The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF CHARLES E. JOHNSON, PETITIONER

On February 16, 2010, Petitioner was definitely suspended from the practice of law for one year. In the Matter of Johnson, 386 S.C. 545, 689 S.E.2d 623 (2010). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than May 3, 2011.

Columbia, South Carolina

March 4, 2011

The Supreme Court of South Carolina

In the Matter of Ann S. Lieb, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1990, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 14, 2011, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 3, 2011

The Supreme Court of South Carolina

In the Matter of Lois S. Wilson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1984, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 1, 2011, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 3, 2011

The Supreme Court of South Carolina

In the Matter of Franklin S. Henson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated February 3, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 3, 2011

The Supreme Court of South Carolina

In the Matter of Lisa Crow, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 16, 2011, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has

fully complied with the provisions of this order. The resignation of Lisa M. Crow shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 3, 2011

The Supreme Court of South Carolina

In the Matter of William Gary White, III,

Respondent.

ORDER

On March 7, 2011, respondent was definitely suspended from the practice of law for ninety (90) days. In the Matter of White, Op. No. 26939 (S.C. Sup. Ct. filed March 7, 2011) (Shearouse Adv. Sh. No. 8 at 47). Accordingly, we hereby appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Ian Douglas McVey, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. McVey shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. McVey may make disbursements from

respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

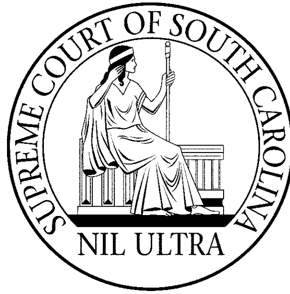
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Ian Douglas McVey, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. McVey's office.

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

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

Columbia, South Carolina

March 7, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
March 7, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Maria A. Hollins, as Parent and Guardian ad Litem for Jane Doe, a minor under the age of fourteen years, Petitioner,

v.

Wal-Mart Stores, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26937
Heard February 16, 2011 – Filed March 7, 2011

DISMISSED AS IMPROVIDENTLY GRANTED

David E. Massey, Summer C. Tompkins, and Debra Sherman Tedeschi, all of Columbia, for Petitioner.

Stephen G. Morrison, C. Mitchell Brown, and Susan M. Glenn, all of Nelson Mullins Riley & Scarborough, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals opinion in Hollins v. Wal-Mart, 381 S.C. 245, 672 S.E.2d 805 (Ct. App. 2008). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

ACTING CHIEF JUSTICE PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justices James E. Moore and John H. Waller, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: The State of South Carolina ex rel. Alan Wilson, Attorney General, Appellant,

In re: Christopher Ward Campbell, Gregory Scott Kinsey, Shemuel Ben Yisrael & Coastal Conservation League, Appellants,

v.

The Town of Yemassee, Binden Plantation, LLC, Castle Hill Farms, Inc. & Raymond B. Basso, Respondents.

Appeal from Beaufort County
James E. Lockemy, Circuit Court Judge

Opinion No. 26938
Heard September 22, 2010 – Filed March 7, 2011

AFFIRMED IN RESULT

Attorney General Alan Wilson, Assistant Deputy Attorney General Robert D. Cook and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for Appellant, State ex rel. Wilson.

G. Trenholm Walker, W. Andrew Gowder, Jr. and Daniel S. McQueeney, Jr., all of Pratt-Thomas & Walker, of Charleston, for Appellants Campbell, Kinsey, and Coastal Conservation League.

Shemuel Ben Yisrael, of Yemassee, *pro se* appellant.

Roberts Vaux and Deborah H. Boshaw, both of Vaux & Marscher, of Bluffton, for Respondent Town of Yemassee.

Frances I. Cantwell, of Regan & Cantwell, of Charleston, for Respondents Binden Plantation, LLC, Castle Hill Farms, Inc., and Raymond P. Basso.

JUSTICE KITTREDGE: These consolidated direct appeals concern annexation, specifically the "100% petition method" in South Carolina Code section 5-3-150(3). After the Town of Yemassee annexed property purportedly pursuant the 100% petition method, Appellants Campbell, Kinsey, Yisrael, and Coastal Conservation League filed an action challenging the annexation. We are asked to determine whether the circuit court erred in finding the individual Appellants and Coastal Conservation League did not have standing to challenge the annexation. In addition, we are asked whether the circuit court erred in denying the State's motions to intervene or be substituted as the real party in interest in the annexation challenge.

We hold the circuit court properly granted summary judgment to Respondents because the individual Appellants lacked standing. The State,

on the other hand, had standing to challenge the annexation. In this regard, the circuit court erred in finding the State's signature was not required before the annexation could proceed under the 100% petition method. Nevertheless, because the section 5-3-270 statute of limitations had expired before the State sought to intervene, we hold the circuit court properly denied the State's motions. Thus, we affirm in result.

I.

In April 2006, the Town of Yemassee ("the Town") adopted an ordinance annexing the following:

(1) Binden Plantation and the "upland, marsh and O.C.R.M. critical areas" therein, to include "the marshes of the Pocotaligo River and Stoney Creek," and "any roads, rights-of-way, easements, railroad tracks, utility lines, or critical areas within the boundaries of Binden Plantation;"

(2) a strip of land twenty feet in width on the property of Castle Hill Farms ("the Strip"), the Strip beginning at the intersection of U.S. Highways 17 and 21 and running along the rights-of-way to those highways and to U.S. Highway 17A, then along the right-of-way to Castle Hill Road until it reaches the Town boundary; and

(3) "[a]ll roads, easements, rights-of-way, railroad tracks, marshlands and critical areas that intervene between Binden Plantation" and the Strip; between any portions of the Strip; and between the Strip and the corporate limits of the Town.

Binden Plantation, Castle Hill Farms, and Raymond P. Basso were the only signatories to the annexation petition.[1] The State, which is the

[1] Binden Plantation consists of approximately 1300 acres of property located in Beaufort County, directly across the intersection of U.S. Highways 17 and 21 from Castle Hill Farms. Respondent Raymond P. Basso is the president of Castle Hill Farms.

presumptive owner of the annexed marshlands, did not sign the petition. Notwithstanding the absence of the State's consent to the annexation, the annexation ordinance recites that the Town received a petition signed "by all persons owning real estate" in the annexed area.

The annexation petition was expressly contingent on the Town's approval of a development agreement. This agreement permitted the annexed property to be developed with single and multiple family homes, parks, equestrian facilities, golf courses, and commercial, office, and retail buildings.

Appellants Campbell, Kinsey, Yisrael, and Coastal Conservation League (hereinafter, the "Private Party Appellants") filed a complaint challenging the annexation. Appellants Campbell and Kinsey are the co-owners of approximately 1000 acres of land in Beaufort County abutting Binden Plantation. Their property shares a border with Binden for approximately one mile. Appellant Yisrael is a freeholder[2] and resident of the Town. Campbell, Kinsey, and Yisrael are also members of the Coastal Conservation League, a non-profit environmental organization.

Respondents moved for summary judgment, asserting the Private Party Appellants lacked standing. Before the circuit court ruled on the motion for summary judgment, the State—through the Attorney General—moved on July 16, 2007 to intervene. The State then filed an alternative motion on October 1, 2007 to be substituted as the real party in interest.

The circuit court granted Respondents' motion for summary judgment and declined to reach the merits of the annexation challenge. The court denied the State's motions.

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[2] "Freeholder" is a term of art defined by South Carolina Code section 5-3-240 (2004). This definition is set forth below in Section III.B.1.

II.

The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted)).

South Carolina Code Title Five, Chapter Three, sets forth various methods that a municipality may use to extend its corporate limits. S.C. Code Ann. § 5-3-10 (2004). Two methods of annexation are at issue here. First, the "100% petition method" allows a municipality to annex property upon the signature of all persons who own real estate in the annexed area. The requirements of this method are set forth at South Carolina Code section 5-3-150(3) (2004):

> Notwithstanding the provisions of subsections (1) and (2) of this section, any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. . . . This method of annexation is in addition to any other methods authorized by law.

Second, the "75% petition method" permits a municipality to proceed with annexation with the consent of less than all of the property owners. The requirements of this method are set forth at South Carolina Code section 5-3-150(1):

Any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by seventy-five percent or more of the freeholders, as defined in Section 5-3-240, owning at least seventy-five percent of the assessed valuation of the real property in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. . . . This method of annexation is in addition to any other methods authorized by law; however, this property may not be annexed unless the following has been complied with: . . . (5) the municipality or any resident of it and any person residing in the area to be annexed or owning real property of it may institute and maintain a suit in the court of common pleas, and in that suit the person may challenge and have adjudicated any issue raised in connection with the proposed or completed annexation; (6) not less than thirty days before acting on an annexation petition, the annexing municipality must give notice of a public hearing by publication in a newspaper of general circulation in the community, by posting the notice of the public hearing on the municipal bulletin board, and by written notification to the taxpayer of record of all properties within the area proposed to be annexed, to the chief administrative officer of the county, to all public service or special purpose districts, and all fire departments, whether volunteer or full time. This public hearing must include a map of the proposed annexation area, a complete legal description of the proposed annexation area, a statement as to what public services are to be assumed or provided by the municipality, and the taxes and fees required for these services. The notice must include a projected timetable for the provision or assumption of these services.

The 75% petition method provides greater notice and opportunity to challenge than the 100% petition method. The 100% petition method provides neither an express notice provision nor an authorization for third parties to challenge the annexation. The absence of such provisions in the 100% petition method is readily understood in light of the requirement that **all** property owners in the annexed area consent by signing the annexation petition. Notably, residents of the annexing municipality are not permitted to challenge a 100% petition annexation. Rather, "[i]n order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights." *St. Andrews Public Service District v. City Council of Charleston*, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (citing *State by State Budget and Control Bd. v. City of Columbia*, 308 S.C. 487, 489, 419 S.E.2d 229, 230 (1992)). In sum, the 100% petition method is a "fast track" for annexation that may be used only when all of the property owners consent.

The State holds presumptive title to all land below the high water mark, including marshland, in trust for the benefit of the citizens of this State. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149-50, 580 S.E.2d 116, 119-20 (2003); *see State v. Holston Land Co.*, 272 S.C. 65, 67-68, 248 S.E.2d 922, 923-24 (1978) (finding the term "marsh land" in a conveyance from the King sufficient to overcome the State's presumptive title to land below the high water mark). Thus, the State is the presumptive owner of the marshlands that were annexed in this case.

III.

A. Private Party Appellants

The Private Party Appellants advanced several theories in support of their standing to challenge this annexation. We hold the circuit court properly rejected each theory. In doing so, we adhere to our existing precedent regarding standing to challenge 100% petition annexations. *See St. Andrews Public Service District*, 349 S.C. at 604, 564 S.E.2d at 648.

1. Standing as a Resident of Yemassee

The annexation ordinance at issue recites that annexation was achieved pursuant to section 5-3-150(3), the 100% petition method. The Private Party Appellants argue that, because the State is the presumptive owner of the annexed marshlands and the State did not sign the petition, the annexation was not proper under the 100% petition method. On this premise, Appellants contend the annexation was actually achieved by 75% petition. If the annexation was by 75% petition, Appellant Yisrael had standing to bring his challenge.[3] § 5-3-150(1)(5) ("[T]he municipality or any resident of it . . . may institute and maintain a suit in the court of common pleas, and in that suit the person may challenge and have adjudicated any issue raised in connection with the proposed or completed annexation.").

The circuit court found the State's signature was not required for the 100% petition annexation, and therefore, Mr. Yisrael did not have standing under the 75% petition method. While we disagree with the circuit court's interpretation of the statute, we can only reach that question if presented by a party with standing. *See, e.g.*, *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 194-95, 669 S.E.2d 337, 339 (2008) ("We are obligated before reaching the merits of the rezoning question to determine whether ATC has standing to press its complaint."); *Joytime Distribs. and Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) ("Standing to sue is a fundamental requirement in instituting an action."). We reject the suggestion that the perceived merits of the underlying claim may influence the standing determination. This basic principle defeats the Private Party Appellants' claim.

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[3] The Private Party Appellants challenge the annexation on the grounds that (1) the Town failed to obtain the consent of the Department of Transportation prior to annexing the portion of U.S. Highway 17 that lies between Castle Hill Farms and Binden Plantation; and (2) the annexation is not contiguous. Because we find Appellants lack standing, we do not reach the merits of these challenges.

The ordinance recites that the annexation was achieved using the 100% petition method. If we went behind that assertion without a proper plaintiff, we would be inviting a sliding scale for standing: the more meritorious a claim appears, the more relaxed the standing requirement would be. We rejected such reasoning when we overruled *Quinn v. City of Columbia*.[4] *See St. Andrews Public Service District*, 349 S.C. at 605, 564 S.E.2d at 648 (overruling the *Quinn* rule that a stranger to an annexation may challenge the annexation if the ordinance is "absolutely void"). Adhering to our precedent, we must determine standing without regard to the merits of the underlying claim. Accordingly, we cannot use the alleged flaws in the 100% petition to find standing pursuant to the 75% petition method.

2. Public Trust Doctrine

The Private Party Appellants assert that, because the State holds title to the annexed marshlands in trust for the benefit of the residents and citizens of South Carolina, Appellants (as citizens) are equitable owners of these properties. Appellants argue this equitable ownership is a proprietary interest sufficient to create standing to challenge an annexation by 100% petition. We disagree.

Appellants' position in this regard is at odds with our holding in *St. Andrews Public Service District*. Under Appellants' position, every member of the public would have standing, even though our precedent states that standing to challenge annexations by 100% petition is limited. We adhere to our precedent and reject this argument.

3. Other Theories for Standing

The Private Party Appellants have advanced several additional theories in support of their standing. First, they argue Appellants Campbell and Kinsey have standing to challenge the annexation pursuant to a statute—South Carolina Code section 6-29-760(C) (2004)—that grants the owners of

[4] 303 S.C. 405, 401 S.E.2d 165 (1991).

adjoining land standing to challenge zoning changes. This statute is inapplicable because this lawsuit challenges annexation, not zoning.

Second, the Private Party Appellants argue they will suffer an individualized injury sufficient to support standing because they personally enjoy "the nature views and wildlife" on the annexed property and their enjoyment would be harmed by the development of the property into commercial and residential units. This alleged harm is shared by all, and like Appellants' public trust claim, this argument, if accepted, would effectively overrule our decision in *St. Andrews Public Service District*.

Finally, the Private Party Appellants argue that if they do not have standing under section 5-3-150(3), this denial of standing violates their due process and equal protection rights under the South Carolina Constitution. We have carefully reviewed these claims and find them to be manifestly without merit. We affirm the circuit court's decision on these issues pursuant to Rule 220(b)(1), SCACR and the following authorities: *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 463, 467, 470 n.4, 530 S.E.2d 112, 114-15 (2000) (setting forth the test for rational basis review of an equal protection claim and explaining that "[a] legislative enactment will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it," even if the hypothesis does not represent the "actual motivations of the enacting governmental body"); Rule 208(b)(1)(D), SCACR (requiring every issue raised in an appellant's brief to be "followed by discussion and citations of authority").

In sum, we hold the circuit court properly rejected each of the Private Party Appellants' arguments in support of standing. An annexation by 100% petition may be challenged only by a person who "assert[s] an infringement of [his or her] own proprietary interests or statutory rights." *St. Andrews Public Service District*, 349 S.C. at 604, 564 S.E.2d at 648.

B. State's Motions to Intervene or be Substituted as the Real Party in Interest

Fifteen months after the annexation ordinance was adopted, and while Respondents' motion for summary judgment was pending, the State moved to intervene in the annexation challenge. The State then filed an alternative motion to be substituted as the real party in interest in the Private Party Appellants' case. The circuit court found both motions were untimely. While we disagree with the circuit court's reasoning as it pertains to the interpretation of section 5-3-150(3), we affirm the circuit court's determination that the State's effort to intervene was barred by the statute of limitations.

1. The State as an Owner of Real Estate within the Meaning of Section 5-3-150(3)

The circuit court found the phrase "persons owning real estate," as used in the 100% petition method, is synonymous with the word "freeholder" in the 75% petition method. "Freeholder" is defined as:

> [A]ny person eighteen years of age, or older, and any firm or corporation, who or which owns legal title to a present possessory interest in real estate equal to a life estate or greater . . . and who owns, at the date of the petition or of the referendum, at least an undivided one-tenth interest in a single tract and whose name appears on the county tax records as an owner of real estate.

§ 5-3-240. Because the State was not listed on the county tax rolls as an owner of the annexed property, the circuit court found the State was not a freeholder. Accordingly, the circuit court found the State's signature was not required for the 100% petition annexation. We reject this position.

Where the State holds title to real property in the area to be annexed, it is a "person[] owning real estate" within the meaning of section 5-3-150(3) and its signature is required to accomplish an annexation by 100% petition.

Section 5-3-150(3) provides in relevant part:

> [A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a *petition signed by all persons owning real estate in the area requesting annexation*.

(Emphasis added). By its plain language, section 5-3-150(3) requires the signatures of "all persons owning real estate in the area requesting annexation."

The term "freeholder" is not included in subsection (3), and we decline Respondents' invitation to read it in. The phrase "all persons owning real estate," as it is commonly understood, does not carry with it the various requirements of "freeholder" status. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988) ("[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."). We must respect the General Assembly's use of distinct terms to describe the signatories required for 100% petition versus 75% petition method annexations. *See U.S. v. Barial*, 31 F.3d 216, 218 (4th Cir. 1994) ("Where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect."). For these reasons, we find the circuit court's interpretation of section 5-3-150(3) was an error of law.[5]

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[5] The circuit court asserted that an interpretation giving meaning to the difference in terms would have an absurd result. It reasoned that section 5-3-150(4) defines the lessee in a fee in lieu of taxes agreement as a freeholder, and therefore, a construction that gave effect to the difference in terms would mean the lessee could sign an annexation petition under the 75% petition method but not under the 100% petition method. We decline to speculate

Further, while section 5-3-150(3) does not explicitly require notice to each property owner, it is self-evident that each property owner who *signs* the petition has *notice* of the petition. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."). The petition itself provides notice. Thus, the Town was required to present the petition to the State for signature.

This annexation did not comply with the requirements of the 100% petition method. The State was the presumptive owner of the annexed marshlands and the Town did not provide the State with prior notice of the annexation or obtain the State's signature on the petition.[6] Nevertheless, the State's challenge to the annexation is time-barred.

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about the General Assembly's reasons for choosing to define the lessee as a freeholder. The truly absurd result would be to construe the statute to allow a landowner's property to be annexed without his consent where the annexation purports to have been achieved by a petition of 100% of the landowners.

[6] We reject Respondents' argument that the notice provided to the Secretary of State, Department of Transportation, and Department of Public Safety pursuant to South Carolina Code section 5-3-90 (2004) satisfied the requirements of the 100% petition method. This notice is given *after* the annexation is complete and serves to advise the agencies of the "new boundaries" of the municipality. It gives the agencies notice of a completed act; it does not satisfy the requirement that an annexing municipality receive consent from all property owners *before* proceeding under the 100% petition method.

2. State's Motions were Untimely

South Carolina Code section 5-3-270 (2004) provides:

> When the limits of a municipality are ordered extended, no contest thereabout shall be allowed unless the person interested therein files, within sixty days after the result has been published or declared, with both the clerk of the municipality and the clerk of court of the county in which the municipality is located, a notice of his intention to contest the extension, nor unless, within ninety days from the time the result has been published or declared an action is begun and the original summons and complaint filed with the clerk of court of the county in which the municipality is located.

Here, the ordinance was adopted on April 25, 2006, after two readings by the Town Council. Section 5-3-270 clearly provides that the limitation period runs from the publication or declaration of the result of the annexation. Thus, though the Attorney General asserts the State did not learn of the annexation until July 2, 2007, the State's motions—which were filed on July 16, 2007 and October 1, 2007—were untimely. In essence, the State requests that the Court create a "discovery rule" for purposes of the section 5-3-270 limitations period. We decline to do so under the facts presented.[7] On balance, while we recognize the State's lack of actual notice of the annexation, we assign greater importance to the policy of finality of an annexation, with its attendant consequences. We believe this policy is reflected in the abbreviated statute of limitations in section 5-3-270. *See State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 16-21, 528 S.E.2d 408, 412-14 (2000) (holding the State is subject to the statute of limitations when bringing a *quo warranto* action to challenge an annexation); *Hite v. Town of*

[7] There is no evidence of a nefarious motive on the part of the Town in not seeking the State's consent to the annexation. This is a novel issue, and it is clear that the Town, like the circuit court, believed the State's signature was not required for an annexation pursuant to section 5-3-150(3).

West Columbia, 220 S.C. 59, 64-66, 66 S.E.2d 427, 429-30 (1951) (holding the sixty-day limit on notice of intent to contest an annexation and ninety-day limit on filing a challenge are not "unreasonable and arbitrary" and are not a denial of due process).

The State argues, however, that its motions should "relate back" to the timely action by the Private Party Appellants. We have carefully reviewed the record and find that, under the circumstances of this case, the circuit court did not abuse its discretion in denying the State's motions. *See Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir. 2001) ("Thus, assuming that Intown is the real party in interest in the *Transcontinental* action, with standing and claims that have not been waived, we consider whether the district court abused its discretion in refusing to permit Intown to join its insurer's suit as a party plaintiff, not by intervening under Rule 24, but by a combination of Rules 15 and 17[, Fed. R. Civ. P.]"); *Berkeley Electric Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) ("In reviewing the granting or denial of a Rule 24(a)(2) motion, we must determine whether the trial judge abused his discretion.").

IV.

In conclusion, we hold the circuit court properly rejected the Private Party Appellants' attempts to establish standing. We made clear in *St. Andrews Public Service District* that a party seeking to challenge a 100% petition annexation "must assert an infringement of its own proprietary interests or statutory rights." The Private Party Appellants lacked standing, and the circuit court properly dismissed their challenge.

We further hold the circuit court properly determined that the State's annexation challenge was untimely. We conclude, however, that the circuit court erred in finding the State's signature was not required for an annexation by 100% petition. As a property owner, the State's signature was required on the 100% petition. A town or municipality may not undertake a "fast track" annexation without a petition signed by "all persons owning real estate in the area requesting annexation."

