duplicative recoveries for the same acts, cases after *Todd* began enumerating three required elements to assert an allegation of civil conspiracy, including the element of pleading "special damage":

> A civil conspiracy . . . consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10, 344 S.E.2d 379, 382 (Ct. App. 1986); *accord Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 600, 358 S.E.2d 150,

152 (Ct. App. 1987) (citing *Lee* and its three-part definition of civil conspiracy); *Yaeger v. Murphy*, 291 S.C. 485, 487, 354 S.E.2d 393, 394 (Ct. App. 1987) (citing the definition in *Lee*).

While the requirement of pleading special damages became known as the *Todd* rule, notably none of the foregoing cases (*Lee*, *Island Car Wash*, and *Yaeger*) specifically cited *Todd* for the three-part definition of civil conspiracy incorporating this element. *Island Car Wash* and *Yaeger* relied solely on the definition in *Lee* and did not cite *Todd* for any legal proposition. *Lee* did cite *Todd*, but it was in the context of distinguishing civil and criminal conspiracy and reiterating the need to show an overt act and resulting damage for a civil claim.

In *Lee*, the court of appeals indicated the parties had confused civil and criminal conspiracy. 289 S.C. at 10, 344 S.E.2d at 381. The court stated the definition involving an agreement to undertake "an unlawful act or a lawful act by unlawful means" defined only a criminal conspiracy, and instead enumerated a three-part test for a civil action—"(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." *Id.* at 10, 344 S.E.2d at 382. In doing so, it cited this Court's decision in *Charles I*, along with a 1915 Tennessee decision and several United Kingdom cases.[4] *Id.*

We note this Court's precedent demonstrates the definitional elements of civil conspiracy actually parallel the elements of criminal conspiracy.[5] *See Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (observing the elements of criminal conspiracy and civil conspiracy "are quite similar" and noting

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[4] While the United Kingdom cases have some efficacy, we do not find them determinative of South Carolina law. In particular, we note some of the decisions consist of a collection of individual determinations, with each individual expressing his own, singular opinion. Although such decisions reach one ultimate result, they are not all in agreement in their reasoning.

[5] *See* S.C. Code Ann. § 16-17-410 (2015) ("The common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means."); *see also State v. Davis*, 88 S.C. 229, 232, 70 S.E. 811, 812–13 (1911) ("[T]he description which seems to have the widest recognition and approval by the authorities declare a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." (citation omitted)).

civil conspiracy turns on the existence of damages). The similarity is logical because the major difference between civil and criminal conspiracy is a plaintiff's need to additionally prove an overt act and resulting damages to obtain a civil recovery. *See* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("The elements of civil conspiracy are quite similar to those required of a criminal conspiracy, with the distinguishing factor being that an agreement is the essence of a criminal conspiracy, while damages are the essence of a civil conspiracy."); *id.* § 55 ("The gist of a civil conspiracy is not the unlawful agreement or combination but *the damage caused by the acts committed in pursuance* of the formed conspiracy." (emphasis added)); *see also* 15A C.J.S. *Conspiracy* § 7 (2012) ("Although criminal and civil conspiracy have similar elements, the distinguishing factor between the two is that damages are the essence of a civil conspiracy, and the agreement is the essence of a criminal conspiracy.").[6]

Later cases began reciting *Lee*'s three-part test for civil conspiracy that developed post-*Todd* and which included the requirement of pleading special damages. *See LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *see also Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006); *Lawson v. S.C. Dep't of Corr.,* 340 S.C. 346, 532 S.E.2d 259 (2000); *Future Group II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Inexplicably, this new requirement for special damages was labeled the *Todd* rule.

Although the Court did not mention "special damages" in *Todd*, several years after *Todd* a few cases, such as *Lee*, 289 S.C. at 10, 344 S.E.2d at 382, recited the three-part test for civil conspiracy that appeared to contain the pleading requirement as an element of the claim. This definition, in turn, was then quoted repeatedly by our appellate courts. This pleading requirement became known as the *Todd* rule.

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[6] In a case discussing criminal conspiracy, this Court has observed that "unlawful" merely means "contrary to law" and is not limited to criminal conduct. *State v. Davis*, 88 S.C. 229, 233, 70 S.E. 811, 813 (1911) ("It is enough if the acts agreed to be done, although not criminal, are wrongful; that is amount to a civil wrong." (citations omitted)). As for civil conspiracy, early English law has noted that, "[i]n view of the infinite variations of oppressive misconduct[,] no definition [of "unlawful means"] can be given which is at once satisfactory and exhaustive." *Pratt v. Brit. Med. Ass'n*, [1919] 1 K.B. 244, 260 (1918). However, *Pratt* stated precedent recognized that violence or threats of physical violence, threats not involving physical harm, nuisance, and fraud, are readily encompassed, although they are not the only examples. *See id.* at 260–61.

See, e.g., *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 ("hold[ing] the conspiracy action is barred under *Todd*" where special damages were not properly alleged). However, the pleading requirement's relationship to *Todd* is rendered somewhat tenuous because, as previously noted, the earliest cases did not specifically cite *Todd* for this requirement. *See, e.g.*, *Island Car Wash*, 292 S.C. at 600, 358 S.E.2d at 152; *Yaeger*, 291 S.C. at 487, 354 S.E.2d at 394.

This test resulted in the dismissal of civil conspiracy actions that did not expressly plead special damages on the basis they failed to adequately allege a cause of action. South Carolina courts held that, because special damages are a required element of a civil conspiracy claim, a plaintiff must plead special damages that go beyond the damages alleged in other claims to state a cause of action. Those cases further stated that, if a plaintiff merely repeated the damages from another claim without specifically listing special damages as part of the civil conspiracy allegation, then the civil conspiracy action must be dismissed. *See, e.g.*, *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim *instead of specifically listing special damages* as part of their civil conspiracy claim, their conspiracy claim should be dismissed." (emphasis added)); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*.").[7]

We granted Petitioner's motion to argue against the *Todd* rule in the current case, where her civil conspiracy claim was dismissed at the pleadings stage for the failure to plead special damages.[8] Petitioner contends the requirement of pleading special damages for civil conspiracy should be abandoned because it resulted from,

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[7] The law requiring the dismissal of a civil conspiracy claim for failing to plead special damages has also been cited in federal courts applying South Carolina law. *See, e.g.*, *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015); *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F. Supp. 2d 645 (D.S.C. 2009).

[8] The *Todd* rule requiring the pleading of special damages was previously called into question in another case before this Court, but we declined to abandon the rule at that time because a trial had been held some twelve years prior in that matter, and there was concern that it would be unfair to change the requirements for pleadings and proof upon remand, given the age of the case. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 34 n.3, 791 S.E.2d 140, 145 n.3 (2016).

inter alia, a misreading of *Corpus Juris Secundum*. We agree the *Todd* rule should be abolished.

In *Todd* the Court cited 15A C.J.S *Conspiracy* § 33 and held a plaintiff in a civil conspiracy action must allege acts in furtherance of the conspiracy. The Court noted the only wrongful acts alleged were those for which damages had already been sought, so the claim failed as a matter of law. This was taken in cases after *Todd* as imposing a requirement of pleading (and proving) special damages for a civil conspiracy claim. We find this section of *Corpus Juris Secundum* simply addressed a prohibition on duplicative recoveries; it did not establish a requirement of pleading special damages for civil conspiracy claims. The plaintiff in *Todd* failed to plead any overt acts in furtherance of the conspiracy. Thus, the Court correctly concluded the civil conspiracy claim failed as a matter of law. In that situation, the Court noted, the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim.

We note that, in addition to perhaps resulting from a misinterpretation of *Corpus Juris Secundum* and *Todd*, the pleading requirement for civil conspiracy also perhaps resulted, at least in part, from differing interpretations of the term "special damages." Traditionally, general damages are implied by law and can be alleged without particularity because they are the proximate and foreseeable consequences of the defendant's conduct. Special damages, in contrast, are those that might be the natural result of an injury, but not the necessary or usual consequences of the defendant's conduct, and they typically are unique to a particular case. *See* 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1310 (4th ed. 2018) (distinguishing general and special damages). Under the South Carolina Rules of Civil Procedure ("SCRCP") and under the federal procedural rules, special damages must be specifically pled to avoid surprise and give notice to the opposing party. *See, e.g.*, Rule 9(g), SCRCP.