AFFIRMED IN RESULT.

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

JUSTICE PLEICONES: I concur in part and dissent in part.

I agree with the majority's finding that the circuit court properly rejected the Private Party Appellants' theories in support of their standing to challenge the annexation. I also agree with the majority's finding that the Town was required to obtain the State's signature on the petition. I respectfully disagree, however, with the majority's finding that the State's motion to intervene was untimely.

In reviewing the granting or denial of a Rule 24, SCRCP, motion, the Supreme Court must determine whether the trial judge abused his or her discretion. Berkeley Electric Coop., Inc. v. Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990).

Pursuant to Rule 24, SCRCP, a party may intervene only upon timely application. Our courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Ex parte Reichlyn, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993); see also Davis v. Jennings, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991).

The circuit court found the State's action could not relate back to the date of the Private Party Appellants' filing because the Private Party Appellants lacked standing. Specifically, the circuit court found it "had no jurisdiction to begin with," and that the State could not create jurisdiction after the statute of limitations had run. I would find the circuit court erred in making this finding because a party's lack of standing as a real party in interest does not deprive the court of subject matter jurisdiction. See Bardoon Props., NV v. Eidolon, 326 S.C. 166, 485 S.E.2d 371 (1997).

Further, the circuit court failed to exercise its discretion by not applying the four-part test to determine whether the motion was timely. See Callen v.

Callen, 365 S.C. 618, 627, 620 S.E.2d 59, 64 (2005) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.") (quoting Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)). I would thus remand the case to the circuit court with instructions to apply the four-part test.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Gary White, III, Respondent.

Opinion No. 26939
Heard February 1, 2011 – Filed March 7, 2011

DEFINITE SUSPENSION

Lesley Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Gary White, III, of Columbia, South Carolina, pro se Respondent.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct ("Commission") investigated allegations of misconduct involving the Respondent, William Gary White, III, for his lack of civility and professionalism while handling a zoning dispute with the Town of Atlantic Beach ("Town"). The Office of Disciplinary Counsel ("ODC") filed formal charges against Respondent, and a Hearing Panel of the Commission recommended a definite suspension. We find Respondent has committed misconduct that warrants imposition of a definite suspension of ninety days and order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement.

I. FACTS

In 2004, Respondent represented the Atlantic Beach Christian Methodist Episcopal Church[1] ("Church") in a legal action it filed against the Town regarding a zoning dispute. The Town Attorney was Charles Boykin. The parties settled the action in 2007. As part of the settlement, the Church's action was dismissed, the Town paid damages to the Church, and the Church promised future compliance with all of the Town's building, permitting, and zoning requirements.

On April 30, 2009, Kenneth McIver, the new Town Manager, sent a notice about the need for zoning compliance to the owners of the Church property, Vonetta M. Nimocks and Eboni A. McClary ("Church's Landlords"). In his notice, McIver stated that as part of the prior settlement, "the judge ordered that the Church must comply with the Town's Zoning Ordinances and that a request for compliance must come from you, the owner[s]." McIver copied the notice to the Church's pastor, who gave it to Respondent.

On May 6, 2009, Respondent sent a letter about McIver's notice to the Church's Landlords. Respondent sent copies of his letter to McIver and Boykin. The remarks made by Respondent in his May 6th letter are the subject of this disciplinary proceeding. The letter reads in full as follows:

> You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.
>
> We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they

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[1] It also appears in the record as the Christian Methodist Episcopal Mission Church.

> pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.
>
> First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

McIver delivered the letter to the Town Council, and three council members thereafter filed a disciplinary complaint against Respondent. ODC instituted formal charges against Respondent as a result of his conduct.

At the hearing on June 8, 2010, counsel for ODC stated: "ODC alleges that [Respondent's] statements questioning whether Mr. McIver has a soul, saying that he has no brain, calling the leadership of the Town pagans and insane and pigheaded violates his professional obligations, which include his obligation to provide competent representation to his clients; his obligation under Rule 4.4 to treat third parties in a way that doesn't embarrass them; Rule 8.4 to behave in a way that doesn't prejudice the administration of justice; and also [] the letter was not in conformity with his obligations under his oath of office, Rule 402(k)."[2] Counsel for ODC further alleged that Respondent had failed to cooperate with disciplinary authority by refusing to answer the allegations against him, threatening to sue the complainants for filing the grievance, and questioning ODC's authority.

The Hearing Panel found that Respondent was subject to discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, for violating the following Rules of Professional Conduct (RPC) of Rule 407, SCACR: Rule 1.1 (competence), Rule 4.4 (respect for the rights of third persons), Rule 8.1 (knowing failure to respond to a lawful demand from a disciplinary authority), and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

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[2] Rule 402(k)(3), SCACR provides every applicant for admission to practice law in this state must take and subscribe to the "Lawyer's Oath," by which the applicant pledges to act with "fairness, integrity, and civility, not only in court, but also in all written and oral communications." Id.

The Hearing Panel further found Respondent is subject to discipline for violating the following provisions of the RLDE contained in Rule 413, SCACR: Rule 7(a)(3), RLDE (knowing failure to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5), RLDE (engaging in conduct tending to pollute the administration of justice, tending to bring the legal profession into disrepute, and demonstrating an unfitness to practice law); and Rule 7(a)(6), RLDE (violating the Lawyer's Oath taken upon the admission to practice law in South Carolina).

The Hearing Panel found three aggravating circumstances: Respondent's lack of remorse and unwillingness to acknowledge his wrongdoing, his extensive disciplinary history, and his "disregard and disrespect for these proceedings."

The Hearing Panel stated "Respondent offered no evidence in mitigation," but noted he did call his wife as a witness, who testified that she suffers from cancer. The Hearing Panel stated Respondent offered no evidence that his wife's condition impacted his conduct in any way and, further, Respondent's wife was not diagnosed until after he sent the May 6, 2009 letter, so the Hearing Panel did "not consider Respondent's wife's medical condition as a mitigating factor."

The Hearing Panel recommended that Respondent be suspended from the practice of law. Three members of the Hearing Panel recommended a one-year suspension; one member recommended a two-year suspension. The Hearing Panel recommended that Respondent be required to pay a fine and the costs of these proceedings. It also recommended that Respondent be ordered to complete the Legal Ethics and Practice Program administered by the South Carolina Bar as a condition of reinstatement.

II. LAW/ANALYSIS

Respondent has filed a brief opposing the Hearing Panel's recommended discipline, and ODC has filed a brief in support of the recommendations.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Tullis, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007). The Court "has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

A disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

A. Rule 4.4(a), Respect for Rights of Third Persons

Rule 4.4(a) of the RPC provides in relevant part: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Rule 4.4(a), Rule 407, SCACR.

Respondent argues his letter served numerous purposes other than embarrassing others, such as serving as a "warning" that he would sue the Town "a fourth time," protecting his and his client's religious beliefs, and protecting the integrity of the courts. We agree with ODC and the Hearing Panel that it is clear Respondent's "substantial purpose" in making the remarks and copying the letter to the Town Manager and the Town Attorney was to intimidate and embarrass those he perceived as being contrary to his client's legal position.

Respondent argues the rule contains its own "safe harbor" that protects "uncivil" remarks when they serve other purposes. However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a). See, e.g., In re Norfleet, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's

file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation).

Moreover, an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys. See In re Golden, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (1998) (determining the attorney's conduct in questioning a witness by using sarcasm, unnecessary combativeness, threatening words, and intimidation served no legitimate purpose other than to embarrass, delay, or burden another person and, even if the witness was being uncooperative, it would not justify the attorney's insulting conduct, which was found to have "completely departed from the standards of our profession" as well as "basic notions of decency and civility").

It is clear from the record in this matter that Respondent sent the letter as a calculated tactic to intimidate and insult his opponents. Although Respondent maintains he used many of the words at the request of his client, the Church, Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by his client.

Respondent has also justified his conduct by arguing that he has a duty to provide zealous representation. We agree that an attorney has an obligation to provide zealous representation to a client. However, an attorney also has a corresponding obligation to opposing parties, the public, his profession, the courts, and others to behave in a civilized and professional manner in discharging his obligations to his client. Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes.

B. Constitutional Arguments

To the extent Respondent argues the contents of his letter are protected by the United States Constitution by the First Amendment provisions for freedom of speech and freedom of religion, we conclude these rights do not prevent disciplinary action for an attorney's misconduct that is violative of the professional standards set by the courts.

"In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991).

"'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo, J., in In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), quoted in Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957)." Id. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." Id. at 1071. Limitations on the free speech rights of attorneys are also recognized as to extrajudicial statements. See id. at 1075-77.

"States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (alteration in original)).

"Although a lawyer does not surrender her freedom of expression upon admission to the bar, once admitted, a lawyer must temper her criticisms in accordance with professional standards of conduct." Burton v. Statewide Grievance Committee, 830 A.2d 1205, 1211 (Conn. Super. Ct. 2002) (citing United States Dist. Court for the E. Dist. of Washington v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993)). "[T]here is a balancing of an attorney's right of free speech and the state's interest in preserving the integrity of the judicial system." Id. (citation omitted).

The Hearing Panel's determination that Respondent's conduct is not protected by the First Amendment is supported by clear and convincing evidence. Respondent could have zealously protected his client's rights by means other than using derogatory and demeaning comments. The legal profession is one of advocacy; however, Respondent's role as an advocate would have been better served by zealously arguing his client's legal position, not making personal attacks. His statement that the RPC are always trumped by the First Amendment is not a correct statement of the law, and we hold the Hearing Panel properly found his actions amounted to sanctionable misconduct.

C. Rule 8.1, Failure to Cooperate

As to the Hearing Panel's finding that he violated the RPC by failing to cooperate with lawful demands from a disciplinary authority, Respondent argues "[t]here is nothing in the record indicating any lack of cooperation, simply that the Respondent was adamant about his client's rights and that they were being violated."

Respondent filed answers when requested, essentially justifying his conduct as being protected by the First Amendment, and he did file a witness list and an exhibit list and respond to all other inquiries from ODC and participate in the hearing in this matter. Thus, although we find Respondent clearly committed misconduct in other respects, we decline to find that he violated Rule 8.1 by failing to cooperate.

D. Mitigation

As to Respondent's arguments regarding the failure of the Hearing Panel to find his wife's health was a factor in mitigation, we find the record clearly supports the Hearing Panel's finding. Although his wife's diagnosis is certainly unfortunate, the evidence indicates Respondent's letter of May 6, 2009 predates her diagnosis. Moreover, even if she had been diagnosed sooner, Respondent failed to elicit any testimony on point as to how this affected his state of mind or affected his ability to conform his conduct to the rules concerning professional conduct.

III. CONCLUSION

After considering the record in this matter, we conclude Respondent has committed misconduct in the respects identified by the Hearing Panel, except for the allegation regarding the failure to cooperate. We further find the Hearing Panel's suggestion of a definite suspension is appropriate under the circumstances.

Based on Respondent's blatant incivility and lack of decorum in this instance and the aggravating factors found by the Hearing Panel, including his disciplinary history, we impose a definite suspension of ninety days. We further order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement.[3] Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole. He represented to this Court at oral argument that in the future he will conduct himself in accordance with the RPC and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less.

DEFINITE SUSPENSION.

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

[3] We decline the recommendation of the Hearing Panel to impose a fine or costs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, Appellant

v.

David E. Meacher, M.D., David E. Meacher, M.D., P.A., Carolina Health Specialists, P.A. a/k/a Care First Health Specialists, and The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4764
Heard September 15, 2010 – Filed December 15, 2010
Withdrawn, Substituted and Refiled March 2, 2011

AFFIRMED

C. Mitchell Brown, Michael J. Anzelmo, Monteith P. Todd, and Weldon R. Johnson, all of Columbia, for Appellant.

Andrew F. Lindemann and Andrew G. Melling, both of Columbia; Hutson S. Davis, Jr. and Barry L. Johnson, both of Okatie; and James Edward Bradley, of West Columbia, for Respondents.

GEATHERS, J: In this appeal of a declaratory judgment action, Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center ("Colleton"), contends the circuit court erred in holding that Colleton was not entitled to equitable indemnification for costs it incurred in defending and settling a malpractice action brought by a third party. Colleton also argues that the circuit court erred in finding against Colleton on its breach of contract claim against Carolina Health Specialists, P.A., a/k/a CareFirst Health Specialists ("CareFirst"). We affirm.

FACTS

This declaratory judgment action arises out of a medical malpractice action brought by Johnnie Grant against Colleton, David E. Meacher, M.D. ("Dr. Meacher"), David E. Meacher, M.D., P.A. ("Meacher P.A."), and CareFirst (hereinafter referred to as "the Grant action"). On March 10, 2000, Grant arrived at the emergency department at Colleton, complaining of pain and swelling in his left testicle. Grant was examined and treated by Dr. Meacher, who, according to Grant's amended complaint, diagnosed Grant with epididymitis and released him. Dr. Meacher had been assigned to work at Colleton by CareFirst, which had entered into a professional services agreement with Colleton (the "Agreement") to provide physician staffing for Colleton's emergency department.

According to Grant, he continued to experience pain and swelling in his testicle after being discharged from Colleton. He thereafter sought treatment at the Medical University of South Carolina ("MUSC"), where he was diagnosed with testicular torsion. The MUSC physicians determined that Grant's testicle could not be repaired, and it was surgically removed.

Grant subsequently sued Colleton, Dr. Meacher, Meacher P.A., and CareFirst for medical malpractice. In his amended complaint, Grant contended that Dr. Meacher and Colleton deviated from the standard of care in failing to take appropriate diagnostic measures, in failing to request a urological consultation, in misdiagnosing his condition, in failing to rule out testicular torsion as a diagnosis, and in otherwise failing to diagnose and treat his condition properly. Additionally, Grant contended that Colleton, CareFirst, and Meacher P.A. were vicariously liable for Dr. Meacher's negligence. Colleton made demand on CareFirst to assume its defense pursuant to section four of the Agreement, but CareFirst refused. Specifically, section 4.1 of the Agreement required CareFirst to provide a defense to Colleton "for claims arising solely on the basis of vicarious liability or ostensible or apparent agency." (emphasis added).

Grant's case proceeded to trial. On the second day of trial, Grant reached a settlement with Colleton, Dr. Meacher, and Meacher P.A. for $100,000, with Colleton contributing $50,000 and Meacher contributing $50,000. The settlement agreement expressly denied any negligence or fault by any party. The settlement agreement further provided "this Release And Agreement shall not be construed as an admission of liability by any or all of the Released Parties."

Following the settlement, Colleton asked for indemnification from Respondents. They refused, and Colleton subsequently brought this declaratory judgment action against them. In its complaint, Colleton alleged, among other things, that it was entitled to equitable indemnification from Respondents for its payment of $50,000 to settle Grant's medical malpractice claim. It further alleged that CareFirst breached section 4.1 of the Agreement by failing to assume Colleton's defense in the Grant action.

Prior to the hearing on Colleton's declaratory judgment action, the parties entered into a joint stipulation of facts. At the hearing, Colleton called only one witness: Weldon Johnson, the attorney who represented Colleton in the Grant action. The circuit court subsequently found that Colleton was not entitled to equitable indemnification and that it was not entitled to recovery under the Agreement. Colleton filed a motion to alter or amend judgment, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in holding that Colleton was not entitled to equitable indemnification?

2. In an imputed fault vicarious liability action setting, should there be a requirement on the part of the indemnitee to prove its own lack of fault?

3. Alternatively, in an imputed fault vicarious liability indemnity action setting, should proving fault on the part of the indemnitee be by way of an affirmative defense, with the burden for doing so being placed on the indemnitor?

4. Did the trial court err in denying relief on Colleton's breach of contract claim?

5. Does the nondelegable duty doctrine set forth in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 53, 533 S.E.2d 312, 323 (2000), preclude recovery by Colleton?[1]

6. Is Colleton precluded from seeking equitable indemnification because its insurance company paid all of Colleton's settlement costs?

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[1] Issues five and six listed in the Statement of Issues on Appeal are additional sustaining grounds raised by Respondents.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). Equitable indemnity is an action in equity. See Verenes v. Alvanos, 387 S.C. 11, 18 n.6, 690 S.E.2d 771, 774 n.6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature); Loyola Fed. Sav. Bank v. Thomasson Props., 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) (same). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." Goldman v. RBC, Inc., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). "However, this broad scope of review does not require the appellate court to disregard the findings made below." Id.

In contrast to equitable indemnification, "[a] breach of contract action is an action at law." Madden v. Bent Palm Invs., LLC, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). Therefore, the trial court's findings will not be disturbed unless they are found to be without evidence that reasonably supports those findings. Id. at 600, 675 S.E.2d at 415.

LAW/ANALYSIS

I. Did the circuit court err in holding that Colleton was not entitled to equitable indemnification?

Colleton contends the circuit court erred in holding that it was not entitled to equitable indemnification because the circuit court erroneously concluded that the settlement of the Grant action precluded Colleton from being indemnified by Meacher. After reviewing the language of the order, we believe Colleton misconstrues the circuit court's order.

The order sets forth the requirements for equitable indemnification set forth in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Pursuant to Vermeer, a plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. Vermeer, 336 S.C. at 63, 518 S.E.2d at 307. The order then states:

> These requirements have not been met in the present case. [Colleton] settled the Grant lawsuit prior to the completion of trial. Thus, Dr. Meacher has not been legally adjudicated at fault, nor has [Colleton] been found without fault. Therefore, since there has been no finding of fault, [Colleton] is not entitled to equitable indemnification.

We believe the language of the order is ambiguous as to whether the circuit court based its decision on Colleton's failure to satisfy the Vermeer requirements or on the fact that the parties settled prior to the completion of trial.

We note that Rule 52(a) of the South Carolina Rules of Civil Procedure requires a trial court to make specific findings of fact so that the parties and the appellate court may determine the basis for the ruling. As our supreme court recently stated: "The [Rule 52] requirement for appropriately detailed findings is designed . . . to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010) (internal citations and quotations omitted).

If this were an action at law, we would remand for further factual findings. See In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134, 568 S.E.2d 338, 343-44 (2002) (remanding law case for failure to comply

with Rule 52, SCRCP). However, in this equitable action we are free to make findings of fact in accordance with our own view of the preponderance of the evidence. Goldman, 369 S.C. at 465, 632 S.E.2d at 851.

In reviewing the record, we look for evidence to support a finding that Meacher was at fault, while Colleton was not at fault. See Vermeer, 336 S.C. at 63, 518 S.E.2d at 307 ("Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not."); id. ("If the second party is also at fault, he comes to court without equity and has no right to indemnity."); id. ("The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.").

We believe the preponderance of the evidence supports the conclusion that Colleton failed to meet the Vermeer requirements. Importantly, at the declaratory judgment hearing, the only witness Colleton offered was Weldon Johnson, who acted as Colleton's attorney in the Grant action. No medical experts testified on Colleton's behalf at the hearing. Although Johnson rehashed some of the testimony provided by medical experts at the truncated Grant trial,[2] the transcript of the Grant trial is not in the record and it is therefore impossible to know whether Johnson provided a full picture of what occurred at that trial. We note that the Grant trial transcript was also not admitted as evidence during the indemnification hearing before the circuit court judge.

In addition, Colleton offered no expert testimony at the declaratory judgment hearing. See Melton v. Medtronic, Inc., 389 S.C. 641, 653, 698 S.E.2d 886, 892 (2010) ("[E]xpert testimony is required in cases involving medical malpractice claims.").[3] We believe the record reflects that Colleton

[2] Johnson's testimony arguably constituted hearsay, but we note Respondents did not object when Johnson provided this testimony.

[3] Although the present case is not technically a medical malpractice case, in order to establish that Dr. Meacher was liable for Grant's damages (as

failed to meet the first and second elements of equitable indemnification. Specifically, Colleton did not conclusively establish that Dr. Meacher was liable for causing Colleton's damages. Further, Colleton failed to present any evidence that it was without fault. See Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (stating in clear terms that the person "asserting an equitable indemnification cause of action" must prove the elements of indemnity, including that "the indemnitee was exonerated from any liability").

Colleton claims that the parties' stipulations were sufficient evidence for the trial court to find that Dr. Meacher was at fault and that Colleton was not at fault. In making this argument, Colleton cites the following stipulations: (1) "At the Grant trial, Dr. Mazo testified that Dr. Meacher's failure to order an ultrasound was a departure from [the] standard of care."; (2) "The only evidence introduced at the Grant trial by Plaintiff as to negligence or departure from [the] standard of care by either Defendant was limited to alleged departures by Dr. Meacher."; and (3) "At the Grant trial, Dr. Mazo testified that in his opinion, to a reasonable degree of medical certainty, the cause of the loss of a testicle by Grant was the misdiagnosis of testicular torsion by Meacher."

All of the above stipulations, however, merely discuss what occurred at the Grant trial—a trial that was terminated early because a settlement was reached. Moreover, Colleton, Dr. Meacher, and Meacher P.A. expressly denied any negligence or fault resulting from Grant's medical treatment as part of the settlement agreement. As noted above, the stipulations are not accompanied by a transcript of the Grant trial and thus provide an incomplete picture of that trial.

We believe these stipulations were akin to stipulations as to the law. Therefore, the circuit court was not required to accept these stipulations as conclusive proof that Dr. Meacher was liable for causing Grant's injuries, or as conclusive proof that Colleton was not liable. See Greenville Cnty. Fair

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mandated by Vermeer), Colleton was required to make a showing similar to that required in a medical malpractice case.

Ass'n v. Christenberry, 198 S.C. 338, 345, 17 S.E.2d 857, 859 (1941) (holding that a "stipulation as to the law" is generally not binding upon the courts); McDuffie v. McDuffie, 308 S.C. 401, 409-10, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding that stipulations involving questions of law are not binding on the court).

We recognize that settlement alone does not preclude indemnification when there is sufficient evidence to support a finding of fault on the part of the indemnitor and lack of fault by the indemnitee. However, we distinguish this case from the facts of Otis Elevator, Inc. v. Hardin Construction Co., 316 S.C. 292, 450 S.E.2d 41 (1994), and Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). In Otis Elevator, a subcontractor (Otis Elevator) settled with the plaintiff after a twelve-day trial and four hours of jury deliberation. Id. at 295, 450 S.E.2d at 43. Otis Elevator then brought a cause of action for contractual indemnification against the general contractor (Hardin Construction). Id. In the indemnification action, the jury returned with a verdict against Hardin Construction. Id. The jury also responded to a special interrogatory finding no act or omission on the part of Otis Elevator caused the plaintiff's injuries. Id. Thus, Otis Elevator was entitled to seek indemnity from Hardin Construction, because although Otis Elevator settled, there was a subsequent finding of lack of fault on Otis Elevator's part while Hardin Construction was subsequently found liable. Id. at 295-96, 450 S.E.2d at 43-44.

In Griffin, Van Norman (home seller) employed an exterminating company (exterminator) to provide a wood infestation report required by the Griffins (home buyers) before the sale of a house could be completed. Griffin, 302 S.C. at 521, 397 S.E.2d at 379. After the sale was consummated, the Griffins discovered the report was false. Id. The Griffins sued Van Norman and the exterminator. Id. at 521, 397 S.E.2d at 378-79. Both defendants settled with the Griffins, but the Van Norman's cross-claim for indemnification against the exterminator proceeded to a bench trial. Id. at 521, 397 S.E.2d at 379. The trial judge found that the loss suffered by the Griffins was occasioned "solely by the wrong of the [exterminator]" and that Van Norman had no knowledge that the report was false. Id. at 522, 397 S.E.2d at 379. Because the indemnity trial established that Van Norman was

totally innocent of wrongdoing and that the exterminator was guilty of fraud, the trial court concluded Van Norman was entitled to indemnification by the exterminator. Id. This court affirmed the trial court's ruling on appeal. Id. at 527, 397 S.E.2d at 382.

Unlike Griffin and Otis Elevator, here the circuit court made no finding of fault on Dr. Meacher's part or lack of fault on Colleton's part at the subsequent indemnification hearing. Reviewing the record, we conclude that there was insufficient evidence presented at the indemnification hearing to enable the circuit court to make any such findings of fault. Finally, even if the circuit court's order was ambiguous as to the exact basis for finding Colleton was not entitled to equitable indemnification, we can affirm for any reason appearing (or, in this case, failing to appear) in the record. See Rule 220(c), SCACR (noting "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); see also I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

There was insufficient evidence of fault on Dr. Meacher's part and lack of fault on Colleton's part presented at the medical malpractice trial prior to settlement, and insufficient evidence of fault/lack of fault at the subsequent indemnity hearing. Therefore, the Vermeer requirements were not met and the circuit court did not err in finding Colleton was not entitled to equitable indemnification.

II. Did the circuit court err by denying relief to Colleton on its breach of contract claim against CareFirst?

Colleton argues that the circuit court misconstrued its breach of contract claim against CareFirst as a contractual indemnification claim and therefore the matter should be remanded to the circuit court for a determination of whether CareFirst breached the Agreement.

The portion of the Agreement at issue, section 4.1, states in pertinent part:

> Contractor's [CareFirst's] insurance coverage shall provide Facility [Colleton] defense for claims arising solely on the basis of vicarious liability or ostensible or apparent agency, for the acts or inaction of Contractor and/or Contractor's Representatives.[4] . . . . In the event neither Contractor nor Contractor's Representatives purchase the required coverage, Facility, in addition to any other rights it may have under the terms of this Agreement or under law, shall be entitled, but not obligated, to purchase such coverage. Facility shall be entitled to immediate reimbursement from Contractor or Contractor's Representative for the cost thereof.

(emphases added).[5]

In its complaint, as well as in its motion to amend, Colleton alleged that CareFirst "breached" section 4.1 by failing to obtain insurance coverage that provided Colleton a defense in the Grant action. However, in its pre-trial brief, Colleton did not specifically contend that CareFirst breached the

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[4] The term "Contractor's Representatives" is defined in the Agreement as "all of Contractor's [CareFirst's] employees, shareholders, partners, subcontractors, and agents providing services under this Agreement." Thus, the term would appear to include Dr. Meacher.

[5] Under section 4.1 of the Agreement, CareFirst was required to obtain insurance that would provide a defense to Colleton. Section 4.1 did not require CareFirst to obtain coverage that would indemnify Colleton. Therefore, even if CareFirst had breached section 4.1, it is questionable whether Colleton would be entitled to the $50,000 settlement amount as Colleton claims. See Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) ("The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured.").

Agreement. Rather, it claimed that it was entitled to "contractual indemnification" from CareFirst under the Agreement. Moreover, at the declaratory judgment hearing, Colleton's counsel referred to its contract claim as a "contractual indemnity" claim.[6]

In its order, the circuit court reviewed section 4.1 of the Agreement and found:

> These provisions [of the Agreement] do not entitle either party to indemnification in the event of malpractice liability, but rather for the reimbursement for the costs of obtaining insurance. They merely provide the procedure of obtaining insurance and handling claims on the theory of ostensible or apparent agency, not for the indemnification for settlement of such claims, especially without a finding of fault.

Thus, we acknowledge that the circuit court construed Colleton's claim as a contractual indemnification claim rather than a breach of contract claim. However, we believe remand is not required because there was no breach of contract.

Initially, we note this issue is questionably preserved because of the nebulous manner in which Colleton presented its contract issue to the circuit court. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 58 (2d ed. 2002) ("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."). However, in light of the fact that Colleton raised the

[6] Black's Law Dictionary 837 (9th ed. 2009), defines "contractual indemnity" as "[i]ndemnity that is expressly provided for in an agreement." Black's Law Dictionary further defines "indemnity clause" as "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur." Id. at 837-38.

breach of contract issue in both its complaint and its motion to amend, we proceed to address the issue on the merits.

As to the merits of Colleton's breach of contract claim, we do not believe CareFirst was required to provide Colleton a defense in the Grant action. The South Carolina Supreme Court has instructed that "[i]f the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). Therefore, "the allegations of the complaint determine the insurer's duty to defend." Id.

Although the situation here is slightly different than Hartsville, we believe CareFirst's duty to defend should be determined by reviewing Grant's complaint. In paragraph eighteen of his complaint, Grant alleged that Colleton, CareFirst, and Meacher P.A. were vicariously liable to Grant for Dr. Meacher's negligence. However, in paragraph sixteen of his complaint, Grant contended that both Dr. Meacher and Colleton deviated from the standard of care in failing to take appropriate diagnostic measures, in failing to request a urological consultation, in misdiagnosing his condition, in failing to rule out testicular torsion as a diagnosis, and in otherwise failing to diagnose and treat his condition properly. Thus, Grant's complaint alleges that Colleton was negligent in its own right. Accordingly, because the Agreement only required CareFirst to provide a defense to Colleton "for claims arising solely on the basis of vicarious liability or ostensible or apparent agency," CareFirst was not required to provide Colleton a defense at the onset of the litigation.

We recognize Grant's attorney "stipulated" during the Grant trial that his only cause of action against Colleton was a vicarious liability claim. However, the record reflects this stipulation was made as part of the settlement agreement. Thus, as of the date of the stipulation, when CareFirst arguably was required to provide a defense to Colleton, Colleton was no longer in need of a defense. See Hartsville, 382 S.C. at 547, 677 S.E.2d at 580 (holding that insurer had a "continuing duty to defend").

Furthermore, the settlement agreement contained the following disclaimer language:

> It is understood that the Released Parties expressly deny that any negligent acts and/or omissions on their part caused or contributed to the circumstances described herein and thus they deny they are liable for any loss, injury and/or damage resulting to [Grant] because of the medical treatment. This Release and Agreement is entered into for the purpose of ending existing litigation and avoiding future litigation. Therefore, this Release and Agreement shall not be construed as an admission of liability by any or all of the Released Parties.

Therefore, we do not believe the language of the settlement agreement, which contains an explicit disclaimer as to any liability, can be construed as evidence that Colleton was <u>only</u> liable to Grant under a theory of vicarious liability. Indeed, the settlement agreement's release language further supports the conclusion that there was no adjudication of fault or lack of fault on Colleton's behalf.

Because we do not believe CareFirst breached the Agreement, it is inconsequential whether the circuit court misconstrued Colleton's breach of contract claim against CareFirst as a contractual indemnification claim. <u>See</u> Rule 220(c), SCACR (noting "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"). Accordingly, we decline to remand to the circuit court for further proceedings.

III. Remaining Issues on Appeal

A. Issue Preservation

Colleton contends that, in a vicarious liability indemnity setting, the indemnitee should not have to prove that it was not at fault. In other words,

Colleton contends that the test set forth in Vermeer should be modified in vicarious liability cases so that the indemnitee is not required to establish its own lack of fault. Colleton further argues that in an imputed fault vicarious liability action, proving fault on the part of the indemnitee should be by way of an affirmative defense, with the burden of doing so being placed on the indemnitor.

We decline to address either of these issues as neither issue was properly preserved for appellate review. To be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (citations and quotations omitted). Here, Colleton never specifically argued to the circuit court that the Vermeer test should be modified for vicarious liability cases. Accordingly, we believe neither issue was properly preserved. See Bodkin v. Bodkin, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010) (an issue is not preserved for appeal unless it was raised to and ruled upon by the trial court).

B. Additional Sustaining Grounds Raised by Respondents

The remaining issues on appeal are additional sustaining grounds raised by the Respondents, namely (1) whether the nondelegable duty doctrine set forth in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 53, 533 S.E.2d 312, 323 (2000), precludes recovery by Colleton, and (2) whether Colleton is precluded from seeking equitable indemnification because its insurance company paid all of Colleton's settlement costs. We decline to address either of these issues because we affirm on other grounds appearing in the record on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

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

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AJG Holdings LLC, Stalvey Holdings LLC, David Croyle, Linda Croyle, Jean C. Abbott, Lynda T. Courtney, Sumter L. Langston, Dian Langston, Carl B. Singleton, Jr., Virginia M. Owens and Stoney Harrelson, Respondents,

v.

Levon Dunn, Pamela S. Dunn and Helen Sasser, Appellants.

Appeal From Georgetown County
John M. Milling, Circuit Court Judge

Opinion No. 4779
Heard September 16, 2010 – Filed January 19, 2011
Withdrawn, Substituted and Refiled February 28, 2011

AFFIRMED

Stephen P. Groves, Sr. and Thomas S Tisdale, Jr., both of Columbia; for Appellants.

Jack M. Scoville, Jr, of Georgetown; for Respondents.

FEW, C.J.: This appeal involves restrictive covenants prohibiting commercial use of property absent the developer's approval and whether the developer's rights can be sold after the developer no longer owns any of the property. The Respondents, landowners who purchased property originally owned by developer Helen Sasser, filed this action against Levon and Pamela Dunn seeking to enforce the restrictive covenants against the Dunns, who planned to operate a bed and breakfast on their property. The Dunns filed several counterclaims, and both parties filed motions for summary judgment. The circuit court granted partial summary judgment to Respondents, finding Sasser's attempt to sell the developer's rights to the Dunns was invalid and Respondents were entitled to judgment as a matter of law on the Dunns' counterclaims for civil conspiracy and intentional infliction of emotional distress. We affirm.

FACTS/PROCEDURAL HISTORY

In 1978, Helen Sasser acquired land from the partition of Woodland Plantation, located along the Great Pee Dee River in Georgetown County. Sasser later subdivided the land and began selling lots. The deeds to these lots included the following restrictive covenant: "No lot shall be used for commercial purposes without express written consent from the Developer." The term "Developer" was defined as "Helen Sasser, her heirs and assigns." Sasser sold her last remaining lots in the subdivision in 1991.

In 1994, the Dunns purchased lots 9 and 10, and in 2003, they purchased lots 7 and 8. The Dunns also acquired nine acres of land outside the subdivision; these nine acres abut the Dunns' property in the subdivision, but are not governed by the subdivision's restrictive covenants. In 2005, the Dunns began renovation of an existing house (the guest house) on lots 7 and 8 in preparation for the opening of a bed and breakfast inn and wedding venue.

Tommy Abbott, the husband of Respondent Jean Abbott, wrote to the Dunns, objecting to the commercial use of their property and pointing out the restrictive covenants. He then visited the local planning and zoning

commission to inquire about the building permit issued to the Dunns for the guest house. The commission later mistakenly issued a stop work order for the Dunns' work on their primary residence, but the order was lifted within a few hours. Rupert Stalvey, a member of Respondent Stalvey Holdings, LLC, contacted the Dunns' insurance agent to advise her of their commercial use of the guest house. As a result, the agent contacted the Dunns to advise them that they needed to obtain commercial coverage for the guest house. The Dunns further allege Respondents contacted the U.S. Army Corps of Engineers to falsely report the Dunns were filling in wetlands.

Several Respondents also signed a petition to amend the restrictive covenants so that the covenants would govern the Dunns' nine acres bordering the subdivision. One of the Respondents told the Dunns that if they refused to sign the petition, the other subdivision landowners would file an action to enjoin the Dunns' commercial use of their property. The Dunns did not sign the petition.

Respondents then filed this action against the Dunns, seeking an injunction against the commercial use of the property. After receiving notice of the action, the Dunns obtained from Sasser a written assignment of any developer's rights she may have remaining in the subdivision. The Dunns also executed a document asserting that, as the assignee of Sasser's developer's rights, they consented to the commercial use of their own property. Respondents sought and obtained a temporary restraining order against the commercial use of the property, which was affirmed by this court on appeal. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009).

Respondents filed an amended complaint to add Sasser as a defendant and to add several additional causes of action. The Dunns and Sasser filed counterclaims for tortious interference with prospective business relations, interference with a contractual relationship, civil conspiracy, and intentional infliction of emotional distress. The parties filed cross-motions for summary judgment, and the circuit court ruled that Respondents were entitled to partial summary judgment because Sasser no longer retained any developer's rights

to assign to the Dunns. Accordingly, the Dunns' subsequent execution of a written consent to commercial use was meaningless.

The circuit court also granted Respondents summary judgment on the counterclaims for interference with prospective contractual relations, civil conspiracy, and intentional infliction of emotional distress. The circuit court stated that the issue of whether the restrictive covenants run with the land and all remaining issues were matters to be decided by the fact-finder. The circuit court later denied Appellants' motion to alter or amend the judgment.

LAW/ANALYSIS

I. Restrictive Covenants

Appellants make two distinct arguments with regard to the restrictive covenants: first, that Sasser lawfully assigned her developer's rights to the Dunns, and second, that Respondents have no right to enforce the restrictive covenants in any event. The circuit court granted summary judgment only with regard to the assignment of developer's rights, specifically holding that the second issue – whether the covenant was personal to Sasser or ran with the land (the answer to which will determine whether Respondents can enforce the covenant) – was to be determined by the fact-finder at trial.

A. Assignment of Developer's Rights

Appellants first argue the circuit court erred in granting summary judgment to Respondents with regard to the assignment of developer's rights. We disagree.

In Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), our court set forth five conditions which must be met in order for a developer to reserve the right to amend or impose new restrictive covenants running with the land:

> (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

368 S.C. at 350, 628 S.E.2d at 907 (emphasis added). Focusing on the second condition of Queen's Grant, the circuit court found that because Sasser conveyed all the property she owned in the subdivision in 1991, she no longer retained a sufficient property interest in the subdivision to convey developer's rights to the Dunns. Therefore, the circuit court granted partial summary judgment to Respondents, finding the Dunns' purported consent to commercial use was legally insignificant.

On appeal, Appellants are unable to point to any interest Sasser retained in the property other than her purported right to amend the restrictive covenants.[1] Their argument is a circular one: Sasser has a sufficient property interest in the development to allow her to reserve developer's rights because she reserved to herself developer's rights. As Queen's Grant makes clear, the

[1] During oral arguments, Appellants argued for the first time that Sasser retained rights to use a fishing pond in the development. This argument is not preserved because it was never raised or ruled upon below, nor was it argued in the Appellants' brief. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue . . . must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (holding issues not argued in the brief will not be considered on appeal).

reservation itself is allowed only when the five conditions are met, and one of those conditions is that the developer possesses a sufficient property interest in the development. For this condition to be a meaningful one, the property interest must necessarily be something more than a purported reservation of developer's rights. This is so regardless of whether the restrictive covenants run with the land or are personal to Sasser. See McLeod v. Baptiste, 315 S.C. 246, 433 S.E.2d 834 (1993) (holding a restrictive covenant that was personal to the grantor may not be enforced against a remote grantee when the grantor owns no real property which would benefit from enforcing the covenant).[2]

Because Sasser did not retain any property interest in the development, she did not retain developer's rights. Accordingly, we affirm the trial court's grant of summary judgment with regard to Sasser's inability to assign developer's rights to the Dunns.

B. Denial of Appellants' Summary Judgment Motion

Appellants further argue that even if Sasser had no developer's rights to assign, the circuit court erred in denying their motion for summary judgment because Respondents have no authority to enforce the restrictive covenants. For later purchasers like Respondents to benefit from a restriction imposed by a developer, the developer must have intended for the benefit to run with the lots subsequently sold. See Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988). The circuit court found the issue of whether the restriction ran with the land or was personal to the developer could not be disposed of by summary judgment, but must "be decided at the trial." Because the circuit court denied summary judgment, we are prohibited from reviewing that ruling pursuant to Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

In Olson, two issues were before the supreme court: (1) whether the court of appeals erred on the merits in affirming the granting of summary judgment and (2) whether the court of appeals erred in declining to address

[2] The Dunns are remote grantees because they did not acquire their property through Sasser.

the merits of the appeal from a denial of summary judgment. Despite the immediate appealability of the first issue, the supreme court unequivocally held the denial of summary judgment was never subject to review, not in an interlocutory appeal nor even after final judgment. Id. Accordingly, we may not address this issue on its merits.

II. Summary Judgment on Counterclaims

Appellants contend that summary judgment on their counterclaims for civil conspiracy and intentional infliction of emotional distress was inappropriate.[3] We disagree.

A. Civil Conspiracy

In order to recover for civil conspiracy, the Dunns were required to demonstrate that two or more persons combined for the purpose of injuring and causing special damage to them. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (2009). To prove special damages, the Dunns had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. See Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Special damages must be properly pled, or the claim for civil conspiracy will be dismissed. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009); see also Rule 9(g), SCRCP (requiring special damages to be specifically stated in the pleadings).

In their pleadings, the Dunns allege that Respondents conspired "for the purpose of injuring [the Dunns] and such conspiracy has resulted in special

[3] Appellants also argue the circuit court erred in granting summary judgment on their counterclaim for interference with a contractual relationship; however, the circuit court denied summary judgment on this counterclaim. Therefore, we do not address this argument.

damages, insofar as [the Dunns] have lost the quiet use and enjoyment of their property, have suffered damage to their reputations in the community, as well as other injury in an amount to be proven at trial." At the summary judgment hearing, the circuit court pointed out that these damages were no different from the damages alleged in the Dunns' other causes of action. At that point, the Dunns argued that their payment of attorney's fees and costs constituted special damages. Every litigant represented by a lawyer incurs attorney's fees and costs. However, the Dunns never pointed out to the circuit court specific attorney's fees or costs they contended qualified as special damages, nor did they seek permission to amend their counterclaim to include the specificity required by Rule 9(g). In granting summary judgment, the circuit court noted the damages the Dunns alleged did not "go beyond the damages alleged in other causes of action."

At oral argument before this court, the Dunns conceded that the damages pled in their civil conspiracy counterclaim mirrored those alleged in their interference with a contractual relationship counterclaim. They argued, however, that Respondents' contact to the Corps of Engineers caused them to incur specific attorney's fees and costs associated with the accusation the Dunns had filled in wetlands, and those expenses qualified as special damages. Because that argument was not presented to the circuit court, we may not consider it. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 (requiring issue to be raised below to be preserved for appellate review). Because the Dunns failed to plead a sufficient claim for special damages unique to the civil conspiracy claim, the circuit court properly granted summary judgment. See Rule 9(g), SCRCP.

B. Intentional Infliction of Emotional Distress

In their counterclaim for intentional infliction of emotional distress, the Dunns had the burden of establishing a prima facie case as to each element of the claim in order to survive summary judgment. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). To establish such a claim, the plaintiff must show the defendant: (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially

certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized community"; (3) such actions actually caused plaintiff's emotional distress; and (4) the emotional distress was so severe "no reasonable man could be expected to endure it." 374 S.C. at 356, 650 S.E.2d at 70 (citing Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981)).

We affirm the circuit court's determination that the Dunns did not establish a prima facie case that their emotional distress was "severe such that no reasonable man could be expected to endure it." Hansson, 374 S.C. at 356, 650 S.E.2d at 70 (internal quotes omitted). In Hansson, our supreme court found that the plaintiff's testimony he lost sleep and developed a habit of grinding his teeth was not sufficient to survive summary judgment:

> To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something 'more' – in the form of third party witness testimony and other corroborating evidence – in order to make a prima facie showing of 'severe' emotional distress.

374 S.C. at 358-59, 650 S.E.2d at 72.

Here, Levon Dunn testified that Respondents' actions caused him to develop high blood pressure and digestive problems. He also testified that his nerves were "shot" and that he took medication for his high blood pressure and nervousness. Pamela Dunn testified that she had been "emotionally ill" and that she had lost twenty pounds. Like in Hansson, we find this evidence, even when viewed in the light most favorable to the Dunns, is not sufficient to survive a motion for summary judgment.

C. Standard of Review

In affirming the circuit court's determination that the evidence is insufficient to survive summary judgment on the Dunns' counterclaims, we are mindful of our limited standard of review. We may affirm an order granting summary judgment only if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Our supreme court has recently stated that where the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The supreme court has never specifically applied the "mere scintilla" standard to a cause of action for civil conspiracy. However, our ruling that the Dunns failed to plead a sufficient "claim" for special damages means that any factual issue as to civil conspiracy is not "material." Thus, because our ruling is not based on the sufficiency of the evidence it is unnecessary for us to determine whether the "mere scintilla" standard applies to civil conspiracy.