In this context, however, it seems South Carolina precedent has varied in what it considers "special damages." *See generally* Michael G. Sullivan, *Elements of Civil Causes of Action* 89–90 (5th ed. 2015, Douglas MacGregor, ed.) ("The requirement that the plaintiff plead special damages means essentially this - that the complaint must describe damages that occurred as a result of the conspiracy in *addition* to any alleged as a result of other claims."). *But see Hackworth*, 385 S.C. at 116–17, 682 S.E.2d at 875 ("Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. . . . Special damages . . . are not implied at law because they do not necessarily result from the wrong. Special damages must, therefore, be specifically alleged in the complaint to

avoid surprise to the other party." (internal citation omitted)). We further note the SCRCP, which require that special damages be specifically pled, were not in effect at the time *Todd* was decided.

The essential principle *Todd* intended to address was the need to plead an overt act in furtherance of the agreement, not special damages. As a result, we overrule *Todd* and cases relying on *Todd* or other precedent, such as *Lee*, to the extent they impose or appear to impose a requirement of pleading (and proving) special damages. South Carolina's position in this regard was an outlier, as our research indicates South Carolina was the only state to require the pleading of special damages.

In light of our decision today, we are returning to our long-standing precedent pre-*Todd* and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.[9] *See Charles II*, 199 S.C. at 176, 18 S.E.2d at 727; *Charles I*, 192 S.C. at 101, 5 S.E.2d at 472; *see also* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. *Conspiracy* § 4 (2012) (same). By doing so, we are returning not only to our historical roots, but also to the traditional elements of a civil conspiracy claim as they have been similarly defined by the majority of jurisdictions.[10]

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[9] Since civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis. *See* 16 Am. Jur. 2d Conspiracy § 53 (2020) ("Since one cannot agree, expressly or tacitly, to commit a wrong about which they have no knowledge, in order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong." (footnotes omitted)).

[10] Most states incorporate the elements of an agreement to do an unlawful act or a lawful act by unlawful means (or the common variation of an unlawful purpose or a lawful purpose by unlawful means). *See, e.g.*, *Harp v. King*, 835 A.2d 953, 972 (Conn. 2003); *Mustaqeem-Graydon v. SunTrust Bank*, 573 S.E.2d 455, 461 (Ga. Ct. App. 2002); *Yoneji v. Yoneji*, 354 P.3d 1160, 1168 (Haw. Ct. App. 2015); *Hall v. Shaw*, 147 N.E.3d 394, 407–08 (Ind. Ct. App. 2020); *Coghlan v. Beck*, 984 N.E.2d

We disagree with the concurring/dissenting opinion to the extent it goes beyond the sole question accepted by this Court—which asks, "Should the Court reverse the special damages pleading requirement on civil conspiracy claims arising from Todd v. S.C. Farm Bureau Mut. Ins. Co.?"— and appears to consider a point raised by Respondents in their brief. Namely, whether civil conspiracy itself should be "abolished" as an independent claim in this state and should, instead, always be dependent on an underlying actionable wrong or tort. Respondents have not cross-appealed in this matter, and we reject Respondents' attempt to advance this issue for the first time on appeal. Any further arguments potentially affecting the viability of Petitioner's claim, whether they arise from this Court's decision or otherwise, are properly raised upon remand to the circuit court, in the first instance, particularly where the case was halted at the pleadings stage.

We note a few jurisdictions recognize two forms of civil conspiracy. The first, which is the general rule, requires an underlying actionable wrong or tort, and liability is imposed on an individual for the tort of another. A second form, also described as an exception to the general rule, exists when the conduct complained of would not be actionable if done by one person, but where by force of numbers or other exceptional circumstances, the defendants possess a peculiar power of coercion that gives rise to an independent tort of civil conspiracy (often referred to as the "force of numbers" or "economic boycott" exception). *See Am. Diversified Ins. Servs., Inc. v. Union Fid. Life Ins. Co.*, 439 So. 2d 904 (Fla. Dist. Ct. App. 1983); *Baker v. Wilmer Cutler Pickering Hale & Dorr LLP*, 81 N.E.3d 782 (Mass. App. Ct. 2017); *see also Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013)

132, 151 (Ill. App. Ct. 2013); *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 260–61 (Ky. Ct. App. 2008); *Franklin v. Erickson*, 146 A. 437, 438 (Me. 1929); *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 428 (Md. 2009); *Swain v. Morse*, No. 346850, 2020 WL 3107696, at *7 (Mich. Ct. App. June 11, 2020); *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013); *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. Ct. App. 2008); *George Clift Enters., Inc. v. Oshkosh Feedyard Corp.*, 947 N.W.2d 510, 537 (Neb. 2020); *Jay Edwards, Inc. v. Baker*, 534 A.2d 706, 709 (N.H. 1987); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253, 263 (N.J. 2005); *In re Fifth Third Bank, N.A.*, 719 S.E.2d 171, 181 (N.C. Ct. App. 2011); *Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013); *Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. Ct. 2008); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002); *Pohl, Inc. of Am. v. Webelhuth*, 201 P.3d 944, 954–55 (Utah 2008); *Wilson v. State*, 929 P.2d 448, 459 (Wash. Ct. App. 1996); *N. Highland Inc. v. Jefferson Mach. & Tool, Inc.*, 898 N.W.2d 741, 747 (Wis. 2017).

(observing "[s]ome courts have applied an 'economic boycott' or 'force of numbers' exception to the general rule that the basis for a civil conspiracy must be an independent wrong or tort," but not deciding whether to adopt the exception in that state because it would not be applicable, in any event). Early South Carolina law pre-*Todd* appeared to reference similar concepts. *See, e.g.*, *Howle v. Mountain Ice Co.*, 167 S.C. 41, 58, 165 S.E. 724, 729 (1932); *Charles II*, 199 S.C. at 170, 18 S.E.2d at 724. However, to rule on whether this Court has or ever will recognize an exception to the general rule would require the Court to issue an advisory opinion on a distinct subject that has not yet been disputed in this case.

III. CONCLUSION

Because the court of appeals upheld the dismissal of Petitioner's civil conspiracy claim based on the failure to plead special damages, we reverse and remand the matter to the circuit court for further proceedings on Petitioner's claim for civil conspiracy. Our decision in Petitioner's case is based solely on the narrow question before the Court regarding the abolishment of the *Todd* rule, and we do not reach any other issue concerning the viability or merits of Petitioner's claim. Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis.

REVERSED AND REMANDED.

HEARN and JAMES, JJ., concur. KITTREDGE, J., concurring in result in a separate opinion. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur in result. In overruling the so-called "special damages" requirement of *Todd v. South Carolina Farm Bureau Mutual Insurance Co.*,[11] the Court must necessarily examine the elements of civil conspiracy. I commend Chief Justice Beatty for his excellent opinion, which tracks this Court's meandering civil conspiracy jurisprudence and properly restores the elements of a civil conspiracy claim to its original understanding. As a result of today's opinion, it is again settled that a civil conspiracy claim requires proof of (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. Stated differently, we have abandoned the standardless formulation that required only (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) which caused the plaintiff special damage. I write separately to address the effect of *Todd* on the election of remedies and note my support for the concurrence of Justice Few.

First, in my judgment, *Todd* is more properly viewed as an election of remedies case, not a pleading case. *Todd* created a fiction that special damages caused by the civil conspiracy were somehow different than the damages caused by the underlying unlawful conduct. That misunderstanding, in turn, led to a misapplication of our election of remedies law. Because a civil conspiracy claim was purportedly supported by special damages, some trial courts would avoid an election of remedies and permit a double recovery. Today's rejection of a special damages requirement should restore a proper approach to election of remedies. For one wrong, there is one recovery.

Next, I view Justice Few's concurrence as well within the question accepted by this Court for review. The misguided pleading rule that grew out of *Todd* spawned a series of cases that further separated civil conspiracy from its original moorings. Justice Few compellingly frames the amorphous nature of the civil conspiracy cause of action that resulted from *Todd* and its progeny. It is the second element—to commit an *unlawful act* or a lawful act by *unlawful means*—that restores an objective legal standard to this cause of action. When the appellate courts of this state approved of an analytical framework that allowed one's personal sense of fairness and right and wrong to be sufficient for a civil conspiracy claim, we created a rudderless cause of action. Justice Few correctly observes that the post-*Todd*

[11] 276 S.C. 284, 278 S.E.2d 607 (1981).

sanctioned civil conspiracy claim "permit[ted] the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror's sense of fairness or responsibility." I do not construe Justice Few's concurrence as "abolishing" civil conspiracy. Rather, by restoring the traditional elements of a civil conspiracy claim and overruling *Todd*'s so-called special damages pleading requirement, this Court returns civil conspiracy to its historical roots. Because the Court has reset the elements of civil conspiracy and restored an objective standard, I would apply today's decision prospectively with one exception: for those cases that were tried under the *Todd* rubric and are on appeal now, I would evaluate the merits of the appeal under the *Todd* framework.

transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."). Accordingly, the family court did not err in finding Ponderosa was transmuted.