However, we do base our ruling affirming the circuit court as to intentional infliction of emotional distress on the sufficiency of the evidence. As recognized in Hansson, a cause of action for intentional infliction of emotional distress carries a "heightened burden of proof."[4] 374 S.C. at 356, 650 S.E.2d at 71. Accordingly, the "mere scintilla" rule of Hancock does not apply to this cause of action. See Hancock, 381 S.C. at 330-31, 673 S.E.2d at 802-03 (stating "where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment"). Rather, the court must determine "whether the defendant's conduct may reasonably be regarded" as meeting the requirements of Ford v. Hutson. Hansson, 374 S.C. at 357, 650 S.E.2d at 71 (quoting Holtzscheiter v.

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[4] In this opinion we address the burden of proof as it affects the summary judgment stage. We do not address the burden of proof to be charged to the jury.

Thomson Newspapers, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991)). The court must determine whether "reasonable minds could differ as to whether [the] conduct was sufficiently 'outrageous'" and "whether [the] resulting emotional distress was sufficiently 'severe.'" Hansson, 374 S.C. at 358, 650 S.E.2d at 71-72. This responsibility, which the supreme court has called "a significant gatekeeping role in analyzing a defendant's motion for summary judgment," Hansson, 374 S.C. at 358, 650 S.E.2d at 72, requires the circuit court to determine whether a prima facie case has been established. See Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994) ("Initially . . . the [circuit] court determines whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury."). Upon careful review of the record before us, we find the circuit court exercised its gatekeeping responsibility within its discretion when it determined that the Dunns failed to establish a prima facie case for intentional infliction of emotional distress.

CONCLUSION

Based on the reasoning above, we decline to address the circuit court's denial of summary judgment with regard to Respondents' authority to enforce the restrictive covenants. Otherwise, we affirm the circuit court's partial grant of summary judgment in all respects.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Juan Orozco, Appellant.

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

Opinion No. 4798
Submitted February 1, 2011 – Filed March 2, 2011

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General William M. Blitch, Jr., of Columbia, James Strom Thurmond, Jr., of Aiken, for Respondent.

HUFF, J.: Appellant, Juan Orozco, was convicted of two counts of first-degree criminal sexual conduct (CSC) with a minor and two counts of lewd act upon a child and was sentenced to concurrent terms of twenty years, suspended upon service of fifteen years for the CSC charges, and fifteen years on the lewd act charges. Orozco appeals, asserting the trial judge erred in (1) admitting testimony regarding Orozco's suicide attempt and (2) charging the jury that testimony of a child witness need not be corroborated. We affirm.[1]

FACTUAL/PROCEDURAL HISTORY

Orozco was accused of sexually abusing two of his nieces, who are cousins. The girls, who were minors, both testified as to Orozco's sexual misconduct. Testimony shows the younger child, who was four or five years old at the time of the incidents, made the allegations to an adult on June 21, 2006. The following day, June 22, 2006, the younger child's mother, Suzie, filed a report with the sheriff's department. On that same day, Suzie also notified her older sister, Ann, of the younger child's allegations against their brother-in-law. Following this conversation between Suzie and Ann, Ann went to speak with their sister Janet, Orozco's wife, before noon on June 22, 2006, and informed Janet of the allegations made by the younger child. Ann testified she did not know what was going to happen after Suzie filed the report and she wanted to let Janet know about the allegations against her husband.

Within a few days of the allegations made by her niece, Ann contacted her minor daughter in Indiana where the older child was vacationing with another of Ann, Suzie and Janet's sisters. The older child, who was eight or nine at the time she used to visit in Orozco's home, thereafter disclosed incidents of sexual abuse committed by Orozco upon her.

The State made a pretrial motion to admit evidence of Orozco's suicide attempt asserting, although there was no South Carolina law addressing the

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

issue, the courts of most states allow such evidence. Defense counsel acknowledged that a lot of states do equate a suicide attempt with flight, and while South Carolina does allow evidence of flight, there was no South Carolina law equating the two. Further, defense counsel argued there was no direct evidence Orozco was aware of the allegations and therefore attempted suicide to evade the charges. Counsel maintained the suicide note indicated only that Orozco expressed he did not want to go to prison because "somebody lied on him," and this was the only evidence that Orozco knew of the charges, but the State did not intend to introduce the suicide note. Counsel thus argued the suicide attempt was not from a guilty conscience, but from lack of faith in the judicial system. He argued the prejudice from admitting the suicide attempt evidence outweighed the probative value and would also confuse the jury. The solicitor indicated she did not intend to admit the suicide note because she believed it was hearsay, it was not an admission against Orozco's interests, and it was "more in [Orozco's] own favor." The solicitor contended that there was circumstantial evidence that Orozco was aware of the allegations inasmuch as there was evidence the mother of one of the victims told Orozco's wife the morning of the suicide attempt that the younger child had made the allegation of sexual abuse, and Orozco's wife was present when EMS and the sheriff's department arrived at the suicide attempt call. The trial judge determined the suicide attempt evidence was admissible, noting that such evidence was admissible in other states, and evidence of flight is admissible in South Carolina. The judge further informed trial counsel that the defense needed to make a decision about the suicide note, and that the court would be inclined to admit the note based on this ruling.

Thereafter, over Orozco's objection, the State presented evidence that at 2:01 p.m. on the afternoon of June 22, 2006, officers were dispatched to the Orozco residence in reference to a suicide attempt. Sheriff's Deputy Tom Gray testified when he arrived at the home, he found Orozco being treated by emergency medical personnel for taking rodent poison. Deputy Gray also found a box of rodent poison and a purported suicide note written in Spanish.

Orozco's wife Janet, who was also the complainant,[2] was also present at the scene.

During a discussion regarding jury charges, Orozco objected to inclusion of a charge that no corroboration of the testimony of the two children was needed, maintaining such was an impermissible comment on the facts. The trial judge determined the charge was South Carolina law, and determined he would charge the pertinent statute as written. Thereafter, the trial court included in the jury instruction a charge pursuant to section 16-3-657 of the South Carolina Code that, "in South Carolina the testimony of a victim need not be corroborated for prosecution in a criminal sexual conduct case." This was the extent of the charge given regarding corroboration.

ISSUES

1. Whether the trial judge erred in admitting testimony regarding Orozco's suicide attempt.

2. Whether the trial judge erred in charging the jury that the testimony of the child witnesses did not need to be corroborated.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of testimonial evidence falls within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of that discretion, resulting in prejudice. State v. Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009). "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." State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

[2] In referring to "the complainant," it appears Deputy Gray was indicating Janet placed the 911 call reporting the attempted suicide.

LAW/ANALYSIS

I. Evidence of Suicide Attempt

On appeal, Orozco asserts the trial court erred in admitting evidence of his suicide attempt. He argues there is no South Carolina authority supporting the admission of a suicide attempt as evidence of consciousness of guilt, and though South Carolina law has held evidence of flight constitutes evidence of guilty knowledge and intent, our courts require proof an accused is aware of the charges before evidence of flight becomes relevant and admissible. Orozco contends the prejudicial effect of introducing evidence of his suicide attempt outweighed any probative value, as the evidence of his suicide attempt would only become relevant and admissible upon the State's establishing that he was aware of the charges against him at the time of the suicide attempt. He maintains, because the State failed to present the critical proof that he was aware of the charges at the time of his suicide attempt, the evidence was irrelevant and prejudicial and should have been excluded pursuant to Rule 403, SCRE.

Generally, all relevant evidence is admissible. Rule 402, SCRE; State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; Pittman, 373 S.C. at 578, 647 S.E.2d at 170. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). An appellate court reviews 403 rulings, balancing whether the probative value of evidence was substantially outweighed by its prejudicial effect, pursuant to the abuse of discretion standard, and gives great deference to the trial court's decision. State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

Whether evidence of attempted suicide is probative of the accused's consciousness of guilt is an issue of first impression in South Carolina. The

question, however, is easily analogized to other types of circumstantial evidence of guilt based on the accused's behavior after the crime. First, our courts have held that, as a general rule, any guilty act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt. State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). Further, it has long been the rule in South Carolina that evidence of witness intimidation and evidence of attempted flight are probative of the accused's consciousness of guilt. See State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009) (holding witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt), see also State v. Walker, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005) (holding "[u]nexplained flight is admissible as indicating consciousness of guilt, for it is not as likely that one who is blameless and conscious of that fact would flee"); State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004) (noting flight, when unexplained, is admissible as indicating consciousness of guilt). Additionally, courts of other jurisdictions, applying the same principle that deems evidence of flight by one accused of a crime as probative of consciousness of guilt, have frequently held admissible evidence that the accused, after the crime was committed, attempted to commit suicide. See 29 Am. Jur. 2d Evidence § 547 (2008) ("The principle upon which evidence of flight of one accused of a crime is admitted is applicable to evidence that the accused, when in custody, and charged with a crime, attempts to take his or her own life and thereby escape further prosecution."); Dale Joseph Gilsinger, Annotation, Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide, 73 A.L.R. 5th 615, 624 (1999) ("The principle on which evidence of flight by one accused of a crime is admissible is almost universally held to apply to evidence that the accused, after the crime was committed - such as at the time of arrest or while in custody for the crime for which they are being tried - attempted to commit suicide and thereby escape further prosecution."). Finally, the overwhelming majority of states considering this issue have determined that evidence of attempted suicide is generally admissible to establish consciousness of guilt. See 29 Am. Jur. 2d Evidence § 547 ("Evidence of attempted suicide by a person who is, at the time of the attempt or thereafter, charged with or suspected of a crime, is relevant as possibly indicating consciousness of guilt and admissible at trial for that crime for whatever weight the jury chooses to assign."); Gilsinger, supra at 624. ("With a single exception, courts have unanimously

held that an accused's attempt to commit suicide is probative of a consciousness of guilt and is therefore admissible."); 22A C.J.S. Criminal Law § 1011 (2006) ("Evidence is generally admissible that the accused attempted or threatened to commit suicide subsequent to the time the crime was committed. Such evidence ordinarily is admissible as indicating a consciousness of guilt."). Accordingly, we conclude that evidence of a suicide attempt is probative of a defendant's consciousness of guilt and is generally admissible for whatever value the jury decides to give it.

Orozco argues, however, that evidence of his suicide attempt should not have been admitted because the State failed to show he was aware of the allegations made against him at the time of his attempt. He argues, as in the case of evidence of flight, proof that the accused is aware of the charges at the time of the conduct is necessary before the evidence can be relevant. He notes, in particular, his argument to the trial court that the suicide note was the only indication he was aware of the charges, and without the note there was insufficient evidence of his awareness.

In addressing the admission of evidence of flight, our courts have determined that "[f]light, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee." State v. Crawford, 362 S.C. 627, 635, 608 S.E.2d 886, 890 (Ct. App. 2005). However, we have further noted that "[t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." Id. at 636, 608 S.E.2d at 891. "Flight evidence is relevant when there is a nexus between the flight and the offense charged." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). "It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." Crawford, 362 S.C. at 636, 608 S.E.2d at 891. Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted. See Pagan, 369 S.C. at 209, 631 S.E.2d at 266 (holding flight evidence was not relevant where the evidence did not create an inference that defendant's alleged failure to stop for a blue light was

motivated by his belief that the police were seeking him for his pending murder charge).

Here, the circumstances justify an inference that Orozco was aware of the sexual misconduct allegations against him by the younger child. Testimony shows that on June 22, 2006, the mother of the younger child informed the mother of the older child about the younger child's allegations against Orozco and that, sometime before noon that same day, the mother of the older child informed Orozco's wife of the disclosure by the younger child. Around 2:00 that afternoon, Deputy Gray responded to a dispatch for a suicide attempt at Orozco's home where he observed a box of rodent poison and a suicide note, found Orozco being treated for ingestion of the poison, and noticed Orozco's wife, the complainant, was at the scene. Thus, the totality of the evidence creates an inference that Orozco's actions in attempting suicide were motivated as a result of his belief that sexual misconduct allegations had been made against him. We therefore find the suicide attempt evidence was relevant. Further, we find no merit to Orozco's argument that the evidence was inadmissible pursuant to Rule 403, SCRE. Although Orozco summarily asserts he was prejudiced by the admission of this evidence, he fails to argue how he was prejudiced or why the prejudicial effect of the suicide attempt evidence outweighed its probative value. Accordingly, giving due deference to the trial court's ruling on this matter, we find no abuse of discretion. Myers, 359 S.C. at 48, 596 S.E.2d at 492.

II. Charge on Corroboration

On appeal, Orozco asserts the trial judge committed reversible error in giving the charge on corroboration. He argues the instruction focused the attention of the jury on a particular class of witnesses, the victims, and indicated the testimony of those particular witnesses, apart from other witnesses, needed no corroboration. Because the trial judge failed to instruct that any other class of evidence need not be corroborated, he contends the instruction constituted an unconstitutional and impermissible charge on the facts and the credibility of the witnesses. Orozco further maintains the harm was not cured by the balance of the trial court's charge. While recognizing our supreme court has addressed this issue in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006) (hereinafter Rayfield II) and found such a charge

appropriate under the circumstances, Orozco points to the dissent in Rayfield II and the fact that the earlier decision in the seminal case of State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) relied upon an Indiana case that was later overruled by the Indiana court. He further argues, even under the decision of the majority in Rayfield II, the issuance of the instruction was unduly emphasized by the State in its closing argument and therefore was reversible error.

Section 16-3-657 of the South Carolina Code (2003) provides, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." These criminal statutes, which generally encompass the prohibition of various forms and degrees of criminal sexual conduct, include criminal sexual misconduct with a minor for which Orozco was charged. S.C. Code Ann. § 16-3-655 (Supp. 2010).

In Rayfield II, our supreme court, in a majority opinion, affirmed this court's opinion in Rayfield I,[3] finding no reversible error in the giving of a jury instruction on section 16-3-657. Rayfield asserted on appeal that the trial judge erred in charging section 16-3-657 to the jury because the charge constituted an impermissible comment on the facts of the case, it improperly emphasized the testimony of one witness, and it carried a strong possibility of unfairly biasing the jury against the defendant. Rayfield II, 369 S.C. at 115, 631 S.E.2d at 249.

In Rayfield I, this court found the challenged charge withstood appellate scrutiny in the Schumpert case. Rayfield I, 357 S.C. at 505, 593 S.E.2d at 491. We further determined there was no reversible error in the trial court's instruction to the jury regarding the corroboration of the victims' testimony in Rayfield's case, as the charge was consistent with Schumpert, noting the trial court: (1) properly instructed the jury that it was the sole finder of fact with the discretion to determine the credibility of the witnesses; (2) correctly charged our state's constitutional mandate prohibiting the court from commenting on the facts or having an opinion about the facts in the case; and (3) correctly charged the State's burden of proof. Id. We held,

[3] State v. Rayfield, 357 S.C. 497, 593 S.E.2d 486 (Ct. App. 2004).

while a "section 16-3-657 charge is not mandatory, such charge does not constitute reversible error when the Schumpert safeguards are present." Id.

In Rayfield II, the supreme court noted the trial court charged the jury the State had the burden of proving Rayfield was guilty of the charged offenses beyond a reasonable doubt, and further instructed the jurors that they were the sole and exclusive judges of the facts of the case, that the trial court was prohibited from commenting on or having an opinion about the facts of a case, and they were responsible for assessing the credibility of the witnesses who testified in the case. Rayfield II, 369 S.C. at 116-17, 631 S.E.2d at 249-50. The supreme court then stated as follows:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear--not only to the judge but also to the jury--that a defendant may be convicted solely on the basis of a victim's testimony.

Rayfield II, 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added). The court then concluded, while a trial judge is not required to charge § 16-3-657, when the judge chooses to do so, giving the charge does not constitute reversible error when "this single instruction is not unduly emphasized and the charge as a whole comports with the law." Id. at 117-18, 631 S.E.2d at 250. Because the jury in that case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the court determined the trial judge fully and properly instructed the jury on those principles. Id. at 118, 631 S.E.2d at 250.

The arguments made by Orozco on appeal are the same as those raised and rejected by our courts in the Rayfield cases.[4] As in Rayfield, the trial court here properly charged the jury that the State had the burden of proving the defendant guilty beyond a reasonable doubt, that the jury had the duty to find the facts and determine the credibility of the witnesses, and that the jury should disregard any indication from the trial judge that he might believe a fact to be true or not. Thus, the trial court thoroughly instructed the jury on the State's burden of proof and the jury's duty to determine the facts and judge the credibility of witnesses. Further, the only charge given by the trial court in regard to the corroboration of the victims' testimony was that "in South Carolina the testimony of a victim need not be corroborated for prosecution in a criminal sexual conduct case." Thus, this single instruction was not unduly emphasized. Accordingly, there was no reversible error.

CONCLUSION

Although South Carolina has yet to directly address the admissibility of evidence of a defendant's attempted suicide, given the almost unanimous decisions of courts of other jurisdictions finding such evidence to be generally admissible, our jurisprudence allowing other evidence of conduct showing consciousness of guilt, and the equating of attempted suicide evidence to that of flight in other jurisdictions, along with the circumstances justifying an inference that Orozco was aware of the sexual misconduct allegations against him such that the evidence was relevant and probative, and in light of our standard of review giving the trial court great discretion in weighing Rule 403 matters, we find no error in the admission of this evidence.

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[4] Orozco recognizes the significance of Rayfield II, but focuses heavily on the dissent and its reasoning. However, the decisions of the supreme court bind this court as precedents. S.C. Const. art. V, § 9; see also Bain v. Self Mem'l Hosp., 281 S.C. 138, 141, 314 S.E.2d 603, 605 (Ct. App. 1984) (holding, where the law has been recently addressed by the Supreme Court and is unmistakably clear, the Court of Appeals has no authority to change it).

We further believe Rayfield II is controlling on the issue of the corroboration charge. There are no distinguishing factors that would set this case apart from Rayfield II, and this court does not have authority to change the law of Rayfield II. Accordingly, Orozco's convictions are

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

L. Paul Trask, Jr., Personally, and as Next of Kin and as the Duly Appointed Personal Representative of the Estate of L. Paul Trask, III, deceased; and Meredith C. Trask, Appellants,

v.

Beaufort County; Curtis M. Copeland in His Official Capacity as Coroner of Beaufort County; Judy R. Copeland, as Personal Representative of the Estate of Curtis M. Copeland; and Copeland Company of Beaufort, LLC, Respondents.

Appeal From Beaufort County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4799
Heard October 6, 2010 – Filed March 2, 2011

AFFIRMED

Stephen P. Groves, Thomas S. Tisdale, Jr., and Jeffrey S. Tibbals, all of Charleston, for Appellants.

Andrew F. Lindemann, of Columbia; and Marshall H. Waldron, Jr., of Beaufort; for Respondents.

FEW, C.J.: The primary issue in this appeal is whether various statutes governing coroners and crematory operators give rise to private rights of action for civil damages. We agree with the circuit court that they do not, and affirm. We also affirm the circuit court's ruling granting summary judgment for the defendants for spoliation of evidence and intentional infliction of emotional distress.

I. Facts

On November 21, 2005, Paul Trask, III, a twenty-year-old, consumed beer at his parents' home in Beaufort.[1] Shortly before midnight Paul drove his father's car to a Hess gas station named Xpress Lane on Boundary Street. The gas station attendant sold Paul two twenty-four-ounce cans of beer without verifying his age. Paul Trask, Jr. described the store video as showing his son "going into the Xpress Lane store and immediately going in, going to the bathroom, pretty clear he had been drinking beer, coming out, he seems steady, but we know he's been drinking beer." Paul consumed the beer he purchased from Xpress Lane while driving approximately twenty-two miles to Fripp Island, but was turned away at the security gate. After driving

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[1] We recite the facts, derived primarily from the complaint and Mr. Trask's deposition, in the light most favorable to the Trasks. See Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010) (noting in a summary judgment case "the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party").

almost four miles away from Fripp Island, Paul lost control of the car, ran off the road, and collided with large pine trees. The car caught on fire and Paul died from the injuries he sustained in the accident, either the impact, fire, or a combination.

On May 22, 2006, Mr. Trask and his wife filed a wrongful death and survival action against Hess Corporation and Xpress Lane, Inc., which we refer to as the Xpress Lane suit. The Trasks alleged Paul's death "was the proximate result of the alleged negligence of [Hess and Xpress Lane], in several particulars, including: the negligent sale of alcohol to a minor."[2] They claimed the beers Xpress Lane sold to Paul "were the beers that caused his intoxication." Hess and Xpress Lane agreed to pay the Trasks $750,000 to settle the case before trial. As required by law, the Trasks requested the circuit court approve the settlement, which it did on January 9, 2008. However, Mr. Trask later testified "that it was worth more than $750,000" and explained, "we were only able to negotiate a very partial settlement in the Xpress Lane case because we had no definitive toxicology results to prove . . . that Paul was intoxicated . . . . And so I would say that caused great damage to the Xpress Lane suit."

In this action the Trasks have sued Beaufort County and Curtis Copeland,[3] both in his official capacity as the coroner of Beaufort County and in his individual capacity as a crematory operator. They seek damages for the reduced settlement value of the Xpress Lane suit along with damages for emotional harm. The Trasks contend various statutes create duties owed to them which Copeland breached individually and officially. This case is troubling because Copeland did violate at least some of the statutes, and conducted himself in a manner we believe was inappropriate. We hold, however, that the law does not provide a remedy for this conduct in the form of civil damages.

[2] This quotation is from the "Petition for Approval of Settlement" in the Xpress Lane suit.

[3] Mr. Copeland passed away after oral argument. Judy R. Copeland, the personal representative of his estate, has been substituted for him in his individual capacity.

Shortly after the accident occurred, Copeland went to the scene. At around 1:00 a.m. on November 22, after he learned who owned the car, Copeland drove to the Trasks' home to inform them of the accident and death. When Copeland arrived at their home, he did not know who was killed in the accident; he knew only that the car belonged to Mr. Trask. Once the Trasks determined Paul was the only family member not at home, they realized he had been the driver. Later that day family and friends of the Trasks gathered at Mr. Trask's mother's home. Copeland went there around noon to discuss the funeral arrangements. In addition to being the county coroner, Copeland also owned Copeland Company of Beaufort, LLC, which owns and operates Copeland Funeral Home and Coastal Cremation Services. At the gathering, the Trasks told Copeland they wanted Paul's body cremated and signed the cremation authorization form. Although they signed the form sometime between noon and one o'clock, Copeland instructed them to write the time as 9:15 a.m. The following day Coastal Cremation Services cremated Paul's body.