IV. Retirement Account

Husband argues the family court erred by not dividing the parties' retirement accounts equally. We disagree.

The family court found that all of the funds in Husband's retirement account were acquired during the marriage, while most, but not all, of Wife's funds were acquired during this time. Because Wife had funds rolled over into her retirement account from a job she had prior to the marriage, the court found that the premarital portion of Wife's retirement was nonmarital. As such, the court found the value of Husband's retirement account subject to division was $17,366.49,[8] and Wife's was $185,000.

Further, the family court found that while Husband's availability due to shift work and periods of unemployment allowed Wife to work more and progress in her career to some extent, there was evidence that established Husband undertook more leisure activities than Wife during his free time and did side work in order to obtain benefits primarily for himself (fishing, hunting, etc.). Meanwhile, Wife worked overtime and used that income to cover shortfalls in marital expenses. As such, the court found that each party was entitled to 45% of the other party's retirement. This meant that Wife was entitled to 45% of husband's marital retirement, totaling $7,814.92, while Husband was entitled to 45% of Wife's marital retirement, totaling $83,250.00.[9]

"When distributing marital property, the family court should consider all fifteen factors set forth in the Code." *Craig v. Craig*, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). These factors are as follows: (1) the duration of the marriage; (2) marital misconduct or fault of the parties; (3) the parties' contributions; (4) the income of each spouse; (5) the health of each spouse; (6) each spouse's need for training or education; (7) the nonmarital property of each spouse; (8) the parties'

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[8] The parties separated at the end of March 2016, and Husband filed for divorce on April 1, 2016.

[9] In its final order and amended final order, the family court erroneously wrote this figure as $82,350.00.

retirement benefits; (9) the existence of a spousal support award; (10) the use of the marital home; (11) any tax consequences; (12) the existence of any support obligations; (13) any lien or encumbrances on marital property; (14) child custody arrangements and obligations; and (15) such other relevant factors as the court enumerates in its order. S.C. Code Ann. § 20-3-620(B) (2014).

Here, the record reflects that the family court considered all factors set forth in the Code. In deviating from the standard 50% division, the court cited the fact that throughout the marriage, Husband failed to maximize his employment opportunities while Wife sacrificed possible leisure time to work overtime and advance in her career. We find the court did not err in its division of the retirement accounts. *See Fitzwater v. Fitzwater*, 396 S.C. 361, 370–71, 721 S.E.2d 7, 12 (Ct. App. 2011) (awarding a husband 60% of the marital estate because "[the w]ife brought in little to no money or assets during the marriage, while [the husband] provided the majority of income and assets").

V. Alimony

Husband argues the family court erred by denying his request for alimony, citing the fact that he is "crippled by significant debt." We disagree.

In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014).

In denying Husband's request for alimony, the family court noted the following relevant facts: (1) the twelve-year duration of the marriage; (2) both parties were in good health and able to support themselves through their work in the coming decades; (3) Wife possessed a nursing degree with twenty-three years of experience, while Husband had some college credits, a commercial driver's license, and boat mechanic certification; (4) both parties worked throughout the thirteen-year marriage, but Husband, having college credits and specialized training, failed to maximize his earning potential, such as failing to seek management positions in the

course of his employment;[10] (5) the parties enjoyed a middle-class standard of living during the marriage and were each able to maintain a standard of living similar to, albeit more modest than, that enjoyed during the marriage upon the divorce; (6) both parties were capable of supporting themselves financially into the future; (7) Husband had the expense of Ponderosa, which still carried a mortgage; (8) the parties each had a home—Harbor Place and Ponderosa; (9) although the parties were sharing custody of the children and Husband was paying child support, most of the burden of supporting the children on a daily basis would continue to fall on Wife; (10) there were no fault grounds pled and no evidence of fault for the breakdown of the marriage; (11) the division of property would not create any adverse tax consequences for either party; (12) neither party had prior support obligations; and (13) Husband testified that Wife was not responsible for many of the changes in his standard of living.

The record reflects that the family court considered all factors set forth in the Code. Further, Husband conceded at the final hearing that Wife was not responsible for his current financial predicament. Accordingly, we find the court did not err by denying Husband's alimony request.

VI. Tax Returns

Husband argues the family court erred in finding that each party is liable for their own 2016 income taxes. He contends that he "is entitled to, at least, one-quarter of the combined tax refund for 2016 received by Wife (or $3,122.75) and contribution from Wife for one-quarter of [his] 2016 combined tax obligation (or $940) in a total amount of $4,062.75." We disagree.

In its order, the family court found that the 2016 tax returns' liabilities and refunds were substantially accrued after the filing of the action and the evidence was insufficient to allow the family court "to determine each party's contribution to the accumulation of the assets or creation of the liability pre-filing." We agree with the family court that the filing of separate returns was appropriate. Husband chose to separate from Wife three months into the year. Considering the parties were separated for three-fourths of the year, it is logical that they would file separate returns. Husband presented no evidence that Wife was required to file a joint return

[10] The family court noted that "[h]ad [Husband] maximize[d] his certification as a boat mechanic[] to become a Master Mechanic, his income could have been as high as $85,000.00/year."

with him.[11] We find credible Wife's testimony that her accountant advised her that it would be more advantageous to file a separate return due to Wife's pay increase. Accordingly, the family court did not err.

VII. Attorney's Fees

Husband argues the family court erred by denying his request for attorney's fees.[12] We disagree.

In determining whether to award attorney's fees, the family court must consider "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). In determining what amount in attorney's fees is reasonable, a court should then consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In its order, the family court delineated its consideration of the *E.D.M.* and *Glasscock* factors, finding the following: (1) The nature, extent, and difficulty of the legal services rendered were not of a complex nature; (2) both parties devoted a great deal of time to the case; (3) both counsel in the case enjoyed good standing as legal professionals before the court and the local legal community; (4) neither party had entered into contingency fee arrangements with their respective counsel, and each party had accrued moderate fee amounts; (5) both parties obtained some beneficial results through the litigation; (6) neither party could pay the entire amount of attorney's fees charged by their counsel; however, both could afford to pay their own respective fees based on their income or income prospects; (7) the hourly rates charged by both counsel were customary for similar services; (8) both parties were capable of being gainfully employed, and although Husband was currently unemployed, given his age and experience in his industry, he had the ability to become professionally successful for the foreseeable future; and (9) awarding attorney's fees would affect each party's standard of living. The family court found that neither party was in a position to pay the total amount of their own attorney's

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[11] Husband testified that he did not remember whether he verbally gave Wife the choice on how to file the tax return.
[12] Husband requested $41,334.63 in attorney's fees.

fees—let alone the other party's. As aforementioned, Husband conceded that his current financial situation resulted from events that occurred after he separated from Wife, and he conceded that Wife is not at fault for his change in his standard of living. Wife has physical custody of the parties' two children and, as such, is primarily responsible for providing for the children's care. Therefore, we find denying Husband's request for attorney's fees was proper in this matter.

CONCLUSION

Based on the foregoing, we affirm the family court's order on all issues with the exception of issue 2. We reverse the family court's order on issue 2 and find Husband is entitled to half of the reduction in mortgage indebtedness as special equity, in addition to the amount previously ordered by the family court.

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Property and Casualty Insurance Guaranty Association, Respondent,

v.

South Carolina Second Injury Fund, Appellant.

IN RE:

Michael Quarles, Employee/Claimant,

v.

Cryovac Sealed Air Corporation, Employer, and Lumbermens Mutual Casualty Company in Liquidation/South Carolina Property and Casualty Insurance Guaranty Association, Carrier/Defendants.

Appellate Case No. 2019-000020

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5849
Submitted June 1, 2021 – Filed August 18, 2021

AFFIRMED

Robert Merrel Cook, II, of The Robert Cook Law Firm, LLC, of Batesburg-Leesville, and Andrew F. Lindemann,

of Lindemann & Davis, P.A., of Columbia, both for Appellant.

Joseph Hubert Wood, III, of Wood Law Group, LLC, of Charleston, for Respondent.

THOMAS, J.: In this workers' compensation case, the South Carolina Second Injury Fund (the Fund) appeals from the circuit court's order affirming the decision of the South Carolina Workers' Compensation Commission (the Commission) to order the Fund to make reimbursements to the South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association) for workers' compensation benefits paid by the Guaranty Association for an insolvent insurer. The Fund argues the circuit court and the Commission erred in (1) ruling the Guaranty Association meets the statutory definition of insurer or carrier and is entitled to seek reimbursement from the Fund; (2) concluding the Guaranty Association paid assessments to the Fund and is eligible to seek reimbursement from the Fund; and (3) ruling the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund. We affirm.

FACTS

Michael Quarles was injured on the job on December 17, 1999. Pursuant to an agreement entered into between Lumbermens Mutual Insurance Company (Lumbermens) and the Fund, the Fund reimbursed Lumbermens for payments it made for Quarles' injury in numerous installments from November 25, 2003 through January 26, 2014.[1] Lumbermens was liquidated via an order of the Circuit Court of Cook County, Illinois, dated May 8, 2013. As a result, the Guaranty Association became responsible for Quarles' claim pursuant to the terms and provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act (the Guaranty Act). *See* S.C. Code Ann. § 38-31-10 et seq. (2015). Under the Guaranty Act, the Guaranty Association was considered the

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[1] The Fund was created by South Carolina Code section 42-7-310 (2015) for the purpose of reimbursing employers or carriers for paid compensation or medical benefits. The Fund was terminated on July 1, 2013, by South Carolina Code section 42-7-320 (2015).

insurer to the extent of its obligation on Quarles' covered claim and had all rights, duties, and obligations of Lumbermens, as if Lumbermens had not become insolvent. *See* S.C. Code Ann. § 38-31-60(b) (2015). According to the deposition testimony of the Guaranty Association's Executive Director, the Guaranty Association was responsible for and paying for Quarles' claim as a covered workers' compensation claim under the Guaranty Act.

On June 17, 2013, the Guaranty Association and the Fund entered into a settlement agreement and release of claims. The agreement stated it concerned the Guaranty Association's claims against the Fund for reimbursement from the Fund for payments on behalf of "certain insureds of Legion Insurance Company, in liquidation and its subsidiaries, including, but not limited to, Villanova Insurance Company" and "Reliance Insurance Company in liquidation, and its subsidiaries, including, but not limited to, Reliance National Indemnity Company, Reliance National Insurance Company, and United Pacific Insurance." The Fund agreed to pay the Guaranty Association $2,900,000 for claims pending against the Fund related to Legion and/or Reliance in exchange for a release of those claims.

The Guaranty Association submitted a claim to the Fund on December 8, 2016, seeking reimbursement for the workers' compensation benefits it paid on behalf of Lumbermens. *See* S.C. Code Ann. §§ 42-9-400, -410 (2015) (providing reimbursement from the Fund). The Fund denied the claim, asserting (1) the Guaranty Association was not statutorily authorized to seek reimbursement from the Fund; (2) the Guaranty Association did not directly participate in funding the Fund; and (3) the 2013 settlement and release between the parties barred the claim for reimbursement. The Single Commissioner ordered the Fund to reimburse the Guaranty Association in accordance with the terms of the previously-approved agreement between the Guaranty Association and the Fund.

The Fund filed a Form 30 Request for Commission Review of the Single Commissioner's order. The Appellate Panel affirmed the Single Commissioner's order in its entirety. The Fund then filed an appeal with the circuit court.[2] After a hearing, the circuit court affirmed the Commission's findings of fact, conclusions

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[2] The date of accident pre-dated the amendment to South Carolina Code section 42-17-60 (2015), which provided for direct appeals from the Commission to this court.

of law, and order awarding reimbursement to the Guaranty Association. This appeal follows.

LAW/ANALYSIS

I. Statutory Definition

The Fund argues the circuit court and the Commission erred in ruling the Guaranty Association meets the statutory definition of insurer or carrier and is entitled to seek reimbursement from the Fund. We disagree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* When interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. "[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Statutory interpretation is a question of law, which this court is "free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

The Fund was established to make reimbursements to an employer or carrier. S.C. Code Ann. § 42-7-310. Section 42-7-310(d)(2) provides the term "carrier" as used in the section "includes all insurance carriers, self-insurers, and the State Accident Fund." Pursuant to the agreement entered into between Lumbermens and the Fund, the Fund agreed to reimburse Lumbermens for payments it made for Quarles' injury and did so through January 26, 2014. Although the Fund was terminated on July 1, 2013, by section 42-7-320[3], subsection 42-7-320(B)(3) specified "[i]nsurance carriers, self-insurers, and the State Accident Fund remain[ed] liable for [the Fund] assessments, as determined by the State Fiscal Accountability Authority, in order to pay accepted claims" and that the Fund "shall continue reimbursing employers and insurance carriers for claims accepted by the

[3] S.C. Code Ann. § 42-7-320.

[F]und on or before December 31, 2011." "[The] Guaranty [Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014). "The legislature has chosen to define a 'covered claim' as a claim arising from an insolvent insurer . . . ." *Id.*

The Commission noted that section 38-31-60(b) provides the Guaranty Association "is considered the insurer to the extent of its obligation on . . . covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Thus, the Guaranty Association is considered the insurer to the extent of its obligation on Quarles' covered claims, and the record established the matter involved a covered workers' compensation claim for which the Guaranty Association was responsible for paying the full amount under section 38-31-60(a). S.C. Code Ann. § 38-31-60(a)–(b). The Commission found it "self-evident that [the Guaranty Association] would not be responsible for paying this claim and would have no reason to be seeking reimbursement from [the Fund] if it was not so authorized." The Commission further found "one of Lumbermens' rights assumed by [the Guaranty Association] is the right to reimbursement from [the Fund] pursuant to, and in accordance with, the approved Agreement to Reimburse Compensation." Finally, the Commission concluded,

> [T]he terms and provisions of [South Carolina Code] § 38-31-90 and § 38-31-100 [(2015)] are not exclusive with regard to [the Guaranty Association's] rights of recoupment and setoff and do not abrogate the rights of an insolvent insurer under the Workers' Compensation Act which [the Guaranty Association] maintains pursuant to § 38-31-60(b).

The circuit court affirmed the Commission's order.

The Fund argues the General Assembly intended that the Guaranty Association should not be treated as a "carrier" for purposes of reimbursement by the Fund. In support, the Fund asserts section 42-1-560, titled "Right to compensation not affected by liability of third party," defined the term "carrier" to explicitly include an association:

> The respective rights and interests of the injured employee, or, in the case of his death, his dependents and any person entitled to sue therefor, and of the employer or person, association, corporation or carrier liable for the payment of compensation and other benefits under this title, hereinafter called the "carrier," in respect to the cause of action and the damages recovered shall be as provided by this section.

S.C. Code Ann. § 42-1-560(a) (2015). Thus, the Fund maintains the General Assembly did not intend for the Guaranty Association to be included in the definition of "carrier" with respect to reimbursement from the Fund. The Fund argues section 38-31-60(b) has limiting language that provides the Guaranty Association is considered an "insurer" only with respect to its "[o]bligations on covered claims," which consists of its liabilities to consumers and not its ability to file claims or seek reimbursement from third parties such as the Fund. Therefore, it asserts the Guaranty Association enjoys "all rights, duties, and obligations of the insolvent insurer" but only with respect to its liability for covered claims. Further, the Fund argues section 38-31-90(2) authorizes the Guaranty Association to recover the amount of any "covered claim" against certain insureds with a high net worth or against "an affiliate of the insolvent insurer" but does not include any other provision authorizing the Guaranty Association to recover the amount of any "covered claim" from any other entity, including the Fund. S.C. Code Ann. § 38-31-90(2) (2015). Finally, the Fund argues the Guaranty Association and the Fund are funded by assessments collected from the same workers' compensation carriers; thus, allowing the Guaranty Association to be reimbursed from the Fund "would be a circuitous action that is largely a meaningless exercise and a waste of resources that substantially originate from the same source."

Our supreme court has said the Guaranty Association is an insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent, and Lumbermans became insolvent while it was paying for Quarles' covered claims. *See Hudson*, 407 S.C. at 124, 754 S.E.2d at 492 ("[The] Guaranty [Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent."). Thus, under the statutory authority, the Guaranty Association is considered the insurer to the extent of its obligation on Quarles' covered claims. Viewing the statute as a whole, we agree with the circuit court and the Commission that the Guaranty Association meets the

statutory definition of an insurer or carrier and is entitled to seek reimbursement from the Fund.