The Trasks contend two statements made by Copeland caused them emotional distress. First, when Copeland was leaving the Trasks' home after telling them about the accident, Mrs. Trask asked him if he planned to perform an autopsy on Paul's body. Copeland responded there was no need to perform an autopsy because "the cause of death is obvious." Second, a few months later the Trasks asked Copeland how badly Paul's body was burned in the accident, to which he responded, "you couldn't tell if the body was black, white, or Mexican."

The Trasks allege Copeland, as coroner, was required, but failed, to positively identify the body in the car as their son, to conduct an autopsy, and to prepare a toxicology report on the body. They claim that because Copeland individually cremated the body without conducting a toxicology test officially as coroner, the resulting lack of knowledge of Paul's blood alcohol level "made it difficult, if not impossible, for the Trasks to establish and prove otherwise valid claims against the Xpress Lane and Hess Corporation" and forced them to settle for less money.

The Trasks filed this action on April 11, 2007, with claims for negligence and negligent supervision and training against Beaufort County and Copeland officially; for negligent spoliation of evidence against Beaufort County; for negligence and intentional or negligent spoliation of evidence against Copeland individually and Copeland Company; and for intentional infliction of emotional distress against Copeland individually.[4] The Trasks moved for partial summary judgment based on liability. All Respondents filed motions for summary judgment. The trial court filed its order on January 2, 2009, granting summary judgment for Respondents. The Trasks appeal the entire order.

II. Determining the Existence of a Private Right of Action

In a negligence cause of action, it is the plaintiff's burden to establish that a duty of care is owed to him by the defendant. See McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 390-91, 684 S.E.2d 566, 571 (Ct. App. 2009) ("An essential element in a negligence cause of action is the existence of a legal duty of care owed by the defendant to the plaintiff. Without such a duty, a plaintiff cannot establish negligence.") (internal quotation marks and citation omitted); Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct. App. 2009) ("If no duty exists, the defendant is entitled to judgment as a matter of law."). Though the common law generally does not impose a duty to act, a statute may create an affirmative duty owed to a plaintiff. Vaughn v. Town of Lyman, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006).

In Rayfield v. South Carolina Department of Corrections, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988), cert. denied, 298 S.C. 204, 379 S.E.2d 133 (1989), this court set forth the analysis to apply when determining whether a statute creates a duty whose breach allows for a private right of action:

[4] In their complaint, the Trasks sought damages for wrongful death and survival actions. Because the Trasks conceded they were not alleging a wrongful death or survival action against Respondents, we do not address that claim.

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

If the plaintiff demonstrates these two elements, he has established the first element of a negligence claim—a duty owed to him by the defendant. 297 S.C. at 103, 374 S.E.2d at 915.

However, when the statute at issue creates or defines the duties of a public official, the public duty rule applies. 297 S.C. at 105, 374 S.E.2d at 915. "'This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually.'" Vaughn, 370 S.C. at 441, 635 S.E.2d at 634 (quoting Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999)). The public duty rule represents a presumption that such a statute "has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public," and thus does not satisfy the elements of the two-part Rayfield test. 297 S.C. at 105, 374 S.E.2d at 915.

The presumption may be overcome when the statute creates a "special duty" to the plaintiff. 297 S.C. at 106, 374 S.E.2d at 916. In Rayfield, this court stated:

> A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members

> of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Id.; see also Vaughn, 370 S.C. at 441, 635 S.E.2d at 634 (referring to the six-part Rayfield test as "the well established 'special duty' exception"); Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 203, 403 S.E.2d 615, 619 (1991) (adopting the six-part Rayfield test and calling it an "exception to the public duty rule"). If a special duty is found to exist after analyzing a statute under this test, courts can be sure the Legislature intended that a plaintiff within the protected class injured by a public official's breach of the duty have a private right of action against the official. 304 S.C. at 201, 403 S.E.2d at 618; see Vaughn, 370 S.C. at 442, 635 S.E.2d at 634 ("The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action . . . . [T]he dispositive issue is . . . whether the statute was intended to provide . . . a private right of action . . . .").

We must analyze the one statute alleged to have been violated by Copeland individually under the general two-part test and those alleged to have been violated by Copeland officially under the special duty exception to the public duty rule.

A. Section 16-17-600 Does Not Create a Duty Owed by Copeland Individually and Copeland Company to the Trasks

The only allegation of negligence against Copeland individually and Copeland Company is that they breached a statutory duty contained in section 16-17-600 of the South Carolina Code (Supp. 2010). The section provides:

> (A) It is unlawful for a person willfully and knowingly, and without proper legal authority to: (1) destroy or damage the remains of a deceased human being; . . . .
> A person violating the provisions of subsection (A) is guilty of a felony . . . .

> A crematory operator is neither civilly nor criminally liable for cremating a body which (1) has been incorrectly identified by the funeral director, coroner, medical examiner, or person authorized by law to bring the deceased to the crematory; or (2) the funeral director has obtained invalid authorization to cremate.

§ 16-17-600(A).[5] The Trasks contend this statute creates an actionable duty under the two-part Rayfield test. Specifically, they argue the statute's essential purpose "is to ensure dead bodies are not destroyed without proper authority." Even if that is the essential purpose, however, it is not the harm the Trasks claim they suffered. At oral argument, the Trasks' counsel stated the harm they suffered was a loss of settlement value of the Xpress Lane suit because Paul's body was no longer available. Additionally, Mr. Trask stated in his deposition: "Mr. Copeland performed an illegal cremation on my son's body, which had the effect of destroying any opportunity to, number one, know for certain whether or not it was our son, Paul,[6] number two, the actual cause of his death, whether it was the crash itself or whether he burned to death. We have been denied the toxicology results as a result of the illegal cremation . . . ." Therefore, the harm they claim to have suffered is that Paul's body was no longer available for an autopsy and a toxicology test.

The essential purpose of section 16-17-600 is not to preserve a body as evidence for a civil action. Accordingly, the Trasks fail to meet the first element of the two-part Rayfield test. The Trasks argue, however, that the statute's specific reference to a crematory operator's immunity for civil liability demonstrates the Legislature intended for its violation to serve as the

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[5] Subsections (B) and (C) prohibit actions of theft, destruction, vandalism, or desecration on burial grounds or in a graveyard. S.C. Code Ann. § 16-17-600(B)-(C) (Supp. 2010).

[6] In several causes of action, the Trasks claimed damages for uncertainty as to whether Paul is dead because his body was never "positively identified." However, the Trasks later conceded the body from the accident was their son. Mr. Trask stated: "I acknowledge that my son is dead."

basis for civil liability. We disagree. Section 16-17-600 is a criminal statute which provides only for criminal sanctions. See Dorman v. Aiken Commc'ns, Inc., 303 S.C. 63, 67, 398 S.E.2d 687, 688-89 (1990) (refusing to find a private right of action for "a criminal statute which provides only for criminal sanctions" because "[t]he primary consideration in deciding whether a private cause of action should be implied under a criminal statute is legislative intent"). We find section 16-17-600 does not create a duty of due care owed by Copeland or Copeland Company to the Trasks, and therefore they do not have a private right of action for its breach.[7]

B. No Duties Exist as to the Negligence Claims Against Copeland Officially

The Trasks allege the following statutory duties were breached by Copeland officially: (1) to perform an autopsy to ascertain the cause of death pursuant to section 17-7-10 of the South Carolina Code (2003); (2) to perform a toxicology test of the victim of a motor vehicle accident pursuant to section 17-7-80 of the South Carolina Code (2003); and (3) to take certain steps pursuant to sections 17-5-570(B) and -590 of the South Carolina Code (2003 & Supp. 2010), which are required when a body cannot be identified. Copeland pled the public duty rule as a defense to these claims. We agree with the trial court that none of these statutes satisfy the elements of the six-part Rayfield test, and thus no special duty exists under any of them and the Trasks have no private rights of action.

First, the Trasks allege section 17-7-10 creates a special duty. It states: "The coroner of the county in which a body is found dead . . . shall order an autopsy or post-mortem examination to be conducted to ascertain the cause of death." § 17-7-10. The essential purpose of the statute is "to ascertain the cause of death." The "particular kind of harm" the Trasks claim to have suffered is that an autopsy would have provided evidence for the Xpress Lane suit, and they were not satisfied with the level of detail in the coroner's

[7] Because we find section 16-17-600 created no duty owed by Copeland to the Trasks, we do not reach the issue of whether the coroner could be immune from liability under the Safe Cremation Act. S.C. Code Ann. §§ 32-8-300 to -385 (2007 & Supp. 2010).

explanation of the cause of death. Mr. Trask testified an autopsy "would have confirmed the results of a toxicology examination, would have determined the actual cause of death, whether it be the crash itself or by the fire." The essential purpose of the statute is neither to provide evidence for a civil lawsuit nor to ensure that the family of a deceased person is given its desired level of detail regarding the cause of death.[8] Accordingly, the Trasks' negligence claim against Copeland officially under section 17-7-10 is barred by the public duty rule.

Second, the Trasks allege section 17-7-80 creates a special duty. Title 17 is labeled "Criminal Procedures," and section 17-7-80 states:

> Every coroner . . . shall examine the body within eight hours of death of any driver and any pedestrian, sixteen years old or older, who dies within four hours of a motor vehicle accident . . . , and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. Such blood or other fluids shall be forwarded to the South Carolina Law Enforcement Division within five days after the accident in accordance with procedures established by the Law Enforcement Division.

The Trasks argue the essential purpose of the section "is to protect those who may perish in a motor vehicle accident, as well as their survivors, their estates, and their heirs, and equally importantly, to accurately ascertain the cause of the decedent's death." They contend if Copeland had taken a toxicology sample, they "would have known what effect alcohol had on Paul's ability to drive, whether it likely impaired his driving, and whether it significantly contributed to his death." We do not believe the essential

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[8] "Cause of death" is a defined term and "refers to the agent that has directly or indirectly resulted in a death." S.C. Code Ann. § 17-5-5(2) (2003). In this case, the Coroner's Report states the "Manner of Death" is "Accident" and the "Cause of Death" is "Multiple Injuries Extreme."

purpose of the statute is to protect against this "particular kind of harm." Rather, because the statute requires the toxicology sample be sent to the South Carolina Law Enforcement Division, we find the purpose of the statute is one of law enforcement. Therefore, any benefit or injury to the Trasks from its performance or nonperformance in determining whether alcohol played a role in their son's death is incidental to its essential purpose. The Trasks' negligence claim against Copeland officially under section 17-7-80 is also barred by the public duty rule.

Third, and finally, the Trasks allege sections 17-5-570(B) and 17-5-590 create a special duty when a body is not identifiable. Because the Trasks concede that Paul died in the accident, we need not address this further. Even under their own theory, they are not within the protected class: families of unidentifiable deceased persons. Accordingly, the Trasks' claims based on these statutory duties are barred by the public duty rule.

III. Third Party Spoliation of Evidence

The Trasks also allege a third party spoliation of evidence cause of action. In Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 36, 659 S.E.2d 122, 124 (2008), the supreme court refused to adopt the tort of third party evidence spoliation. However, it stated, "we decline to address whether we would, under other factual circumstances, adopt the tort." Id. The supreme court then listed the elements of negligent and intentional third party spoliation as stated in Hannah v. Heeter, 584 S.E.2d 560, 569-70, 573 (W. Va. 2003). Austin, 377 S.C. at 34-35, 659 S.E.2d at 123-24. As the supreme court did in Austin, we find the Trasks fail to meet those elements. The Trasks have not presented any evidence that Copeland or Beaufort County had knowledge two days after Paul's death of a potential civil action against Hess Corporation and Xpress Lane, or that Paul's body would be considered evidence in such a lawsuit. More importantly, the Trasks authorized the cremation of Paul's body. They also failed to show it was possible to obtain a toxicology test, and did not show how the results of that test would be vital to their ability to prevail in a civil action. The circuit court correctly granted summary judgment as to this claim.

IV. Intentional Infliction of Emotional Distress

The second category of damages the Trasks claim from Copeland's conduct is emotional harm. They allege Copeland is liable for intentional infliction of emotional distress for the two statements he made to the Trasks. The statements were made in response to questions from the Trasks about the performance of an autopsy and the details of the accident. These are questions properly addressed to a coroner, not a funeral home owner. Under the Tort Claims Act, a coroner is immune from suit for "the intentional infliction of emotional harm." S.C. Code Ann. § 15-78-50 (2005) ("Any person who may suffer a *loss* proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter provided.") (emphasis added); § 15-78-30 (2005) ("'Loss' . . . does not include the intentional infliction of emotional harm."). We agree with the trial court that the Trasks cannot "circumvent the bar of sovereign immunity by raising alleged acts by Copeland acting as the Coroner and then seeking to recover for those acts against Copeland individually."

V. Beaufort County is Not Liable for the Acts or Omissions of Copeland Officially

The negligence claim against Beaufort County for Copeland's failure to perform a toxicology test in his official capacity and the claim of negligent supervision and training were properly dismissed because Copeland owed no duty to the Trasks arising from his official actions or inactions in this case. Beaufort County cannot be vicariously liable for Copeland's conduct because Copeland is not liable. "If no duty exists, the defendant is entitled to judgment as a matter of law." Chastain, 381 S.C. at 519, 673 S.E.2d at 832. Therefore, we need not reach the issue of whether Beaufort County has control over the coroner. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

VI. Conclusion

In this case, much of the coroner's conduct is troubling, but none of it is actionable. Because we find the statutes at issue do not give rise to private rights of action, because South Carolina has not recognized the tort of third party spoliation of evidence, and because the Trasks fail to state a claim for intentional infliction of emotional distress, we find the circuit court was correct in granting summary judgment.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Timothy L. Wallace, Appellant.

Appeal From Oconee County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 4800
Heard November 3, 2010 – Filed March 2, 2011

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia; for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Salley W. Elliott, Assistant

Attorney General Deborah R.J. Shupe, Office of the Attorney General, all of Columbia; and Solicitor Christina T. Adams, of Anderson; for Respondent.

FEW, C.J.: Timothy L. Wallace appeals his conviction and twenty-five year sentence for trafficking cocaine. His primary contention is that the arresting officer did not have reasonable suspicion to detain him after the conclusion of a traffic stop, and thus that the trial judge erred in not suppressing evidence seized during the subsequent search. He also contends the judge erred in not suppressing a statement he made to the officer just before the drugs were found and in not granting a mistrial. We affirm.

I. Facts

Corporal Thomas Crompton of the Oconee County Sheriff's Office stopped Wallace on Interstate 85 for driving his car left of the center line. During the approximately twelve minutes it took Crompton to complete the traffic stop, he made numerous observations that led him to suspect that Wallace was engaged in serious criminal activity. Crompton issued Wallace a traffic ticket, but he continued to question him. He asked if there was anything illegal in the car and sought consent to search it. Wallace did not answer the question about anything illegal, and he refused several times to give consent to search. Crompton then said "hang tight just a second" and retrieved a drug-sniffing dog from his patrol vehicle. At that point, Wallace was detained a second time and not free to leave.[1] When Crompton walked the dog around Wallace's car, the dog alerted on the driver's door and the trunk. Crompton then searched the car. As he pulled bags out of the back, he asked who owned each bag. Wallace claimed ownership of a bag in which Crompton discovered 752 grams of cocaine.

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[1] Wallace does not contend the second detention began until Crompton said "hang tight." During the suppression hearing, trial counsel stated, referring to the "hang tight" directive: "At that point the traffic stop ended and this turns into another type of stop where the officer has to have some sort of a reasonable and articulable suspicion of continuing criminal activity."

After Crompton found the cocaine, Sergeant Dale Colegrove, who had been called to the scene for backup, read Wallace his Miranda[2] warnings. Wallace agreed to speak to Colegrove without an attorney present. Wallace told him that he had picked up the cocaine and was delivering it to someone in North Carolina. Wallace was arrested and later indicted for trafficking more than 400 grams of cocaine.[3]

II. Applicable Law

Wallace concedes there was probable cause for the traffic stop. The State concedes Wallace was detained a second time while Crompton used the drug dog and then searched the car. These concessions narrow the issue before us to whether Crompton's suspicion that Wallace was engaged in serious criminal activity was reasonable under the Fourth Amendment based on information available to Crompton at the time he told Wallace to "hang tight."

In State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), a majority of our supreme court summarized the basic principle that the Fourth Amendment prevents a police officer from detaining a suspect after the conclusion of a valid traffic stop "unless the officer has reasonable suspicion of a serious crime." 388 S.C. at 521, 698 S.E.2d at 205 (citing United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)). However, "'[r]easonable suspicion' . . . defies precise definition." United States v. McCoy, 513 F.3d 405, 411 (4th Cir. 2008). In McCoy, the Fourth Circuit restated the classic passage from Ornelas v. United States, 517 U.S. 690 (1996), concerning the difficulty courts find in applying the requirement of reasonableness to the unique facts of a case: "Far from being susceptible to a 'neat set of legal

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

[3] Sergeant Colegrove testified that after Wallace was arrested, he took Wallace back to the sheriff's office and made some phone calls in an attempt to corroborate what Wallace told him and to make the intended delivery. Wallace cooperated in that effort, but it was not successful.

rules,' [reasonable suspicion] is . . . a 'commonsense, nontechnical conception [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Id. (quoting Ornelas, 517 U.S. at 695-96); see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (quoting Ornelas). In this highly fact-specific inquiry,[4] reasonable suspicion "is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed." United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004). The law summarized above is well settled; the application of the law to a specific set of facts in an individual case can be unsettling.

There are several important principles, however, that assist courts in the analysis. In Branch, the Fourth Circuit stated "it is entirely appropriate for courts to credit 'the practical experience of officers who observe on a daily basis what transpires on the street.'" 537 F.3d at 336-37 (quoting United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993)). Our own court has noted that in reviewing a particular case, "the court must consider the totality of the circumstances." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). Factors that are alone consistent with "innocent travel" can, when "taken together" produce a reasonable suspicion of criminal activity. United States v. Sokolow, 490 U.S. 1, 9 (1989). In applying the concept of reasonable suspicion to the various facts of a case, "[i]t is the entire mosaic that counts, not single tiles." United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988).

III. Application of Law to Facts

We begin our discussion of the reasonableness of Corporal Crompton's suspicion that Wallace was engaged in serious criminal activity by noting that Crompton was an experienced officer. Over the ten years he worked in law enforcement before this arrest he had been continually trained, including education in drugs and drug interdiction. In his testimony at the suppression hearing, Crompton described in detail what happened, what he observed, and the conclusions he drew from those facts. From this testimony and from the

[4] Tindall, 388 S.C. at 527, 698 S.E.2d at 208 (Kittredge, J., dissenting).

totality of the circumstances of this case, we find ample evidence to support the trial judge's ruling that Crompton's suspicion was reasonable under the Fourth Amendment. This evidence, which is described below, is sufficient to require that we affirm under our deferential standard of review. Compare Tindall, 388 S.C. at 521, 523 n.5, 698 S.E.2d at 205, 206 n.5 with Tindall, 388 S.C. at 524-25, 527, 698 S.E.2d at 206-07, 208 (Kittredge, J., dissenting) (describing the standard of review as "clear error" or "any evidence.")

When Crompton activated his blue lights to make the traffic stop, Wallace "hit his brakes, then he let off his brakes and got right at the exit ramp . . . and then hit his brakes again, and then drove halfway up the exit ramp before he decided to get on the shoulder of the road." This "spark[ed] [Crompton's] attention that there might be something else going on." After asking Wallace for his license, registration, and proof of insurance, Crompton noticed he was "fumbling around" and it took him approximately two minutes to collect all of the documents, which is a longer period of time than Crompton testified is normal. During this time, the passenger in Wallace's car looked straight ahead, did not help Wallace locate any of the paperwork, and did not acknowledge Crompton's presence.

Crompton asked Wallace to step out of the car and sit in the passenger's side of his patrol vehicle, while the passenger remained in Wallace's car. Crompton asked Wallace where he was coming from, and he answered, "Atlanta,"[5] but could not tell him how many days he spent there. He appeared to get progressively more nervous as he spoke, instead of gradually relaxing, which Crompton observed is the normal reaction.[6] When he ran Wallace's driver's license, the report indicated that he had a previous alcohol related violation. Crompton asked him about the violation, and Wallace went

[5] Crompton testified Atlanta is a "hub city" where drugs are distributed and Interstate 85 is a known drug corridor.

[6] Crompton testified that Wallace's nervousness was visible on the video of the traffic stop, the relevant portion of which was shown to the trial judge.

into detail about the event and continued to talk nervously, which Crompton described as "nervous chitter."[7]

During their conversation, a black BMW pulled up approximately seventy-five yards behind the area where Wallace was pulled over. The car remained for approximately two minutes and then drove away. After seeing the BMW, Crompton walked from his patrol vehicle over to Wallace's car to speak to the passenger. As soon as Crompton approached the door of the car, a cell phone in the car started ringing. Crompton found this odd and consistent with drug trafficking activity because drug traffickers use decoy cars and call each other on cell phones during delivery trips. Crompton asked the passenger questions, but he would "hardly look" at Crompton and was sweating. Crompton testified that though it was noon in mid-September, Crompton was not sweating—even wearing "a bullet-proof vest and everything else." As the passenger handed Crompton his identification card, the card was "moving up and down in a rapid manner," indicating to Crompton that he was nervous. The passenger said he and Wallace were coming from a baby shower in Atlanta, where they stayed for one day. Wallace had not mentioned a baby shower.

Crompton walked back to his patrol vehicle to ask Wallace a few more questions. Crompton testified Wallace said "he didn't know how many days he stayed [in Atlanta]. He told me one, then he told me two, then two days and one night." He began to explain the traffic ticket to Wallace and asked him where he lived. At that point, Wallace told Crompton he was actually not traveling from Atlanta, but was coming from "Lavonia or Lithonia."[8]

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[7] The alcohol violation itself is of no significance to our analysis. We include it only as context for Crompton's testimony about the "nervous chitter."