II. Assessments

The Fund argues the circuit court and the Commission erred in concluding the Guaranty Association paid assessments to the Fund and is eligible to seek reimbursement from the Fund. We disagree.

Section 42-7-310(d)(2) provides the continuing funding of the Fund would be made by "'equitable assessments upon each carrier, which . . . included all insurance carriers, self-insurers, and the State Accident Fund." Section 38-31-40 states the Guaranty Association is "a nonprofit unincorporated legal entity" and "all insurers defined as member insurers in section 38-31-20(8) are members of the [Guaranty Association] as a condition of their authority to transact insurance in [South Carolina]." S.C. Code Ann. § 38-31-40 (2015).

The Commission found the Fund never assessed the Guaranty Association, and pursuant to section 38-31-40, the Guaranty Association's workers' compensation member insurers paid assessments to the Fund. The Commission noted the Guaranty Association's member insurers paid assessments in accordance with a funding mechanism plan adopted by the State Fiscal Accountability Authority, and there was no indication that any of the member insurers were delinquent in their payment of assessments to the Fund. The Commission determined the Fund had assessed and would continue to assess the Guaranty Association's member insurers for its obligations on the claim. Therefore, the Commission found the Fund's assertion that the Guaranty Association's reimbursement claim was barred for failure to pay assessments was without merit and the Guaranty Association, as an unincorporated entity, effectively paid assessments to the Fund via the assessments paid by its member insurers. The Commission further determined Lumbermens was not in default or delinquent with respect to payment of its assessments and Lumbermens had paid all amounts assessed by the Fund. Finally, the Commissioner concluded:

> Lumbermens' non-participation in the assessment process subsequent to its liquidation [was] not material given that it [was] not in default or delinquent with respect to payment of its assessments; the fact that its assessments

> would go to zero once it went into liquidation and stopped paying claims and the assessments paid by [the Guaranty Association's] member workers' compensation insurers in accordance with the five year/$60,000,000 per year funding plan adopted by [the State Fiscal Accountability Authority] in connection with which [the Fund's] liability for reimbursement on this claim was considered and included.

The Fund argues the Guaranty Association does not qualify as an "insurance carrier" to whom reimbursement may be made because the Guaranty Association does not pay any assessments to the Fund. The Fund acknowledges the Guaranty Association's member insurers are sources of funding for the Fund, but it argues those insurers are paying the assessments because they individually qualify as "carriers" that are statutorily responsible to pay assessments to the Fund and are not paying the assessments for or on behalf of the Guaranty Association.

The Guaranty Association's member insurers paid assessments to the Fund pursuant to section 38-31-40, and there was no indication that any of the member insurers were delinquent in their payment of assessments to the Fund. Thus, we agree with the circuit court and the Commission that the Guaranty Association effectively paid assessments to the Fund via the assessments paid by its member insurers and is, thus, eligible to seek reimbursement from the Fund.

III. Prior Settlement Agreement and Release

The Fund argues the circuit court and the Commission erred in ruling the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund. We disagree.

"A release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). The primary objective in construing a contract is to ascertain and give effect to the intention of the parties. *Id.* "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Id.* (quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)). "To discover the intention of

a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Id.* at 498, 649 S.E.2d at 501. "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Id.* at 498, 649 S.E.2d at 502. "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). If the court decides the language is ambiguous, "evidence may be admitted to show the intent of the parties," and the determination of the parties' intent is a question of fact. *Id.* at 623, 550 S.E.2d at 303. However, if the language is clear and unambiguous, it is a question of law for the court. *Id.* Ambiguity of a contract is a question of law, which this court reviews de novo. *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020).

The Fund and the Guaranty Association entered into a settlement agreement and release on June 17, 2013. The agreement stated it concerned the Guaranty Association's claims against the Fund for reimbursement from the Fund for payments on behalf of "certain insureds of Legion Insurance Company, in Liquidation and its subsidiaries, including, but not limited to, Villanova Insurance Company" and "Reliance Insurance Company in liquidation, and its subsidiaries, including, but not limited to, Reliance National Indemnity Company, Reliance National Insurance Company, and United Pacific Insurance." The Fund agreed to pay the Guaranty Association $2,900,000 for claims pending against the Fund related to Legion and/or Reliance in exchange for a release of those claims. The agreement stated:

> The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the [Fund] is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential . . . .

The Commission found the plain, clear, and unequivocal language in the agreement reflected that beyond the Legion and Reliance claims as defined therein,

the settlement and release applied only to those claims on which the Fund was paying the Guaranty Association as of February 22, 2013. The Commission further found the record reflected that (1) Lumbermens was not liquidated until May 8, 2013; (2) the Guaranty Association was not paying the claim as of February 22, 2013; and (3) the Fund had not reimbursed the Guaranty Association in connection with the claim. Thus, the plain, clear, and unequivocal language in the settlement agreement and release, and any reasonable construction thereof, did not effectuate a bar to the Guaranty Association's reimbursement claim or release the Fund from its liability for reimbursement on the claim.

The Fund argues the agreement bars the Guaranty Association's claim for reimbursement or otherwise releases the Fund from its liability for reimbursement on the claim. The Fund contends the current claim for reimbursement of workers' compensation benefits paid to Quarles was included in that settlement, and thus, any liability by the Fund for reimbursement was fully released. The Fund asserts Lumbermens was ordered liquidated on May 8, 2013, and the Guaranty Association set up a claim and reserves for Quarles on June 4, 2013, both of which pre-dated the June 17, 2013 effective date of the agreement. It admits the Fund was not paying on Quarles' claim on February 22, 2013, but asserts the Commission erred in finding the release did not apply to that claim. The Fund asserts the Commission failed to recognize the parties' express intent that the release was "general and comprehensive in nature." Next, it asserts the Commission failed to give consideration to the language that the "Parties agree that the terms of this Settlement Agreement and Release are to be given the broadest meaning such that the interpretation and construction do substantial justice to the intent of the Parties." Finally, it asserts the Commission erred in focusing on the phrase, "on which the [Fund] is currently paying the Guaranty Association as of February 22, 2013," and concluding any other claims that existed or came into existence after that date were beyond the scope of the release and only claims already known to the Fund and on which payments were being made by February 22, 2013, fell within the scope of the release. The Fund argues that by interpreting the language in a limited manner, the Commission failed to apply the "broadest meaning" as the parties agreed was proper, which was that claims that were not even known or existing as of February 22, 2013, as well as claims on which payments were not being made as of that date, were intended to be included within the scope of the release.

Viewing the agreement as a whole, we find the plain, clear, and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims, the settlement and release applied only to those claims on which the Fund was paying the Guaranty Association as of February 22, 2013, and the Guaranty Association was not paying Quarles' claim as of that date. Thus, we agree with the circuit court and the Commission that the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Dent, Appellant.

Appellate Case No. 2018-001257

Appeal From Beaufort County
Alex Kinlaw, Jr., Circuit Court Judge

Opinion No. 5850
Heard February 11, 2021 – Filed August 18, 2021

REVERSED AND REMANDED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

WILLIAMS, J.: In this criminal matter, Charles Dent appeals his convictions for first degree criminal sexual conduct (CSC) with a minor and disseminating obscene material to a minor. We reverse and remand for a new trial.

FACTS/PROCEDURAL HISTORY

In August 2014, Dent was arrested at his home in Alabama for various charges stemming from alleged sexual abuse of his granddaughter (Victim).[1] At the time of the alleged abuse, Victim lived in South Carolina with her mother and brother, and Dent would periodically stay with them.

In May 2014, Mother began dating John Camelo. Thereafter, Victim made an initial disclosure of abuse by Dent to Camelo. Camelo notified Mother, and Mother reported the abuse to law enforcement. Thereafter, Victim underwent a forensic interview at Hopeful Horizons regarding her initial disclosure. Following the interview, Victim made a second disclosure of abuse by Dent to Camelo and subsequently completed a second forensic interview.

A Beaufort County grand jury indicted Dent with two charges of first degree CSC with a minor and two charges of disseminating obscene material to a minor. Following a trial in May 2018, a jury found Dent guilty of both dissemination charges and one charge of first degree CSC, and the trial court sentenced him to an aggregate term of thirty years' imprisonment. Dent moved for a new trial, and the court denied his motion. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews the underlying matter for an abuse of discretion, which occurs when the findings of the trial court lack evidentiary support or are controlled by an error of law. *State v. Hopkins*, 431 S.C. 560, 568–69, 848 S.E.2d 368, 372 (Ct. App. 2020).