[8] Crompton testified he couldn't tell whether Wallace said Lavonia or Lithonia, but both are reasonably near Atlanta. Regarding the discrepancy, however, Crompton testified: "If I go to Atlanta, I know I'm in Atlanta. . . . And if I get stopped and somebody asks me where I'm coming from, if I go to Lithonia, then I know I've been to Lithonia."

As Crompton finished explaining the ticket, Wallace "was actually looking out the window towards the woods . . . almost to the point that if he could have got out of the car, . . . he would have been gone." He described Wallace at that point as "real defensive." Crompton asked if there was anything illegal in the car. Wallace did not answer and "wouldn't look at [him], he threw a wall up and that was it." Crompton then asked several times if he could search the car. Wallace said "if the vehicle was his, he would give [Crompton] permission to search it; but due to the vehicle not being his . . . he couldn't give that to [him]."[9]

In its brief, the State summarizes all of this evidence in the following fourteen points:

> (1) after he activated his blue lights, Wallace hit the brakes, let off the brakes, got right to the exit ramp, then hit the brakes again and drove halfway up the exit ramp before pulling off the road, all of which was outside the normal behavior for traffic stops; (2) Wallace fumbled around for his license and the car paperwork for longer than the normal time in routine traffic stops; (3) the passenger (Hood) stared straight ahead and did not even acknowledge Cpl. Crompton's presence; (4) Wallace and Hood gave different accounts of their travel time and itinerary; (5) rather than calming down, Wallace became increasingly nervous during his discussions with Cpl. Crompton; (6) a black BMW pulled up behind Cpl. Crompton's patrol car on the side of the exit ramp, sat there for a couple of minutes and then drove away as Cpl. Crompton was walking toward Wallace's car to talk with Hood; (7) as Cpl. Crompton approached the car to talk with Hood, a cell phone on the seat next to Hood started ringing but Hood did not answer it; (8)

[9]A female who was not present was listed as the owner of the car.

> drug dealers frequently use decoy cars and communicate via cell phones when transporting drugs; (9) Hood would not look at Cpl. Crompton when they were talking; (10) Hood was sweating even though it was a mild day, and he was visibly nervous; (11) after Cpl. Crompton spoke to Hood, Wallace changed his story about where they had been and how long they were there; (12) the car Wallace was driving belonged to a third party who was not present, which is common in drug cases; (13) I-85 is a known drug corridor; and (14) Atlanta is a known drug source/hub city.

While none of these items independently amounts to a reasonable suspicion of criminal activity, blending each of these "tiles" into the "entire mosaic" of the totality of the circumstances, we believe Crompton had reasonable suspicion to detain Wallace while he walked the drug dog around the car. Thus, the trial judge ruled correctly to deny the motion to suppress the cocaine.

IV. Other Issues

Wallace argues the trial judge should not have allowed into evidence Wallace's statement that the bag containing cocaine belonged to him. Wallace requested and the judge conducted a Jackson v. Denno[10] hearing at the beginning of Sergeant Colegrove's testimony. However, Corporal Crompton had already testified without objection that Wallace made the statement identifying the bag as his. As the trial judge observed during the hearing, "I can't do anything about something that's already happened." This issue is not preserved because the evidence had already been presented to the jury before Wallace made any objection to it. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

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[10] 378 U.S. 368 (1964).

Wallace also challenges the denial of his motion for mistrial. After deliberation began, the jury requested that a portion of the videotape of the traffic stop be replayed. The part replayed included footage not previously shown to the jury of Wallace telling Corporal Crompton he had a prior drug conviction. The trial judge determined that the error was harmless and denied the motion because Wallace had testified about the same conviction during his direct examination. "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). "A trial judge's ruling on a motion for mistrial will not be disturbed absent an abuse of discretion amounting to an error of law." State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004). The judge's ruling was within his discretion.

V. Conclusion

The trial judge was correct to rule that the arresting officer had reasonable suspicion to detain Wallace long enough to walk the drug dog around his car. Wallace's argument regarding his statement claiming ownership of the bag is not preserved for our review. The judge acted within his discretion in denying Wallace's motion for a mistrial.

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: The Estate of Helen P. Duffy

Robert M. Davitt, Appellant,

v.

Nancy L. Soeker, Individually, as trustee of the Helen P. Duffy Trust, and Personal Representative of the Estate of Helen P. Duffy; Lynn Y. Kuczik; and Karyn Sherman, Respondents.

Appeal From Beaufort County
The Hon. Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 4801
Submitted January 1, 2011 – Filed March 2, 2011

AFFIRMED

Stephen Edward Carter, of Hilton Head Island, for Appellant.

Dean Britton Bell, of Hilton Head Island, for Respondents.

WILLIAMS, J.: On appeal, Robert Davitt (Robert) claims he presented satisfactory evidence to establish he was the common law spouse of Helen Duffy (Helen);[1] thus, the circuit court erred in affirming the probate court's determination that Robert was not entitled to an elective share of Helen's estate. We affirm.

FACTS

Robert and Helen met in 1991 after being introduced by a mutual friend. Both parties were widowed and had children from prior marriages. In 1992, they began cohabiting in New York until they moved to South Carolina in 1998. Upon moving, Helen purchased a home in the Sun City community in Bluffton, South Carolina. Robert lived with Helen in her home until shortly before Helen's death in April 2006. After Helen's death, Robert petitioned for a determination of his status as Helen's surviving spouse and his entitlement to an elective share of her estate.

The probate court held a non-jury trial on June 27, 2007. At trial, Robert presented twelve witnesses from the Sun City community who collectively testified that after moving to South Carolina, Helen and Robert continuously lived together and had a reputation in the community as being married. Robert introduced evidence to corroborate this testimony, including numerous undated Valentine's Day, Father's Day, and birthday cards. Many of these cards referred to Robert as Helen's husband and some explicitly referenced their marriage. Robert also submitted numerous photographs of Helen wearing a ring on her ring finger as well as a copy of their church pictorial directory, which listed the couple as "Bob & Helen Davitt." One of Helen's daughters, Nancy Soeker, testified she heard Helen refer to Robert as

[1] For ease of reference, we refer to the parties by their first names.

her husband to other people; however, Helen never directly told Nancy that she and Robert were married.

At the one-day trial, Helen's estate presented Helen's last will and testament as well as her second amendment and restatement of trust, which Helen executed in November 2004. The second amendment states,

> The Settlor is living with, but is not married to, **ROBERT M. DAVITT**, and has intentionally omitted him from any provisions or distributions to be made hereunder except as may be expressly provided for herein. Settlor's assets were derived from the assets and estates of her [two] prior spouses . . . and it is her intent and desire to protect and preserve those assets for the benefit of her three living children . . . .

Helen's attorney, Michael E. Cofield (Cofield), testified he prepared both of those documents based on input from Helen alone. Cofield also stated her three children brought Helen to his office, but none of them were present when Helen signed the second amendment and restatement of trust, and he had no discussion with any of her children about the contents of Helen's will. In addition, the estate introduced a letter written by Robert to his children on July 24, 1999, which stated, "Just for the record[] – everything is Helen's – the house, the contents, the car – if I pass on, my estate is the [two] Schwab accounts and a checking account. If Helen goes first – her Will will take care of all . . . ."

Robert testified he and Helen maintained a "house account," into which they deposited both of their social security checks and paid joint living expenses; however, only Helen's name was on the account. Helen also maintained her own personal checking account, and both parties kept their personal assets separate. Robert acknowledged that he and Helen designated their filing status as "single" on their federal income tax returns, despite the option to file as "married filing separately."

In its order, the probate court found Robert was not the common law spouse of Helen. As such, the probate court denied Robert's petition to find he and Helen were lawfully married and consequently declined to award Robert an elective share of Helen's estate. This appeal followed.

STANDARD OF REVIEW

The issue of common law marriage sounds in law. Tarnowski v. Lieberman, 348 S.C. 616, 619, 560 S.E.2d 438, 440 (Ct. App. 2002). Because this action sounds in law, and the existence of a common law marriage is a question of fact, this court is bound by the probate court's factual findings and its credibility determinations. Barker v. Baker, 330 S.C. 361, 370, 499 S.E.2d 503, 508 (Ct. App. 1998). Consequently, our review in this case is limited to a determination of whether or not there is any evidence to support the findings of the probate court. Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct. App. 1987). "[T]he question is not what conclusion this [c]ourt would have reached had it been the fact-finder, but whether the facts as found by the probate court have evidence to support them." Barker, 330 S.C. at 370, 499 S.E.2d at 508. Therefore, we must affirm if any evidence supports the probate court's findings. Tarnowski, 348 S.C. at 619, 560 S.E.2d at 440.

LAW/ANALYSIS

Robert contends the circuit court erred in upholding the probate court's determination that he failed to establish a common law marriage. Specifically, Robert claims the circuit court erred in affirming the probate court because the probate court improperly weighed (1) the testimony of the witnesses in their community, (2) the testimony of Helen's estate attorney, and (3) Robert's and Helen's federal income tax returns. We disagree.

In South Carolina, a common law marriage is formed when two parties have a present intent to enter into a marriage contract. Id., 348 S.C. at 619, 560 S.E.2d at 440. An express contract is not always necessary as the intent

to be married can be inferred from the circumstances. Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978). It is essential to a common law marriage that a mutual agreement exists between the parties to assume toward each other the relationship of husband and wife. Johnson v. Johnson, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960).

The party seeking to establish the existence of a common law marriage carries the burden of proof. Ex parte Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937). Because Robert sought to establish the existence of a common law marriage after Helen's death, section 62-2-802(b)(4) of the South Carolina Code (2009)[2] requires proof by clear and convincing evidence.

Clear and convincing evidence is that "degree of proof which will produce in the [fact-finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Satcher v. Satcher, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (internal citation and quotation marks omitted).

In finding Robert failed to establish a common law marriage by clear and convincing evidence, the probate court duly considered the existence of evidence to support a common law marriage, including: (1) numerous celebration cards from Helen to Robert with notations indicating a marital

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[2] Section 62-2-802(b)(4) states that a surviving spouse does not include:

> [A] person claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

relationship; (2) photographs depicting Helen wearing a ring on her ring finger; and (3) testimony from twelve witnesses in the Sun City community, all testifying that the parties lived together continuously and were regarded in the community as husband and wife.

Despite the foregoing testimony and evidence, the probate court effectively gave more weight to the evidence negating the existence of a common law marriage. The probate court emphasized Helen's last will and testament and her second amendment and restatement of trust that declared she was "living with, but [] not married to, Robert M. Davitt," which the court concluded was a clear expression of her state of mind regarding her relationship with Robert. Moreover, the probate court recounted her attorney's testimony that he witnessed Helen execute those documents and that he prepared the documents based on input only from Helen. The probate court found Robert's letter to his children served to buttress other evidence and testimony at the hearing that both parties intended to keep their assets separate and distinct. Last, the probate court considered the parties' decision to file their federal income taxes as "single" rather than "married filing separately" as evidence Robert and Helen did not intend to be married.

Because the probate court, as the fact-finder, is afforded the discretion to weigh the evidence in probate matters, and there is evidence in the record to support the probate court's decision, we find the circuit court properly affirmed the probate court. See Barker, 330 S.C. at 370, 499 S.E.2d at 508 ("[T]he question is not what conclusion this [c]ourt would have reached had it been the fact-finder, but whether the facts as found by the probate court have evidence to support them.").

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.[3]

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

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shane M. Bean, Appellant,

v.

South Carolina Central Railroad Company, Inc., Respondent.

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Opinion No. 4802
Heard November 4, 2010 – Filed March 2, 2011

AFFIRMED

W. Mullins McLeod, Jr., Sonaly K. Hendricks, and Ayesha T. Washington, all of Charleston, for Appellant.

John C. Millberg, of Raleigh, and James B. Richardson, Jr., of Columbia, for Respondent.

GEATHERS, J.: This is an appeal from a negligence action pursuant to the Federal Employer's Liability Act (FELA)[1] for personal injuries suffered by Shane Bean while working for South Carolina Central Railroad Company, Inc. (SCCR). The circuit court granted summary judgment to SCCR, noting Bean executed a valid release agreement that precluded all of his claims. In this appeal, Bean asserts numerous points of error, namely, that the circuit court erred in granting summary judgment to SCCR when (1) Bean presented evidence that the release was procured by fraud, the release was executed pursuant to a mutual mistake, and the release failed for lack of consideration; (2) Bean was not afforded a reasonable opportunity to conduct discovery essential to his claims prior to the grant of summary judgment; and (3) Bean presented evidence of SCCR's negligence as causing or contributing to his injury. We affirm.

FACTS

Shane Bean suffered an on-the-job injury in August of 2004 when his boot slipped off the bottom step of a stationary locomotive while dismounting it, causing him to fall to the ground and injure his right knee.[2] Bean was subsequently diagnosed with a torn anterior cruciate ligament (ACL) in his right knee. Dr. Terence W. Hassler, the doctor who performed two surgeries on Bean's knee, signed a disability certificate on October 11, 2004, noting Bean was sufficiently recovered to return to work and resume a normal workload "as tolerated." Bean returned to work for SCCR and performed primarily engine duty until March 2005 with the assistance of a knee brace.

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[1] 45 U.S.C. §§ 51 to -60 (2007). Under FELA, railroad carriers are liable to their employees for any injuries resulting, in whole or in part, from the employer's negligence. See 45 U.S.C. § 51.

[2] Bean's complaint alleged the fall was due to oil and grease on the ground in the area where the locomotive was stationed. However, during his deposition, Bean admitted he was not looking down at his feet as he dismounted the locomotive and it was possible the accident was his own fault.

In March of 2005, Bean underwent ACL reconstruction surgery and took six months off to recover. In April of 2005, Bean suffered another injury when he fell off the front steps of his home while using crutches after a rain storm. Bean suffered a fractured right knee cap and underwent additional surgery. Bean remained on paid medical leave with SCCR until September of 2005, when he returned to work. SCCR paid all of Bean's medical bills and lost wages during his six-month medical leave.

On September 1, 2005, Dr. Hassler signed another disability certificate noting Bean was sufficiently recovered to return to work with the following limitations: "Engine Duty Only / No ground work for 6 mths." On September 29, 2005, Dr. Hassler issued a third disability certificate with the following limitation: "Engine Duty and light ground work only."

During his deposition, Bean explained he thought "light ground work" included dismounting the locomotive and aligning three to four switches during a tour of duty. When asked if Dr. Hassler specifically told Bean his restriction was permanent, Bean answered "He said that in order for my knee to last I would have to take care of it. He mentioned to me that one more fall, one more good fall would probably wipe my knee out for good." According to Bean, Dr. Hassler told him his restriction would continue "as long as nothing changed with my knee."

Upon returning to work for SCCR, Bean complained to Natalie Jones, the nurse representative employed by SCCR to handle his case, about his desire not to do any night work due to the increased tripping hazards. Jones spoke to SCCR management and Bean was transferred to daytime engine duty work within several weeks. Bean admitted his coworkers and supervisors at SCCR accommodated his restrictions and permitted him to perform only engine duty and light ground work.

Bean began settlement negotiations with Bill Monroe, a claims representative consultant for Rail America,[3] in June of 2006. Bean testified "at that time I thought that my best interest would be to play fair with the

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[3] Monroe was a senior claims manager with Railroad Risk Management, Inc., a company contracted by Rail America, the parent company of SCCR.

railroad and see what they had to say about the situation." Monroe told Bean he had the option of hiring an attorney, and Bean chose not to do so. Bean testified he chose not to hire an attorney because he believed "I would work with them, and they would hopefully work with me." Bean admitted SCCR management did not expressly tell him he should not hire an attorney, or threaten him with the loss of his job if he chose to hire an attorney.

However, Bean did contend that several days after the incident, John Atkinson, an SCCR Trainmaster and Bean's supervisor, took him to the Hartsville Army Navy store and bought him a pair of Oakley sunglasses. During this outing, Atkinson allegedly told Bean he could either hire an attorney and litigate his claim for several years, or he could settle with the railroad and return to work. Atkinson also told Bean he could probably get $50,000 from the railroad if he decided to settle his claim.

As a result of Bean's settlement discussions with Monroe, Bean executed a "General Release and Final Settlement" releasing SCCR from all claims of liability for his knee injury. Bean testified that prior to signing the release, he asked Monroe if SCCR knew he had a permanent restriction. Monroe allegedly told Bean that SCCR was aware of his permanent restriction and "they were willing to work with me on that, and accommodate me." According to Bean, Monroe also told him that the permanent work restriction language, i.e. light ground work and engine duty, "could not" be inserted into the release. Despite knowing the release contained no work restriction limitation language, Bean signed the release and accepted $75,000 from SCCR as part of the terms of the settlement.

After executing the release, Bean continued to work for SCCR for another ten months without incident or complaint. In mid-April of 2007, Bean left for vacation for a week and upon his return he noticed he had been assigned a conductor's job. Bean complained to Michael Rogers and John Atkinson, Trainmasters for SCCR, and informed them that he was on a permanent restriction and therefore could not work as a conductor. SCCR management asked Bean to secure a medical release from his doctor indicating whether he had any permanent medical restrictions. Bean visited Dr. Hassler again and allegedly produced a note to SCCR management stating his permanent work restriction, i.e. engine duty and light groundwork,

had not changed.[4] According to Bean, Atkinson told him not to return to work until he had a full medical release. According to Rogers, SCCR management told Bean to go home until he could provide SCCR with a document clarifying his medical condition.

On May 10, 2007, approximately three weeks later, SCCR faxed Bean a "return-to-work" agreement providing as follows:

> Shane Bean will return to work on Monday, May 14, 2007, under the restrictions of an extended light duty as instructed on the return to work release we received from Dr. Hassler on 09/29/05. [Bean] will be on engine duty with some light ground work. Light ground work meaning he is able and capable of getting off the engine to throw switches, make couplings, apply/release handbrakes, etc. [Bean] will also be able to work as a conductor in an emergency situation (lack of qualified persons, etc.) for a short term. . . . . [SCCR] will make a reasonable effort to accommodate [Bean's] condition based on seniority. [SCCR] would require [Bean] to provide an update on his condition from his doctor every six months.

Bean testified he refused to sign this accommodation letter because the offer was "vague" with regard to how long he would be forced to work as a conductor. Bean never returned to SCCR, nor did he call to inform the company he was not coming back.

Bean applied for and accepted a job in Spartanburg two days after receiving the faxed work accommodation agreement from SCCR. Rogers sent Bean a letter on May 21, 2007, noting he would be terminated for job abandonment if he did not return to work or contact SCCR management. Bean failed to respond or appear, and he was terminated after a hearing on May 24, 2007.

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[4] The record on appeal does not contain any notes or disability certificates from Dr. Hassler in the year 2007.

Bean filed a complaint on August 14, 2007, against SCCR for negligence under FELA and for violations of the Federal Railroad Safety Authorization Act.[5] In addition, Bean alleged fraud and negligent misrepresentation with respect to SCCR's statements and conduct in the execution of the release. SCCR filed a motion for summary judgment arguing the release executed by Bean precluded any personal injury claims against SCCR under FELA. SCCR further argued Bean was unable to demonstrate his injuries were caused by SCCR's negligence. Bean filed a memorandum in opposition to summary judgment arguing the release was invalid based on fraud, mutual mistake of fact, and lack of consideration.

Bean also filed an affidavit in opposition to SCCR's summary judgment motion noting "I provided John Atkinson a copy of Dr. Hassler's return to work form dated September 29, 2005 where he permanently placed me on engine duty only and light ground work." Bean further explained, "Under no circumstances would I have accepted [the $75,000 settlement] money if I knew the railroad would require me to work beyond my physical limitations as explained by Dr. Hassler and in essence take my job from me." With regard to why the permanent work restriction language could not be included in the release, Bean stated "I believed the reason it was not in the release is because I was already back to work. Therefore, there was no need to sign a get back to work form or have that language in the release." Finally, Bean concluded, "The railroad induced me to enter into the settlement under the promise and representation that I would get back to work and that they would accommodate my medical restrictions."

During the hearing on the summary judgment motion, Bean's counsel argued several material facts were in dispute, including whether Bean's work restriction was permanent or temporary, and whether the release applied to Bean's employment claims in addition to his personal injury claims. The circuit court entered an order granting SCCR's motion for summary judgment on the grounds that the release was validly executed. The circuit court did

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[5] Although Bean refers to this claim in his complaint as a violation of the Federal Railroad Safety Authorization Act, we note that this code section, formerly referred to as the Boiler Inspection Act, later became the Locomotive Inspection Act (LIA). See 49 U.S.C. § 20701 (2007).

not reach the issue of SCCR's negligence or Bean's request to conduct further discovery prior to the summary judgment ruling. Bean did not file a Rule 59(e), SCRCP, motion to alter or amend. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in holding that fraud invalidating a FELA release may only be shown where the defendant railroad makes material misstatements meant to deceive an injured worker as to the contents of the release?

2. Did the circuit court err in granting summary judgment to SCCR when Bean presented evidence that the release was procured by fraud on behalf of SCCR?

3. Did the circuit court err in holding that a mutual mistake invalidating a FELA release may only be found when the mistake goes to the nature of the injury?

4. Did the circuit court err in granting summary judgment to SCCR when Bean presented evidence that the release was executed pursuant to a mutual mistake of the parties?

5. Did the circuit court err in granting summary judgment to SCCR when Bean presented evidence that the release failed for lack of consideration?

6. Did the circuit court err in granting summary judgment when Bean was not afforded a reasonable opportunity to complete discovery essential to challenging the validity of the release, proving defendant's liability, and opposing the motion for summary judgment?

7. Did the circuit court err in granting summary judgment when Bean presented evidence of SCCR's negligence as causing or contributing to his injury?

STANDARD OF REVIEW

Generally, a FELA action brought in state court is controlled by federal substantive law and state procedural law. Norton v. Norfolk S. Ry., 350 S.C. 473, 476, 567 S.E.2d 851, 853 (2002). However, a local form of practice may not defeat a federal right. Id. It is firmly established that questions of the sufficiency of the evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules. Brady v. S. Ry., 320 U.S. 476, 479 (1943). A summary judgment motion involves analysis of the sufficiency of the evidence, and therefore federal law applies.[6] See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (explaining that when determining whether summary judgment is appropriate, the judge's function is not to weigh the evidence and determine the truth of the matter, but to ascertain whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"); see also Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 396-97, 618 S.E.2d 903, 905-06 (2005) (applying federal procedural law to an appeal of a summary judgment motion in a state FELA action).[7]

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[6] Although not raised on appeal, we note the circuit court incorrectly cited South Carolina procedural law for the burden of proof to survive summary judgment in its order. Because the burden of proof to survive summary judgment in federal court is more than a scintilla of evidence, and the circuit court granted summary judgment applying the less stringent state standard of proof, this error of law is not determinative of the overall appeal. See Brady, 320 U.S. at 479; accord Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[W]here the federal standard applies, . . . there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.") (emphasis added).

[7] We note that our supreme court applied South Carolina procedural law to a summary judgment motion in a FELA action in Montgomery v. CSX Transp., Inc., 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). However, this Court is bound by the subsequent Hancock decision, in which the supreme court clarified the burden of proof to survive a summary judgment motion in

Rule 56(c), FRCP, provides summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The substantive law identifies which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. "Factual disputes that are irrelevant or unnecessary will not be counted." Id.

A dispute about a material fact is genuine only if there is a sufficient evidentiary basis that would allow a reasonable fact finder to return a verdict for the non-moving party. Id. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (internal citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252; Brady, 320 U.S. at 479 ("The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact–in this case, the jury."); accord Hancock, 381 S.C. at 330-31, 673 S.E.2d at 803 ("[I]n cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.").

In addition, a challenge to the validity of a release under FELA raises a federal question to be determined by federal rather than state law. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952). "One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Callen v. Pennsylvania R.R., 332 U.S. 625, 630 (1948).

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state cases applying federal law. Hancock, 381 S.C. at 330-31, 673 S.E.2d at 802-03; accord Brady, 320 U.S. at 479.

LAW / ANALYSIS

I. AVAILABILITY OF SUMMARY JUDGMENT IN A FELA ACTION

The first issue Bean raises on appeal is whether summary judgment was improper because a challenge to the validity of a release precluding a railroad employee's FELA claims is a question of fact that must always be submitted to a jury.[8] We disagree that a FELA case must always be submitted to a jury when an employee challenges the validity of a release.

"Despite its great utility in many kinds of litigation, the motion for summary judgment is not well adapted to cases under FELA." 11 Am. Jur. Trials § 397 (1966). "This does not mean that the motion is never available." Id. Particularly with regard to negligence claims brought by an employee against a railroad, there is a federal policy in favor of jury trials when there is evidence to support negligence in a FELA action. See Millner v. Norfolk & W. Ry., 643 F.2d 1005, 1010 (4th Cir. 1981); 11 Am. Jur. Trials § 397 (1966) ("Summary judgment is almost always unavailable on the issue of negligence."). "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence." Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943) (citations and quotations omitted). "It is part and parcel of the remedy afforded railroad workers under the [Federal] Employers' Liability Act." Id. "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Id.

Notwithstanding this strong federal policy in favor of jury trials when there is any evidence to support a negligence claim, the South Carolina

[8] We note that this issue was not included in Bean's Statement of the Issues on Appeal. Therefore, we need not address this argument on the merits. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). However, because this issue is pertinent to the disposition of the overall appeal, we proceed to address the merits.

Supreme Court affirmed the grant of summary judgment in a FELA action in Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 401-02, 618 S.E.2d 903, 908 (2005) (affirming the grant of summary judgment to a railroad when there was insufficient evidence of negligence on the railroad's behalf).

We next turn to address the narrower issue of whether summary judgment is appropriate when an employee challenges the validity of a release in a FELA action. The Fourth Circuit has cited Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952), for the proposition that the issue of whether an employee is entitled to rescind a release due to fraud is "triable to a jury as of right." Millner, 643 F.2d at 1010. Therefore, an analysis of Dice is warranted here.

In Dice, a railroad employee claimed the release he signed was void and subject to recission due to fraud because he signed it relying on the railroad's deliberately false statement that the document was only a receipt for back wages. 342 U.S. at 360. The issue of fraud in the execution of a release was properly submitted to a jury based on conflicting evidence, and the jury returned with a verdict in the employee's favor. Id. at 363. However, the trial court entered a judgment notwithstanding the verdict, applying Ohio law on the issue of fraud. Id. at 360. The United States Supreme Court reversed, noting the trial court erred in applying Ohio state law to a FELA release, and in taking away the jury's verdict for the employee "when the issues of fraud had been submitted to the jury on conflicting evidence . . . ." Id. at 363 (emphasis added). Dice was not an appeal from the grant of summary judgment, and there is no language in Dice implying summary judgment may not ever be granted in a FELA action when the employee challenges the validity of a release.

In addition, none of the federal cases Bean relies upon for supporting authority expressly hold a challenge to the validity of a FELA release must be submitted to a jury, even in the absence of any genuine issue of material fact. The cases Bean cites only suggest that between a judge and a jury, any disputed factual issues should be determined by a jury. See Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961) (reversing the grant of a motion for a nonsuit when a genuine issue of fact existed as to whether the amount paid by a railroad to its employee was consideration for the release or mere

payment for back wages); Dice, 342 U.S. at 363-64 (reversing a judgment notwithstanding the verdict when the issue of fraud in the execution of a release was properly submitted to a jury on conflicting evidence, and the jury returned with a verdict in the employee's favor); Callen v. Pennsylvania R.R., 332 U.S. 625, 628-29 (1948) (finding the circuit court erred in charging the jury that a release was valid and binding when conflicting evidence was presented during trial as to whether a mutual mistake of fact existed when the release was executed); Counts v. Burlington N. R.R., 952 F.2d 1136, 1140-41, 1144 (9th Cir. 1991) (finding a new trial was warranted when the trial court incorrectly charged the jury on the law for invalidating a release and an issue of fact was raised as to whether there was a mutual mistake of fact in the execution of the release); Turner v. Burlington N. R.R., 771 F.2d 341, 344-45 (8th Cir. 1985) (noting railroad's equitable counterclaim for specific performance of a settlement agreement was properly submitted to a jury, and not triable to the court, in light of FELA's policy of providing railroad workers the benefit of a jury trial); Millner, 643 F.2d at 1009-10 (finding motion to dismiss was improperly granted when disputed facts existed regarding whether the employee's counsel had express authorization to accept the terms of a proposed settlement offer).

None of the cases Bean cites involved an appeal from the grant of summary judgment. However, the First Circuit analyzed Dice with respect to a summary judgment appeal in Camerlin v. New York Cent. R.R., 199 F.2d 698, 703 (1st Cir. 1952). The Camerlin court noted: "We take it as an a fortiori conclusion from the majority opinion in Dice that on a complaint in a federal district court under [FELA], if there are any genuine issues of fact relevant to the validity of a purported release, such issues are to be determined by the jury, not by the trial judge." Camerlin, 199 F.2d at 703 (internal citations omitted). The First Circuit recognized that "if the release was binding on the plaintiff, even accepting the truth of his version of the facts, as recited in his deposition, then the case was a proper one for summary judgment." Id. at 703. However, the employee in Camerlin alleged he was led to accept a $950 settlement upon the mistaken assumption that his rights were limited by the New York Workmen's Compensation Act. Id. Based on this mistake of law, the First Circuit noted summary judgment was inappropriate. Id. at 703-04.

In both Dice and Camerlin, and in the other authority Bean relies upon for support, a genuine issue of material fact was in dispute with respect to the validity of a release. The existence of a factual dispute regarding the validity of a FELA release precludes summary adjudication by a judge without a jury trial. However, when there is no genuine issue of material fact in dispute, summary judgment is not precluded solely because a case involves a challenge to the validity of a FELA release.

We recognize upholding a grant of summary judgment in a FELA case is not the general trend in federal case law. However, at least one federal court has granted a railroad's summary judgment motion after the employee challenged the validity of a release. Heston v. Chicago & N. W. Ry., 341 F. Supp. 126, 128 (N.D. Ill. 1972) (granting a railroad's summary judgment motion where an employee agreed to execute a release despite his alleged mistake of fact as to the exact future effects of a present injury that was fully known to him at the time of settlement to be of a permanent, painful, and serious nature).[9] Based on this opinion and also on the First Circuit's reasoning in Camerlin, we do not believe a challenge to the validity of a release necessarily precludes the grant of summary judgment in a FELA action. See Camerlin, 199 F.2d at 703.

As discussed below, there is no genuine issue of material fact in dispute with regard to the validity of Bean's release. Bean testified he was told SCCR would "work with" him to accommodate his injury. This vague remark does not rise to the level of an affirmative misrepresentation or

[9] Two other federal courts have granted summary judgment in unreported opinions despite an employee's challenge to the validity of a FELA release: Larson v. Burlington N. and Santa Fe Ry., 2004 WL 692259, at *7 (D. Minn.) (finding a railroad was entitled to summary judgment on an employee's claims when the railroad's misrepresentations went to the method used to calculate the settlement amount, and not to the contents of the release itself); Church v. Burlington N. R.R., 1990 WL 114580, at *2 (N.D. Ill.) (granting summary judgment for the defendant railroad when an employee claimed he was told it was company policy for the railroad to "take care of its employees," noting this vague remark was insufficient to establish any affirmative promise made on the railroad's behalf).

mistake of fact as to the contents of the release. Furthermore, Bean's testimony alone does not constitute more than a mere scintilla of evidence required to survive summary judgment in a FELA action. See Anderson, 477 U.S. at 252; Brady, 320 U.S. at 479; accord Hancock, 381 S.C. at 330-31, 673 S.E.2d at 803. Therefore, we hold summary judgment was appropriate under the facts of this case.

II. VALIDITY OF THE FELA RELEASE

"FELA releases may be set aside on the grounds of fraud, lack of consideration, and mutual mistake." Counts, 952 F.2d at 1142 (internal citations omitted). Bean raises all three grounds for rescinding the release in this appeal. Therefore, we will address each ground in turn.

A. Fraud

The first ground Bean raises for setting aside the release is fraud. Bean alleges the circuit court erred in granting summary judgment to SCCR when he presented evidence that Monroe and SCCR management fraudulently induced him to sign the release. Specifically, Bean contends Monroe failed to fully explain his FELA rights, despite Monroe's knowledge that Bean was not represented by counsel. Bean further argues that Monroe misrepresented the scope of the claims being released. Finally, Bean submits Monroe's assertion that his employment restrictions "could not" be put in the release was a material misstatement concerning the contents of the release. We disagree on all points.

Under FELA, "a release of rights . . . is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release." Dice, 342 U.S. at 362 (emphasis added). Fraud is generally found when the railroad misrepresents the extent or scope of a release, or when the railroad presents the release as an entirely different type of document. See id. at 360, 363 (finding a general release was void as a matter of federal law when the employee relied on the employer's deliberately false statement that the document he signed was nothing more than a receipt for back wages); Fournier v. Canadian Pacific R.R., 512 F.2d 317, 318-19

(2d Cir. 1975) (holding the district court erred in granting summary judgment to a railroad on the issue of a general release's validity where the release was presented to the employee as one applying only to his claim for back wages). But cf. Larson v. Burlington N. and Santa Fe Ry., 2004 WL 692259, at *7 (D. Minn.) (finding in an unreported opinion that a railroad was entitled to summary judgment on an employee's FELA claims when the railroad's misrepresentations went to the method used to calculate the settlement amount, and not to the contents of the release itself).

As to Bean's allegation of a fraudulent oral promise made by SCCR with respect to his future employment duties, the facts of Camerlin are sufficiently similar and warrant discussion. 199 F.2d at 700-01. In Camerlin, the district court granted the railroad's motion for summary judgment and the employee appealed. Id. The district court arguably declined to consider an affidavit the employee filed with the court after his deposition. Id. at 701. The affidavit contained an oral promise by the claims agent of a lifetime job upon the employee's return to work. Id. The First Circuit held that this alleged promise was not relevant to any material fact, and, therefore, any error in excluding it was not prejudicial. Id. The Camerlin court further explained:

> If the release were otherwise valid and binding, it could not be avoided on account of the railroad's subsequent nonfulfillment of this oral promise allegedly made by the claim agent in the course of negotiations leading to the settlement. It is not asserted that the parties meant to include this oral promise in the written contract of settlement, and that it was omitted therefrom by mutual mistake. . . . Nor do the above-stated allegations in the affidavit make out a case of fraud on the agent's part in the sophisticated sense that the agent procured the plaintiff's execution of the release in part by making an oral promise which he then and there had no intention to fulfill, or which he knew the railroad would not fulfill. The mere fact that the railroad subsequently did not give plaintiff a lifetime job is

> not, without more, a basis for inferring as a fact that the claim agent made the promise in bad faith, misrepresenting his then state of mind.

Id. However, the railroad in Camerlin also misled the employee to think the maximum amount he was entitled to recover under FELA was limited by the New York Workmen's Compensation Act. Id. at 703. Therefore, the First Circuit reversed the award of summary judgment on the basis of this latter misrepresentation, calling it a "mistake of law." Id. at 703-04.

Even taking Bean's allegations as true, Bean does not allege any fraud as to the contents of the release. Monroe allegedly told Bean that SCCR was willing to "work with" Bean to accommodate his permanent restrictions. The language of the release does not address Bean's future employment duties, nor does it state whether Bean's injury was of a permanent nature. Like the oral promise in Camerlin, the purported fraud here relates only to an extrinsic statement Bean alleges was made by Monroe in order to induce him to sign the release. During his deposition, Bean admitted he knew the agreement itself did not contain any language about a permanent work restriction before signing it.

In addition, the extrinsic oral agreement was not deliberately false or made to deceive Bean. Once Bean voiced a complaint about his expected employment duties in April of 2007, SCCR asked Bean to secure a disability certificate indicating whether his release was permanent. SCCR's request implied it was willing to abide by such a certificate. In fact, as demonstrated by the "return-to-work" agreement Rogers faxed to Bean, SCCR was indeed willing to accommodate Bean's medically recommended work restrictions. The faxed work agreement provided "[Bean] will be on engine duty with some light ground work," which is the exact limitation language contained in Bean's medical disability certificate. The "return-to-work" agreement further noted "[SCCR] will make a reasonable effort to accommodate [Bean's] condition based on seniority."

The record reflects that SCCR did attempt to "work with" and accommodate Bean's injury. Furthermore, we believe testimony about a vague remark that SCCR would "work with" Bean does not rise to the level

of an affirmative misrepresentation made by the railroad as to the contents of the release. See Church v. Burlington N. R.R., 1990 WL 114580, at *2 (N.D. Ill.) (granting summary judgment for the defendant railroad in an unreported opinion when an employee claimed he was told it was company policy for the railroad to "take care of its employees," noting this vague remark was insufficient to establish any affirmative promise made on the railroad's behalf).

Bean submits Monroe's statement that his work limitations "could not" be included in the release does go to the contents of the release. Bean suggests this was a false representation made to deceive Bean as to the contents of the release. We disagree. Bean conceded during his deposition that the only purported misrepresentation Monroe made to him was whether the railroad knew he had a permanent work restriction and whether SCCR would honor that restriction. At no point during Bean's deposition did he suggest that he believed he was not releasing his employment claims because of the absence of this language in the release. Stated differently, Bean did not ever allege that SCCR intentionally excluded any employment claim language from his release in order to deceive him as to his future employment claims. Indeed, Bean admitted in his affidavit that he believed the reason this language was not included in the release was because he was already back to work. In addition, no dispute about Bean's work duties arose until April of 2007. Therefore, this argument is unfounded.

Finally, Bean contends the release was induced by fraud because Monroe failed to fully explain his FELA rights, despite Monroe's knowledge that Bean was not represented by counsel. We note that this argument is not preserved for review because Bean failed to make this specific fraud argument to the circuit court or raise it in a Rule 59(e), SCRCP, motion to alter or amend. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court."); id. at 212, 634 S.E.2d at 54-55 ("Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

Accordingly, Bean failed to present more than a scintilla of evidence as to the allegation that the railroad made deliberately false and material statements intended to deceive him as to the contents of the release.

B. Mutual Mistake of Fact

The second ground Bean raises on appeal for setting aside the release is a mutual mistake of fact. Specifically, Bean argues summary judgment was inappropriate because a mutual mistake of fact existed that was material to the release at the time the release was executed. We disagree.

A FELA release may be set aside on the basis of a mutual mistake of fact in executing the release. See Callen v. Pennsylvania R.R., 332 U.S. 625, 630 (1948). "One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity . . . by a mutual mistake under which both parties acted." Id. (emphasis added). "In order to rescind or invalidate [a FELA] release, it is necessary to show a mistake concerning past or present facts material to the agreement; a mistake as to the future effect of presently known facts will not affect the validity of the agreement." Heston, 341 F. Supp. at 128.

Initially, Bean argues the circuit court erred in finding a release may only be set aside when the mutual mistake goes to the nature of the injury. This argument misconstrues the circuit court's order. The circuit court found: "No mutual mistake existed between the parties." Therefore, the language of the order was not expressly limited to a mistake of fact as to the nature of plaintiff's injury.

Bean has failed to meet his burden of proof to demonstrate a mutual mistake of fact in existence at the time the release was signed. There are several reasons why Bean's mutual mistake argument must fail. First, Bean's belief about the permanency of his injury was at best a unilateral mistake of fact, as opposed to a mutual mistake of fact. SCCR management was unclear as to whether Bean was permanently or temporarily injured, while Bean believed he was permanently injured. Cf. Callen, 332 U.S. at 628-29 (finding enough evidence of a mutual mistake of fact to submit the issue to a jury when both the employee and the railroad were under the mutual mistaken

belief that the employee was not permanently injured, and the parties arguably settled on that basis); Counts, 952 F.2d at 1141 (finding evidence of a mutual mistake of fact when both the employee and the railroad were under the mutual mistaken belief that the employee would lose his guaranteed job protection if he returned to another position with the railroad, and the release contained language releasing all future employment claims against the railroad).

Second, the evidence in the record does not support Bean's assertion that he had a permanent disability. Bean stated his injury was permanent based on "Dr. Hassler's return to work form dated September 29, 2005 where he permanently placed me on engine duty only and light ground work." However, the disability certificate dated September 29, 2005, states the following limitations, "Engine Duty and light ground work only." The certificate does not mention whether the injury is permanent or temporary. During Bean's deposition, he admitted Dr. Hassler told him his work restrictions would continue "as long as nothing changed with my knee." This statement does not indicate a permanent injury unlikely to change.

Third, Bean cannot demonstrate a mutual mistake of fact that existed at the time the release was signed. The dispute concerning Bean's work limitations did not arise until April of 2007, which was approximately ten months after the release was signed. Further, no evidence in the record indicates the parties intended to include Bean's work limitations in the release, yet omitted the language by mutual mistake. At best, the evidence demonstrates a mutual mistake as to the future effects of a presently known medical condition. Federal case law has found this type of mistake of fact insufficient to void a release. See Heston, 341 F. Supp. at 128.

Lastly, even assuming both parties held the same mistaken belief about the permanency of Bean's injury, that belief was not material to the release because the release contains no language regarding the nature of Bean's injury or its effect on his future employment duties with SCCR. See Heston, 341 F. Supp. at 128; Camerlin, 199 F.2d at 700-01. Bean knew that the release contained no language to this effect when he signed it.

Bean also argues because the release mentions nothing about Bean's future employment with SCCR, a jury could find the parties were operating under a mutual mistake of fact as to whether Bean released his employment claims along with his personal injury claims. We disagree. There is no evidence in the record demonstrating SCCR intended for Bean to retain his right to sue for employment-related claims, and yet omitted this language from the release by mutual mistake. In addition, neither Bean's deposition testimony nor his affidavit suggest Bean believed he had retained the right to sue for future employment-related claims.

The release language applies to "all claims which I have or may hereafter have, for personal injuries, known or unknown, and/or loss of any kind resulting or in any way arising from an accident which occurred at or near Darlington, South Carolina on or about August 21, 2004." (emphasis added). The release is entitled "General Release and Final Settlement." Based on the broad language of the release, and the corresponding lack of evidence to contradict this language, Bean has not met his burden of proof to demonstrate a mutual mistake of fact regarding whether the release applied to future employment-related claims.

Accordingly, Bean did not present more than a scintilla of evidence to demonstrate a mutual mistake of fact in existence at the time the release was signed.

C. Lack of Consideration

The third and final ground Bean raises for setting aside the release is lack of consideration. Bean argues a genuine issue of material fact existed as to whether the release was supported by adequate consideration, thereby precluding summary judgment. Specifically, Bean contends he would not have accepted the $75,000 or signed the release had he known SCCR would not accommodate his work restrictions. Bean further alleges $75,000 was a nominal sum for a permanent injury that subsequently resulted in the loss of his employment. Therefore, Bean submits the oral agreement with respect to Bean's future employment duties was the material inducement for signing the release, and once the oral agreement failed, there was a lack of consideration for the release rendering it invalid. We disagree.

"In order that there may be consideration, there must be mutual concessions." Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961) (citations and quotations omitted). "A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right." Id. "If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid." Id.

In Maynard, the employee claimed the check he received in exchange for a release of his FELA rights was actually a pay check, rightfully owed to him. Id. at 161-62. The employer claimed no back wages were due and an amount equal to back wages was paid in exchange for the release. Id. at 162-63. The United States Supreme Court found a genuine issue of material fact existed with respect to whether the employee received consideration that precluded summary judgment. Id. at 163.

Bean admittedly received a check in the amount of $75,000 from SCCR in return for releasing any and all claims related to his knee injury. Bean received these funds in addition to wages and medical expenses. During settlement discussions, Monroe offered Bean $50,000, and Bean made a counteroffer for $100,000. The parties settled on $75,000 after two settlement meetings. Bean purchased two cars and made upgrades to his home with the settlement proceeds. Bean does not argue he had any pre-existing right to these settlement proceeds. Therefore, the $75,000 was a material inducement to signing the release. See Counts, 952 F.2d at 1140 (holding a release was supported by adequate consideration and the issue should not have been submitted to a jury when the employee admittedly received $70,423 in addition to his wage entitlement in exchange for signing the release).

In addition, Bean received consideration because the oral promise Bean allegedly relied on in signing the release was subsequently fulfilled. SCCR did attempt to "work with" Bean to accommodate his medical restrictions as noted by Dr. Hassler. The faxed "return-to-work" agreement provided Bean would be on "engine duty with some light ground work." Therefore, no genuine issue of material facts exists as to whether the release should be void for lack of consideration.