LAW/ANALYSIS

Dent contends the trial court erred in failing to charge the jury with the requested circumstantial evidence instruction established by *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). We agree.

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[1] Dent also faced charges in Alabama for child pornography.

In *Logan*, our supreme court held that trial courts "should" instruct the jury with the following circumstantial evidence charge when requested by the defendant. *Id.* at 99, 747 S.E.2d at 452.

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, *to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. (emphasis added).

"When requested, the *Logan* charge *must be given* in cases based in whole or part on circumstantial evidence." *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020) (emphasis added).

> Over the years, the circumstantial evidence charge in South Carolina has evolved significantly. In relevant part, it was initially required that circumstantial evidence point conclusively to the guilt of the accused to the

> exclusion of every other reasonable hypothesis. Subsequently, in response to guidance from the Supreme Court of the United States, the [c]ourt removed this requirement, instead ordering trial courts to instruct juries that circumstantial evidence must be given the same weight and treatment as direct evidence (the *Grippon*[2] charge).
>
> However, in *Logan*, the [c]ourt posited that there are different approaches used to analyze direct and circumstantial evidence. . . . Therefore, we held the trial court "should" give the specific charge provided in the *Logan* decision, . . . , when requested.

Id. at 371–72, 845 S.E.2d at 502 (citations and footnotes omitted). "Th[e *Logan*] holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* . . . . However, trial courts *may not exclusively rely* on that charge over a defendant's objection." *Logan*, 405 S.C. at 100, 747 S.E.2d at 452–53 (emphasis added).

"Notwithstanding the mandatory language in *Logan*, erroneous jury instructions remain subject to an appellate court's authority to 'consider[ ] the trial court's jury charge as a whole and in light of the evidence and issues presented at trial.'" *Herndon*, 430 S.C. at 371, 845 S.E.2d at 501–02 (alteration in original) (quoting *Logan*, 405 S.C. at 90, 747 S.E.2d at 448). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003).

During the charge conference, Dent requested the trial court use the *Logan* charge for the instruction on circumstantial evidence. However, the court failed to do so, charging the jury as follows:

> Now, there are, also, two sources—or two types of evidence, rather. And I'm talking about now is there's direct evidence and circumstantial evidence. Direct

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[2] *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997).

> evidence is the testimony of someone who claims to have direct and actual knowledge of a fact, such as an eyewitness. Direct evidence is evidence that if it is believed immediately establishes a fact.
>
> Circumstantial evidence. Circumstantial evidence is indirect evidence. Put another way, circumstantial evidence is proof of a chain of facts from which you could find that another fact exists, even though it has not been proven to you directly.
>
> The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. You may consider both kinds. And there's not a greater degree of certainty required for one over the other.

Following the charge, Dent objected and requested the trial court recharge the jury with the *Logan* instruction. The trial court overruled Dent's objection, finding the charge was sufficient.

We find the trial court erred in failing to grant Dent's request to charge the jury with the *Logan* instruction on circumstantial evidence. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452 ("[D]efendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction."). The evolution of this charge is apparent in our jurisprudence, and our supreme court has unambiguously directed trial courts to use the instruction if requested. *See Herndon*, 430 S.C. at 371, 845 S.E.2d at 501 ("When requested, the *Logan* charge must be given in cases based in whole or part on circumstantial evidence."). Although it is not error for trial courts to use previous iterations of a circumstantial evidence charge, rather than utilizing the *Logan* instruction verbatim, it is mandatory for the trial court to update the charge as necessary. *See Logan*, 405 S.C. at 100, 747 S.E.2d at 452–53 ("Th[e *Logan*] holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* . . . . However, trial courts *may not exclusively rely* on that charge over a defendant's objection." (emphasis added)). Therefore, the trial court additionally erred in failing to supplement the charge, after Dent's renewed objection, to include reference to the requisite connection of circumstantial facts necessary for a

conviction. There was no physical evidence, and the State spent substantial time in summation explaining to the jury that the case was "about circumstantial evidence." Further, the State read part of the trial court's planned charge on circumstantial evidence to the jury, noting that Dent "didn't want to read out the [planned] definition of circumstantial evidence." Considering the circumstantial nature of the evidence, we find these errors prejudiced Dent.[3]

CONCLUSION

Accordingly, we reverse the trial court and remand the matter for a new trial.

REVERSED AND REMANDED.

HILL, J., concurs.

THOMAS, J., dissenting: I respectfully dissent. I find the trial court erred in failing to supplement the jury charge, after Dent's renewed objection, with the requested circumstantial evidence instruction established by *Logan*. However, I find the error committed by the trial court was ultimately harmless. The State's case consisted of direct and circumstantial evidence. While the amount of direct versus circumstantial evidence presented was close, the evidence was not "almost exclusively circumstantial" like in *Herndon*. *See Herndon*, 430 S.C. at 373, 845 S.E.2d at 500-03 (holding the trial court's failure to give the requested *Logan* charge was not harmless error when the State's case against the defendant was "almost exclusively circumstantial"). I also find the trial court's instruction, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 ("A jury charge is correct if, when read as a whole, the charge adequately covers the law."). In *State v. Jenkins*, 408 S.C. 560, 572-73, 759 S.E.2d 759, 766 (Ct. App. 2014), this court found no reversible error in the trial court's jury instruction on circumstantial evidence, applying the harmless error analysis and explaining, "Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary." The *Jenkins* court also found "any

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[3] Because this finding is dispositive, we decline to address Dent's remaining issues on appeal. *See State v. Hepburn*, 406 S.C. 416, 428 n. 14, 753 S.E.2d 402, 408 n. 14 (2013) (declining to review remaining issues when its determination of a prior issue was dispositive of the appeal).

error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law." *Id.* at 572-73, 759 S.E.2d at 766; *see Logan*, 405 S.C. at 94 n. 8, 747 S.E.2d at 449 n. 8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)); *see also State v. Drayton*, 411 S.C. 533, 545-46, 769 S.E.2d 254, 261 (Ct. App. 2015) (determining there was no reversible error in the trial court's failure to include the "reasonable hypothesis" language in its circumstantial evidence jury charge when the trial court's instruction "as a whole, properly conveyed the applicable law"), *aff'd in result and vacated in part on other grounds by State v. Drayton*, 415 S.C. 43, 780 S.E.2d 902 (2015); *State v. Lynch*, 771 S.E.2d 346, 358, 412 S.C. 156, 178 (Ct. App. 2015) (finding the trial court did not commit reversible error in refusing Lynch's requested circumstantial evidence charge because his requested charge was based on the "reasonable hypothesis" language, which the supreme court found unnecessary in *Logan*). Therefore, I would affirm the trial court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Xavier Geter, Appellant.

Appellate Case No. 2018-001647

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5851
Heard June 7, 2021 – Filed August 18, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Tommy Evans, Jr., and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

KONDUROS, J.: In this criminal case, Robert Xavier Geter appeals his convictions for the murder of James Lewis (Decedent) and the attempted murder of

Clarence Stone. The events in the case stem from a bar fight between Geter and Decedent. Geter maintains the circuit court erred in charging the jury on transferred intent in relation to the attempted murder charge and in allowing certain testimony from Investigator Joseph Clarke. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

On the night of March 7, 2015, Stone was at a pool room/restaurant, Culler's Pool Hall, located on Monticello Road in Richland County. Stone acted as something of a bouncer for the business, watching out for arguments or other types of trouble or disturbances. According to Stone, he was playing a game of pool when he heard a commotion and went to investigate. He found Decedent and Geter on the floor fighting. Stone broke up the fight and took Decedent outside on a deck behind the building. Decedent wanted to go back inside to get his chain, and Stone indicated he would retrieve it for him. As Stone was preparing to go back inside, Geter came out onto the deck, approaching Decedent and asking "we good?" Then, Geter swung at Decedent and Stone was caught in between the two while attempting to break up the altercation. Geter had a knife and stabbed and killed Decedent. Geter also struck Stone, stabbing him in the eye, causing permanent blindness in that eye.

Geter was indicted on one count of murder and one count of attempted murder. At trial, in opening statements, Geter's attorney indicated Geter had acted in self-defense after several men, including Decedent and Stone, had attacked and beaten him.

Investigator Joseph Clarke, of the Richland County Sheriff's Office, testified after Stone in the State's case and indicated he was the on-call homicide investigator on the night of the stabbing. He testified as follows regarding his investigation of the incident.

> [STATE]: And you were here in opening statements, correct?
>
> [CLARKE]: Yes.
>
> [STATE]: Is that the first time you heard that story?

[CLARKE]: No. Oh, that story?

[STATE]: Yes, the story that he gave about – in opening statements?
[GETER]: Your Honor. I object. Openings are not evidence, so.

THE COURT: Overruled.

[STATE]: His scenario of the facts that Mr. Geter's attorney is now saying happened, is that the first time you have ever heard that?

[CLARKE]: Yes.

. . .

[STATE]: You confirmed that Clarence Stone was also a victim?

[CLARKE]: I did.

[STATE]: And you spoke with him as well?

[CLARKE]: I did. I took a statement at his home.

[STATE]: And he gave a statement of what occurred?

[CLARKE]: He did.

[STATE]: You saw him testify again today?

[CLARKE]: I did.

[STATE]: And was that exactly what he told you?

[GETER]: Objection. Your Honor. Improper vouching.

> THE COURT: Overruled. You are asking about the testimony that he gave?
>
> [STATE]: Yes. We watched him just a few minutes ago.
>
> THE COURT: Overruled.
>
> [STATE]: The same thing he told this jury happened to him is what he told you?
>
> [CLARKE]: Seems absolutely consistent. Correct.

At the close of the State's case, Geter moved for a directed verdict arguing the State had offered no evidence Geter specifically intended to kill Stone as required by the attempted murder statute. The State contended the necessary intent to establish the attempted murder charge could be transferred based on Geter's intent to kill Decedent. The circuit court agreed and denied the directed verdict motion.

Geter testified in his own defense and indicated he had accidentally stepped on Decedent's foot and when confronted by Decedent, he apologized. While doing so, Stone came over and interfered in their conversation by hitting Geter in the back of the head. Then, according to Geter, Stone and Decedent were beating him pretty severely and he believed several other men were also attacking him. To defend himself, he pulled out his knife and while brandishing it, Decedent and Stone were injured.

At the close of all testimony, Geter renewed his motion for directed verdict which the circuit court denied. Geter objected to the circuit court charging on the doctrine of transferred intent. The circuit court denied the objection and charged the jury as follows:

> Ladies and gentlemen, we'll next talk about the doctrine of transferred intent. If the [d]efendant with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, the law considers that the [d]efendant still had the intent to kill. Intent to kill is a mental state. It exists in the mind. So, if the State proves that a [d]efendant acting with malice

> had the intent to kill one person, but mistakenly injured another, the intent to kill is merely transferred from the original person the [d]efendant attempted to kill to the actual person injured.
>
> Pursuant to the transfer[red] intent doctrine, if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal intent toward the second applies to the third as well.

The circuit court also charged the jury on self-defense. Geter was convicted of murder and attempted murder and sentenced to forty years' imprisonment and twenty years' imprisonment, respectively, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "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." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (*quoting Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Likewise, the admission or exclusion of evidence is subject to the discretion of the circuit court. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013). Additionally, any abuse of discretion related thereto is subject to a harmless error analysis. *Id*. at 362, 737 S.E.2d at 501.

LAW/ANALYSIS

I. Transferred Intent and Attempted Murder

Geter argues the circuit court erred in charging the jury on the doctrine of transferred intent to support the attempted murder charge. We agree.

The South Carolina Court of Appeals has twice-answered the first question presented in this appeal—whether the doctrine of transferred intent applies to

attempted murder which requires specific intent.[1] In *State v. Williams*, 422 S.C. 525, 539, 812 S.E.2d 917, 924 (Ct. App. 2018), *aff'd in part as modified, vacated in part*, 427 S.C. 148, 829 S.E.2d 702 (2019), the court concluded "the doctrine of transferred intent is proper to convict a defendant of attempted murder regardless of whether a victim, intended or unintended, suffers an injury." In that case, Williams had fired shots into a trailer in which his intended target and two other people were located. *Id*. This court found:

> Williams misconstrues the attempted murder statute to the extent he argues the statute requires the specific intent to murder specific victims. Williams specifically argues the transferred intent charge erroneously allowed the jury to find Williams guilty of attempted murder of Ycedra and Wrighton without requiring the State to prove (1) Williams knew they were in the [r]esidence and (2) Williams specifically intended to kill Ycedra and Wrighton [unintended targets], in addition to Young. We disagree.

Id.

However, the Supreme Court of South Carolina, based on preservation grounds, vacated the portion of *Williams* that decided the transferred intent question. *State v. Williams*, 427 S.C. 148, 150, 829 S.E.2d 702, 703 (2019). Because the defendant had not appealed the erroneous jury charge indicating attempted murder was a *general* intent crime, the court declined to weigh in. *Id*. "Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred intent and leave for another day the determination of whether the doctrine applies to attempted murder." *Id*. at 157-58, 829 S.E.2d at 707. In spite of declining to address the merits of the issue, the court offered more insight in a footnote to the opinion.

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[1] "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).

> [W]e find the doctrine of transferred intent unnecessary to sustain the convictions for the attempted murders of Young and Wrighton. Petitioner was alleged to have specifically intended to kill Young the night of the shooting, and to have shot at the door where Wrighton stood, intending to kill the figure in the doorway. It matters not that Petitioner may have been unaware it was Wrighton in the door, rather than Young. Simply put, Petitioner *intended* to shoot the person (Wrighton) who appeared in the doorway. As a result, we alternatively sustain Petitioner's convictions for the attempted murders of Young and Wrighton without resort to the doctrine of transferred intent. Because Petitioner was sentenced to three concurrent twenty-year sentences, reversing his conviction for the attempted murder of [Ycedra[2]] would have no effect on the length of Petitioner's term of imprisonment, and we decline to do so, particularly given that the case was tried as if attempted murder was a general-intent crime.

Id. at 158 n.9, 829 S.E.2d at 707 n.9.

In *State v. Smith*, 425 S.C. 20, 32, 819 S.E.2d 187, 193 (Ct. App. 2018), *rev'd and remanded*, 430 S.C. 226, 845 S.E.2d 495 (2020), the court of appeals was again presented with the opportunity to consider the doctrine of transferred intent and attempted murder. The court concluded the doctrine of transferred intent could provide the specific intent to support the charge. *Id*. at 32, 819 S.E.2d at 193. It stated "[t]he foregoing evidence shows Appellant's unjustified, specific intent to kill at least one of the three men he encountered. Further, the State showed specific intent *as to Victim* [not one of the three men] through the doctrine of transferred intent." *Id*. As it had done in *Williams*, the supreme court declined to adopt the court of appeals' position on the issue. The supreme court stated:

> Smith also contends the court of appeals erred in finding the doctrine of transferred intent applied to attempted

[2] We refer to the third person in the trailer, Ycedra Williams, as Ycedra to avoid confusion with the defendant.

> murder because it is a specific-intent crime. In particular, Smith argues the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person.* Smith points out the "State elected to prosecute [him] for the attempted murder of [the victim] instead of the attempted murder of [the men in the rival group]," and he "was not tried (nor has ever been tried) for any crime related to [the rival group]." We need not address this issue because the prior issues are dispositive. *Nonetheless, we note the State indicated that—were the [c]ourt to reverse Smith's convictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and, thus, there would be no question on remand as to the applicability of the doctrine of transferred intent.*

Id. at 234, 845 S.E.2d at 499 (emphasis added)(citation omitted).