Finally, Bean argues $75,000 was a nominal sum for a permanent injury. We note this issue has been abandoned on appeal because Bean cites no case law in support of this argument. Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an issue was deemed abandoned on appeal when appellant cited no legal authority to support the argument and the argument itself was merely conclusory). In addition, the entire argument on appeal consists of a single sentence. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (finding a one-sentence argument was too conclusory to present any issue on appeal). Therefore, we need not address whether $75,000 constitutes a nominal sum.

III. OPPORTUNITY FOR DISCOVERY

We next turn to address Bean's argument that he was not afforded a reasonable opportunity to complete discovery essential to SCCR's summary judgment motion before the hearing on the motion.

This argument is not preserved for this court's review. Although the parties discussed the possibility of additional discovery at the summary judgment hearing,[10] the circuit court did not rule on Bean's discovery argument in its order granting summary judgment and Bean did not file a Rule 59(e), SCRCP, motion asking the circuit court to rule on the issue of insufficient discovery. Therefore, the question of whether summary judgment was proper in light of Bean's desire to complete further discovery is not preserved for this court's review. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) (holding that to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court); id. at 212, 634 S.E.2d at 54-55 ("Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

[10] In addition, Bean's counsel asked for a ruling on the merits during the summary judgment hearing, thereby conceding that additional discovery was not needed prior to ruling on summary judgment.

IV. NEGLIGENCE

The final argument Bean raises on appeal is whether summary judgment was inappropriate because there was a genuine issue of material fact in dispute as to whether SCCR was negligent in causing or contributing to Bean's injury. The circuit court did not address the issue of SCCR's negligence in its order granting summary judgment, and Bean did not file a Rule 59(e), SCRCP, motion to obtain a ruling on this issue. Therefore, the issue of SCCR's negligence was not preserved for appellate review. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) (holding that to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court); id. at 212, 634 S.E.2d at 54-55 ("Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

Accordingly, the order granting summary judgment is

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Brandon Branham, Appellant.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4803
Submitted January 1, 2011 – Filed March 2, 2011

AFFIRMED

James Ross Snell, Jr., of Lexington, for Appellant.

Rachel Donald Erwin, of Blythewood, for Respondent.

PIEPER, J.: Appellant Charles Brandon Branham was convicted of driving under the influence, first offense, following a jury trial in the magistrate's court. The circuit court affirmed the magistrate's refusal to dismiss the case due to the State's failure to provide Branham with a videotape of his breath alcohol analysis test (breath test). On appeal, Branham argues the court must

dismiss his conviction because the State did not produce the videotape. We affirm.[1]

FACTS

Trooper K.G. Ginn of the South Carolina Highway Patrol arrested Branham for suspicion of driving under the influence. A breath test was administered. Branham appeared pro se before the magistrate to plead not guilty and to request a jury trial. At a pretrial hearing, Branham did not indicate he wished to hire an attorney. On the day of jury selection, Branham did not appear in court and a jury was selected in his absence for a trial to begin the following day. On the day of jury selection but after a jury had been selected, Branham contacted the magistrate's court asking for a continuance because his attorney could not attend trial the next day. The court advised Branham that it would not grant him a continuance. At 4:54 p.m. the same day, attorney James Snell contacted the magistrate's court and requested a continuance because he was scheduled to appear for guilty pleas in the circuit court at the same time as Branham's trial. The magistrate contacted the circuit court and arranged for Snell to be present for Branham's trial.

On the day of trial, Snell moved to dismiss the charge because the State had not provided Branham with a videotape of the breath test site. The magistrate denied the motion. The magistrate also delayed the start of the trial to permit Snell to review evidence and discuss the case with Trooper Ginn. Trooper Ginn testified on behalf of the State. The State also entered the incident site videotape, implied consent form, and breath alcohol analysis test report (datamaster ticket) into evidence. The datamaster ticket contained a notice at the bottom that Branham could view the breath test site video by means of an internet website at www.sled.sc.gov and provided Branham with an I.D. and password to access the video. The jury found Branham guilty of driving under the influence and the magistrate sentenced Branham to thirty days, suspended upon payment of a fine.

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

Branham appealed to the circuit court, asking the court to either dismiss the conviction because the State failed to produce the breath test site videotape or remand for a new trial because the magistrate failed to grant a continuance so the State could produce the videotape. On appeal, the circuit court affirmed the magistrate's refusal to grant Branham's motion to dismiss. The circuit court also found that Branham's request for a continuance was not preserved for review because the magistrate's return did not indicate that a motion for a continuance was made. Alternatively, the circuit court concluded that Branham's continuance request, if made, was untimely because it was made after jury selection on the morning of trial. Branham appealed to this court, arguing only that his conviction should be dismissed for failure to produce the breath test site videotape.

STANDARD OF REVIEW

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo. S.C. Code Ann. § 14-25-105 (Supp. 2010). The appeal must be heard by the circuit court upon the grounds of exceptions made and the record on appeal, without the examination of witnesses. S.C. Code Ann. § 18-3-70 (Supp. 2010). The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." Id. The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007).

ANALYSIS

At the outset, we note that this case involves only the breath test site video required by section 56-5-2953(A)(2) of the South Carolina Code (2006)[2] and does not involve the incident site video, which was produced at

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[2] Section 56-5-2953 was amended effective Feb. 10, 2009. See Act No. 201, 2008 S.C. Acts 1682-85. Thus, the amended statute is not applicable to Branham's March 4, 2008 arrest.

trial by the State. We also specifically note that this case does not involve any claim that the video was not accessible or available online. Thus, we analyze this case within this context.

Section 56-5-2953(B) of the South Carolina Code (2006) provides that a "[f]ailure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal" if certain exceptions apply. The statutory exceptions are: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it and there was no operable breath test facility available in the county; (2) if the officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; and (3) in circumstances including but not limited to road blocks, traffic accidents, and citizens' arrests. Id. Other exceptions are possible as the statute further provides, "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. . . ." Id.

In City of Rock Hill v. Suchenski, our supreme court found dismissal of the charge was "an appropriate remedy" where a violation of section 56-5-2953(A) was "not mitigated" by an exception from subsection (B). 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). On appeal, the City argued its noncompliance was excused pursuant to the exceptions listed in section 56-5-2953(B); however, the supreme court refused to consider the City's arguments because they were not preserved for appellate review. Id. at 15-16, 646 S.E.2d at 880. In finding dismissal an appropriate remedy, the supreme court stated "failure to produce videotapes would be a ground for dismissal if no exceptions apply."[3] Id. at 16, 646 S.E.2d at 881.

[3] Suchenski was resolved on preservation grounds. The case did not address the provision within section 56-5-2953(B) stating "[n]othing in this section may be construed as prohibiting the introduction of other evidence in the trial. . . ." In addition, the supreme court had no need to address what impact the presentation of "any other valid reason for the failure to produce the videotape" may have on possible remedies, such as dismissal or suppression.

Branham argues that the State has inexcusably failed to comply with section 56-5-2953. Branham further asserts that his failure to timely file a Rule 5 motion is not an exception to the State's statutory duty to produce a videotape from the breath test site; thus, Branham asserts his conviction must be vacated.

Pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, the prosecution must disclose certain types of information upon request of the defendant. The magistrate's return does not indicate Branham made an oral or written request for discovery. However, at the hearing before the circuit court, Branham's attorney argued that he made a Rule 5 motion orally before the magistrate. The circuit court addressed this assertion as a part of Branham's argument that the magistrate erred in refusing to grant a continuance in order to allow him to obtain and evaluate the breath test site videotape. First, the circuit court found Branham's issue on appeal was not preserved for the circuit court's appellate review because the magistrate's return did not indicate that Branham made a motion for continuance on the date of trial. The circuit court then alternatively ruled that the magistrate did not abuse her discretion in refusing to grant a continuance. In so doing, the circuit court found "a discovery request was not made until the morning of the trial." The circuit court also noted that the magistrate acted within her discretion when she delayed the start of the trial to permit Branham's attorney to confer with the prosecuting officer.

On appeal, Branham has abandoned his argument that he made an oral motion for discovery pursuant to Rule 5 because: (1) he did not contest the circuit court's ruling regarding the magistrate's failure to grant a continuance in his appellate brief and (2) Branham does not argue on appeal that he orally requested discovery. See State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 282 (Ct. App. 1999) (noting an issue not argued in the appellate brief is deemed abandoned on appeal); Rule 208(b)(1)(B) ("Ordinarily, no point will

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Id. However, based on the posture of this case and our disposition herein, we need not address these issues.

be considered which is not set forth in the statement of the issues on appeal."). Further, because the court also alternatively ruled that Branham made an untimely discovery motion and Branham did not contest that finding, we find this alternative ground constitutes an independent basis to uphold the decision finding Branham's continuance request untimely. See State v. Galloway, 305 S.C. 258, 262-63, 407 S.E.2d 662, 665 (Ct. App. 1991) (declining to reach the merits of the issue where appellant failed to appeal an alternative ruling, which constituted an independent ground for upholding the judgment); see also State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (affirming the ruling of the trial court because the appellant failed to appeal all grounds upon which the ruling was based); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). Thus, we find the circuit court's decision that the magistrate properly proceeded with the trial without permitting more time for discovery is the law of the case.

Therefore, we are left with Branham's sole issue on appeal as to whether the State failed to comply with any statutory duty to produce the breath test site video pursuant to section 56-5-2953. This case presents in part the question of whether a statutory obligation to produce the breath test site video imposes any different obligations upon counsel to request discovery as counsel would in any other context. Branham asserts that the statute places no burden on the defendant to request production of the video in advance of trial. To resolve this question, we must determine the meaning of the word "produce" within the statutory framework at issue.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009). In interpreting a statute, the court will give words their plain and ordinary

meaning, and will not resort to forced construction that would limit or expand the statute. Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

The meaning of the word "produce" in the context of section 56-5-2953(B) has not been addressed by the appellate courts of this state. Black's Law Dictionary defines "produce" as "to provide (a document, witness, etc.) in response to a subpoena or discovery request." Black's Law Dictionary (9th Ed. 2009). "Produce" is also defined by Black's Law Dictionary as "to bring into existence; to create." Dictionary.com offers a similar definition: "to make or manufacture." Merriam-Webster defines "produce" as "to cause to have existence or to happen" and "to give being, form, or shape to; make, especially manufacture." Merriam-Webster additionally includes these definitions: "to offer to view or notice" and "to give birth or rise to: yield." The World English Dictionary provides other definitions of "produce," including "to bring forth (a product) by mental or physical effort; make" and "to manufacture (a commodity)." "Produce" also means "to present to view: to produce evidence" and "to bring before the public," according to the World English Dictionary. Essentially, Branham is asserting that "produce" within the statute means the state has an affirmative duty to hand over or to turn over the video, regardless of whether an actual or formal request was made for it.

Within the statutory framework at issue, we find the definition of the word "produce" intended by the General Assembly to be consistent with the following definitions: to bring into existence; to create; to manufacture; or to cause to have existence or to bring forth by mental or physical effort. We find support in this definitional approach from words in the statute itself. For example, in section 56-5-2953(B), an officer may submit a sworn affidavit certifying it "was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed." The use of the phrase "was physically impossible" instead of "is physically impossible" suggests a focal point at the time of the event. Thus, utilizing that time framework as our perspective, the meaning we ascribe to the word "produce" best fits within the statutory context as opposed to a meaning suggested by Branham, such as to physically hand over or turn over

the videotape. Quite simply, we find the legislature intended that a video of the breath test site be created.

Moreover, the definition we adopt also encompasses the situation where the arresting officer is not the person who conducts the breath test. In this situation, the arresting officer may bring the video into existence or cause the video to be created by taking the individual to the site where the test and video will be conducted by a certified datamaster operator.

Notwithstanding, even if we were to adopt a different meaning of the word "produce," such as to present to view, to bring before the public, or even to hand over or turn over, we nonetheless find the State has met any obligation created by the statute. In State v. Landon, 370 S.C. 103, 634 S.E.2d 660 (2006), our supreme court reviewed the State's alleged violation of section 56-5-2954 of the South Carolina Code (2006), which statutorily requires the State Law Enforcement Division (SLED) to maintain a detailed record of malfunctions, repairs, complaints, or other problems regarding breath test devices at each breath test site. The court found SLED satisfied the record-keeping requirement of the statute by making its internet records available at the breath test site. Landon, 370 S.C. at 108, 634 S.E.2d at 663. Although the case was remanded for further proceedings, we utilize Landon by analogy and find the arresting officer's duty to "produce" the videotape of the breath test site pursuant to section 56-5-2953 is met where the video is made available online and is accessible to the defendant. Whether the word "produce" is alternatively defined as to present to view or to hand or turn over, or some similar meaning, by making the breath test site video available online and accessible to the defendant, we find the State met its burden of producing the breath test video. We decline to find the State may only satisfy any statutory obligation by physically handing or turning over the videotape to the defendant or counsel.

While we need not rely on typical criminal discovery jurisprudence in reaching our conclusion, we note that the approach we adopt here today, including the acceptance of the use of an online website to acquire a copy of the breath test site video, is in harmony with criminal discovery practice.

Rule 5 refers to "information subject to disclosure" upon request of a defendant. Rule 5(a)(1), SCRCrimP. In State v. Newell, 303 S.C. 471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991), this court found the prosecution met its duty to disclose material discoverable under Rule 5 by making its file available to the defense. In Strickler v. Greene, 527 U.S. 263, 276 (1999), defense counsel in a capital case did not file a pretrial Brady motion for discovery of possible exculpatory evidence because the prosecutor maintained an open file, giving counsel access to all evidence in the prosecutor's files. The United States Supreme Court found it reasonable for counsel to rely on the open file policy and the implicit representation that all exculpatory materials would be included in the files. Id. at 284; see also Porter v. State, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006) (citing to Strickler for the proposition that defense counsel may rely on an open file policy in satisfaction of the prosecution's duty to disclose material exculpatory evidence but noting that institution of an open file policy does not mean presumed compliance with Brady); Riddle v. Ozmint, 369 S.C. 39, 46-47, 631 S.E.2d 70, 74-75 (2006) (reversing the denial of post-conviction relief because the solicitor removed documents from the open file offered to defense counsel and the documents were material). The Seventh Circuit Court of Appeals found an unsupported assertion that the government suppressed evidence to be insufficient to support a Brady violation where the government maintained an open file policy of discovery. U.S. v. Driver, 798 F.2d 248, 251 (7th Cir. 1986). We see no real fundamental distinction between the use of the online website to provide access to a video and the use of an open file policy to provide or produce discovery information.

Further, because the State met any statutory obligation to produce and the datamaster ticket in the record indicated the presence of the video online and provided a password to the defendant for access, it was incumbent upon the defendant to then show the video was not available online or accessible.[4] While not controlling as to our disposition of the issue, we also find this

[4] Lack of access could include a situation where a defendant asserts he does not have a computer or means to access or view the video. However, we note most attorneys do have such access.

approach consistent with other discovery practice and jurisprudence, which places the burden on the party claiming the State did not produce evidence that it was required to produce. See Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (holding a defendant asserting a Brady claim for violation of due process must demonstrate: (1) the evidence was favorable to the defendant; (2) it was in the possession of or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment). Here, Branham has failed to demonstrate in the record or in the briefs that the video[5] was not accessible to him or available online.

CONCLUSION

Accordingly, the order of the circuit court affirming the magistrate's decision to deny Branham's motion to dismiss is hereby

AFFIRMED.

THOMAS and GEATHERS, JJ. concur.

[5] Counsel did not request that the video be made part of the record for appellate purposes.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ivory Warren, Appellant.

Appeal From Clarendon County
Paula H. Thomas, Circuit Court Judge
Howard P. King, Circuit Court Judge

Opinion No. 4804
Submitted February 1, 2011 – Filed March 2, 2011

AFFIRMED

Tara Dawn Shurling, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia, and Solicitor Ernest A. "Chip" Finney, III, of Sumter, for Respondent.

PIEPER, J.: This appeal arises out of Appellant Ivory Warren's guilty pleas to burglary in the first degree and attempted armed robbery. After sentencing, Warren filed a timely motion to withdraw her pleas. Warren later amended her post trial motion to request reconsideration of her sentence, specifically abandoning the motion to withdraw her plea. Warren argues the circuit court erred in finding it was without authority to consider her untimely motion to reconsider the sentence. We affirm the finding that Warren's motion to reconsider her sentence was not timely filed.[1]

FACTS

Warren pled guilty to burglary in the first degree and attempted armed robbery in exchange for dismissal of her indictments for murder and possession of a weapon during the commission of a violent crime. Warren also testified in the trial of one of her codefendants. The Honorable Paula H. Thomas presided over the trial and guilty pleas, and sentenced Warren to 15 years of imprisonment on each charge to run concurrently. Seven days after sentencing, Warren filed a motion to withdraw her guilty pleas. More than three years later, Warren filed a motion to amend her still-pending post trial motion, asking the court to reconsider her sentence and specifically abandoning her request to withdraw the pleas. At the hearing on the motions, the parties agreed that the Honorable Howard P. King had authority to hear the motions because Judge Thomas was unavailable due to her election to the South Carolina Court of Appeals. Judge King found Warren's request to reconsider her sentence was not timely. Alternatively, Judge King denied Warren's motion to reconsider her sentence on the merits. Judge King never ruled on the motion to withdraw Warren's plea, as that motion was abandoned. The sole issue on appeal is whether the trial court improperly denied Warren's motion to reconsider her sentence.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews only errors of law and is bound by the factual findings of the trial court unless the findings are clearly

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

erroneous. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

ANALYSIS

Warren argues that the trial court retained the power of adjudication over her case, despite the expiration of the original term of court, because she filed a timely post trial motion. Citing State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008), Warren argues the trial court retained jurisdiction[2] over the entire case, and not just the timely-filed motion to withdraw her plea, such that the court had the authority to reconsider her sentence. The State argues Rule 29, SCRCrimP, allows a circuit judge to retain jurisdiction over the motion filed within ten days after imposition of the sentence; thus, because the amendment asserted a completely different request for relief and abandoned the original request, the State argues the trial court did not have the authority to decide Warren's motion to reconsider her sentence.

Generally, a trial judge is without authority to consider a criminal matter once the term of court during which judgment was entered expires. Campbell, 376 S.C. at 215, 656 S.E.2d at 373. However, there is an

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[2] Although Rule 29 and subsequent case law use the term "jurisdiction" to refer to the court's power or authority to act, we recognize that this issue is not one of subject matter jurisdiction. As stated by the Campbell court, "When we used the 'lack of jurisdiction' language, we meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended." 376 S.C. at 216, 656 S.E.2d at 373. Thus, where the term "jurisdiction" is used, we refer only to the court's power to act on Warren's motions. The circuit court retained subject matter jurisdiction over this criminal matter at all times throughout the case.

exception for timely post trial motions pursuant to Rule 29, SCRCrimP.[3] Id. "Rule 29 further states that the court's jurisdiction to hear the motion will not expire with the term of court if the party has filed a timely motion." Id. at 215-16, 656 S.E.2d at 373. The court does not retain authority to entertain a motion which is not made within ten days of sentencing. Id. at 216, 656 S.E.2d at 373.

> Except for motions for new trials based on after-discovered evidence, post trial motions shall be made within ten (10) days after the imposition of the sentence. In cases involving appeals from convictions in magistrate's or municipal court, post trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

Rule 29(a), SCRCrimP.

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[3] The other exception to the rule that a trial judge may not consider a criminal matter after expiration of the term of court is a motion for a new trial based on after-discovered evidence. Campbell, 376 S.C. at 215, 656 S.E.2d at 373. However, this exception is not before the court.

Warren made a timely post trial motion to withdraw her guilty plea. More than three years later, Warren filed a motion to amend the previous motion, containing the following language: "[Warren] now asks that the post trial motion be amended to reflect her prayer for reconsideration of her sentence and she abandons her request to be allowed to withdraw her pleas." Warren utilizes Campbell to assert that the timely-filed motion to withdraw the plea allows a trial court to retain authority over the entire case. Thus, Warren argues the trial court erred in finding it only retained authority to decide the issue presented in the timely-filed motion to withdraw the plea.

We disagree with Warren's interpretation of Campbell. The trial court retained authority to decide the timely-filed post trial motion pursuant to Rule 29. However, the rule itself focuses on the court's retention of authority to act "for the purpose of hearing and disposing of the motion." See Rule 29(a) (emphasis added). When Warren amended the motion to add a reconsideration of sentence request, while simultaneously abandoning the motion to withdraw her plea, the court lost its authority to act on the motion because the amendment was not timely. Although Warren alternatively argues that the amendment to the timely-filed motion was appropriate because she first added the request to reconsider her sentence to the motion and then abandoned the motion to withdraw her plea, we disagree with this assessment. We find Warren's motion to reconsider her sentence, like the motion to withdraw a guilty plea, is subject to the ten day time period prescribed in Rule 29; thus, because the motion was filed more than three years after imposition of the sentence, Warren's motion is not timely.[4]

[4] Our holding is analogous to jurisprudence concerning Rule 33 of the Federal Rules of Criminal Procedure, which provides the procedure for filing a motion for a new trial. "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). The United States Supreme Court classified this federal rule as a "claim-processing rule," rather than a jurisdictional issue, in addressing the effect of untimely arguments in support of a motion for a new trial where the district court was still considering post trial motions and the matter had not yet been appealed.

Because we find the request for reconsideration of Warren's sentence is untimely, we need not reach Judge King's alternative ruling on the merits denying the motion. See City of Greenville v. Bane, 390 S.C. 303, 309, 702 S.E.2d 112, 115 (2010) (noting an appellate court need not address all issues where disposition of one issue is dispositive).

AFFIRMED.

HUFF and SHORT, JJ., concur.

Eberhart v. U.S., 546 U.S. 12, 17 (2005). Although the Supreme Court ultimately found that the government waived its right to raise a defense of untimeliness by failing to raise it before the district court ruled on the merits, the Court noted the policy of the Federal Rules is not to extend the power to act indefinitely but to confine it within constant time periods. Id. at 17-18.