Jurisdictions are split over whether transferred intent can be applied in attempted murder cases. In jurisdictions finding transferred intent applies in attempted murder cases, the rationale is largely based in public policy and reflects the logical extension of the of transferred intent doctrine in murder cases. In other words, if transferred intent applies to convict a killer of an unintended murder, why should a bad actor have lesser consequences simply because the unintended victim did not die? *See e.g. People v. Ephraim*, 753 N.E.2d 486, 496 (Ill. App. Ct. 2001) ("It is well established that in Illinois, the doctrine of transferred intent is applicable to attempted murder cases where an unintended victim is injured."); *State v. Gilman*, 69 Me. 163, 171 (1879) (applying transferred intent to ensure defendants are punished for their actions not the results); *Ochoa v. State*, 981 P.2d 1201, 1205 (Nev. 1999) (finding no reason not to apply transferred intent in case where intended victim died and unintended victim was wounded because although charges differed the intent was the same); *State v. Ross*, 115 So. 3d 616, 621 (La. App. 2013) ("Applying the doctrine of transferred intent to the facts of this case, Mr. Ross's specific intent to shoot Ms. Cloud was transferred when he accidentally also shot Ms. Peters and Mr. Newman" and the extent of their injuries was

inconsequential); *State v. Fennell*, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.").[3]

On the other hand, some jurisdictions require a specific, intended victim to support an attempted murder charge. Those jurisdictions generally maintain that a person cannot be guilty of "attempting" to do an act he did not intend to do [injuring B while attempting to kill A] and public policy did not require extending the doctrine to punish or deter bad actors. *See Cockrell v. State*, 890 So. 2d 174, 181 (Ala. 2004) ("Applying the foregoing rules of construction, we conclude that the statute defining 'attempt' does not clearly evince a legislative intent to apply the doctrine of transferred intent—applicable only to the completed crime of murder—to punish as attempted murder the consequences of an unintended, nonfatal result."); *Ramsey v. State*, 56 P.3d 675, 681 (Alaska Ct. App. 2002) (finding the jury would have to conclude the defendant intended to kill the injured victim to convict her of attempted murder and could not rely upon transferred intent); *People v. Falaniko*, 205 Cal. Rptr. 3d 623, 631 (2016) ("[B]ecause '[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences,' the shooter who fails to kill the unintended victim cannot be convicted of attempted murder under a theory of

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[3] In *Fennell*, 340 S.C. 266 at 277, 531 S.E.2d at 518, the court found transferred intent applied to a charge of assault and battery with intent to kill (ABWIK). ("We hold that the doctrine of transferred intent may be used to convict a defendant of AB[W]IK when the defendant kills the intended victim and also injures an unintended victim."). However, ABWIK was a general intent crime. *See State v. Foust*, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) ("As this [c]ourt has recognized that a specific intent is not required to commit murder, the logical inference is that, likewise, a specific intent is not required to commit AB[W]IK."). Therefore, the analysis in *Fennell* cannot be considered determinative of this issue as the court has specified attempted murder is not the codification of ABWIK and does require specific intent. *State v. King*, 422 S.C. 47, 63-64, 810 S.E.2d 18, 26-27 (2017) ("Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element.").

transferred intent." (quoting *People v. Bland*, 48 P.3d 1107 (Cal. 2002)); *State v. Hinton*, 630 A.2d 593, 602 (Conn. 1993) ("[T]he rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder."); *State v. Brady*, 903 A.2d 870, 882-83 (Md. 2006) (finding "if a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply");.

After considering South Carolina jurisprudence, as well as that from other jurisdictions, we conclude the circuit court erred in charging transferred intent as to the attempted murder charge.[4] To support that charge, the State must demonstrate Geter attempted to kill Stone, and that was not the State's theory of the case. So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim. Furthermore, from a public policy standpoint, the supreme court has strongly suggested in both *Williams* and *Smith* that the lesser offense of ABHAN in cases such as this would serve as an appropriate punishment for the accused.

Based on all of the foregoing, we conclude the circuit court erred in charging transferred intent in this case, and we reverse Geter's conviction for attempted murder.

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[4] We recognize this court has essentially drawn the same conclusion in the recent case of *State v. James Caleb Williams*, Op. No. 5835 (S.C. Ct. App. filed July 14, 2021) (Shearouse Adv. Sh. No. 24 at 21). However, certain facts in the two cases are distinguishable. Because Williams was acquitted of attempting to murder his "target," the majority in *Williams* concluded no intent existed that could be transferred to the unintended recipient of Williams's bullet. In the case sub judice, Geter was convicted of Decedent's murder. Therefore, because disposition of this case is *wholly* dependent on finding the transferred intent charge *never* applies to sustain an attempted murder charge, we conduct a full analysis rather than exclusively relying on *Williams*, even though much of the analysis follows the same rationale.

II. Testimony of Investigator Clarke

Geter contends the circuit court erred in allowing Investigator Clarke to testify that Geter's opening statement to the jury was the first time he had heard the defense's "scenario of the facts" and that Stone's pretrial statement and testimony were "consistent." We agree in part.

The objection to Investigator Clarke's statement that he first heard Geter's scenario of the facts during opening statements is not preserved for our review. Geter did not object to the question on the ground of bolstering but only noted opening statements are not evidence. Consequently, the point is not preserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal.").

The second statement—that Stone's prior statement to Investigator Clarke was consistent with his trial testimony—is troubling. In *State v. Chappel*, 429 S.C. 468, 837 S.E.2d 496 (2000), our supreme court outlined the elements to be examined when determining whether a witness is improperly bolstering another witness's testimony. This court decided the testimony of a witness is improper bolstering if:

> (1) the witness directly states an opinion about the [other witness]'s credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the [other witness]'s credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth.

Id. at 77, 837 S.E.2d at 501.

"Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Investigator Clarke did not *directly* comment on the veracity of Stone's testimony. By definition, consistent does not necessarily mean truthful, but it does mean "free from variation or contradiction,"[5] thus creating the impression of accuracy and truthfulness. The question serves no other purpose than to bolster Stone's trial testimony and puts an improper imprimatur on Stone's testimony as truthful. Notably, Stone's prior statement would not have been admissible to prove it was consistent with this trial testimony unless Geter had suggested Stone's trial testimony was a recent fabrication.[6] Therefore, it was inappropriate for Investigator Clarke to opine as to the consistency of Stone's testimony with his prior statement.

Nevertheless, any error in allowing Investigator Clarke's testimony is subject to a harmless error analysis. *See State v. Reyes*, 432 S.C. 394, 405-06, 853 S.E.2d 334, 340 (2020) (conducting a harmless error analysis in an appeal premised on improper vouching); *see also State v. Kelly*, 343 S.C. 350, 369-70, 540 S.E.2d 851,

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[5] *See* Merriam-Webster.com/dictionary/consistent (defining consistent as "marked by harmony, regularity, or steady continuity; free from variation or contradiction").
[6] To admit a prior consistent statement at trial:

> (1) the declarant must testify and be subject to cross-examination,
> (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
> (3) the statement must be consistent with the declarant's testimony, and
> (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001); *see id.* (explaining Rule 801(d)(1)(B), SCRE, changed South Carolina's common law to make a prior consistent statement admissible as substantive evidence).

860-61 (2001) (conducting a harmless error analysis after finding a witness had improperly vouched for another witness and suggested an imprimatur from the State) *rev'd and remanded on other grounds*, 534 U.S. 246, (2002). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial. [O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *Reyes*, 432 S.C. at 406, 853 S.E.2d at 340 (citations omitted).

In this case, all of the eyewitnesses' testimony was consistent and the forensic evidence in the case matched a version of events in which Geter was the final aggressor outside on the deck that evening, acting out of revenge rather than self-defense. Additionally, the circuit court instructed the jury that it was charged with determining the credibility of the witnesses in the case. It charged "[n]ecessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth." This instruction did not nullify Investigator Clarke's improper statement but mitigated its impact. *See id*. at 408-09, 853 S.E.2d at 342 (explaining any bolstering of a minor witness's credibility was cured by, among other things, the court's instruction that the jury was the sole arbiter of credibility). Accordingly, we find even though the circuit court erred in allowing Invesitgator Clarke's statement, the error was harmless.

CONCLUSION

Based on the foregoing, we find the circuit court erred in charging the jury on transferred intent. This finding mandates the reversal of Geter's conviction for attempted murder. Additionally, we conclude the circuit court erred in admitting Investigator Clarke's statement regarding the consistency of Stone's testimony with his prior statement. However, this error was harmless under the facts of this case. Nevertheless, we caution the State against eliciting such improper testimony. Because the reversible error in this case pertains only to Geter's conviction for attempted murder, his conviction for Decedent's murder is sustained.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MCDONALD, J., concurs.

GEATHERS, J., concurring in part and dissenting in part: I agree with the majority that the challenged testimony of Investigator Clarke did not contribute to the verdict and, therefore, its admission was harmless beyond a reasonable doubt. However, I respectfully depart from section I of the majority's analysis concerning the status of our state's jurisprudence as to transferred intent. This court previously addressed this status in *State v. Smith*, 425 S.C. 20, 32–34, 819 S.E.2d 187, 193–94 (Ct. App. 2018), *rev'd on other grounds*, 430 S.C. 226, 845 S.E.2d 495 (2020). While our supreme court reversed our decision to affirm Smith's attempted murder conviction on other grounds, there is nothing to indicate that the court rejected our interpretation of its jurisprudence as to transferred intent. Therefore, I stand by that interpretation. Accordingly, I would affirm not only Geter's murder conviction but also his attempted murder conviction.