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

N O T I C E

IN THE MATTER OF WILLIAM F. GORSKI, PETITIONER

Petitioner was definitely suspended from the practice of law. *In the Matter of William F. Gorski*, 424 S.C. 11, 817 S.E.2d 289 (2018). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, 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. Comments should be mailed to:

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

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
August 8, 2019

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

N O T I C E

IN THE MATTER OF EFIA NWANGAZA, PETITIONER

Petitioner was definitely suspended from the practice of law. *In the Matter of Efia Nwangaza*, 396 S.C. 235, 721 S.E.2d 777 (2018). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, 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. Comments should be mailed to:

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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 Gwendolyn Long Robinson

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 19, 2019, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

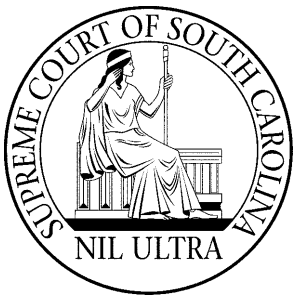
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 15, 2019

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



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 21, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ivon Keith McCarty, Respondent.

Appellate Case No. 2019-001094

Opinion No. 27916
Submitted August 1, 2019 – Filed August 21, 2019

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Bogan Law Firm, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. We further order Respondent to (1) complete the Legal Ethics and Practice Program Ethics School and Trust Account School within one (1) year of the date of this opinion, and (2) pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) or enter into a reasonable payment plan within thirty (30) days of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

While a member of a South Carolina law firm (Law Firm), Respondent moonlighted, handling more than fifty client matters privately and "off-the-books." Law Firm identified approximately $100,000 Respondent personally billed to his moonlighting clients instead of billing on behalf of the firm. Respondent also provided legal services to many clients without charge.

Respondent's secretary reportedly helped Respondent screen for conflicts, and there is no evidence Respondent's moonlighting resulted in any conflicts of interest with current or former Law Firm clients. Respondent's secretary also helped Respondent issue and collect invoices, and a different non-lawyer staff member of Law Firm assisted Respondent in handling a moonlighting client's matter, but there is no record Respondent invoiced or collected a fee in that matter.

In most instances, Respondent did not open files for his moonlighting clients on Law Firm's case management system; however, even when he did, he did not use Law Firm's billing software to track his time or bill his moonlighting clients. Respondent did not maintain a trust account or trust account records for his moonlighting cases and, on one occasion, Respondent failed to deposit $500 in unearned legal fees into a trust account. Respondent did use Law Firm's computers to draft correspondence and pleadings irrespective of whether the matter was a firm matter or a moonlighting matter.

Respondent's moonlighting clients came to him independently of Law Firm and his moonlighting invoices bore only Respondent's name. However, invoice cover letters and update letters addressed to Respondent's moonlighting clients were typically on Law Firm stationery. Respondent presented affidavits from nineteen of his moonlighting clients stating they were aware they were represented solely by Respondent and not by Law Firm. Nevertheless, that same information was not made clear to third parties. Respondent's letters to opposing parties and counsel were on Law Firm stationery and Law Firm's name appeared in the signature block of Respondent's letters and court filings related to his moonlighting cases.[1]

[1] There is no indication Law Firm ever received a malpractice claim arising from any of Respondent's moonlighting cases or that Law Firm was ever asked to send another attorney from the firm to court in any of Respondent's moonlighting matters. There was also no overlap between Law Firm's clientele and Respondent's moonlighting clientele with the exception of a

While working as a member of Law Firm, Respondent was entitled to seventy to eighty percent of his collected billings, covered his overhead, did not neglect firm matters, brought business into the firm through his moonlighting and firm-related work, and represented members of the firm and their families on numerous occasions for no charge. Additionally, while a member of Law Firm, Respondent was elected to town council and helped another member of Law Firm become appointed as town attorney.

Respondent maintains Law Firm had no prohibition against any member of the firm engaging in outside business activities and moonlighting was not prohibited. Respondent further notes he did not hide his moonlighting, but concedes it would have been better if he had explicitly discussed his plan to moonlight and sought clearance prior to engaging in moonlighting. A representative of Law Firm contended Law Firm's policy required all legal services rendered by the firm's attorneys to be billed in the firm's name and that all fees be collected by the firm; however, the representative confirmed this policy was never reduced to writing in Law Firm's operating agreement or elsewhere. Respondent and Law Firm quickly settled their dispute through Respondent's payment of $35,000 to Law Firm and the execution of a mutual release of all claims.

Law

Respondent admits that his actions violated the following provisions of the Rules of Professional Conduct contained in Rule 407, SCACR: Rule 1.15(c) (requiring unearned legal fees be deposited into a trust account); Rule 4.1(a) (prohibiting false statements of material fact or law to third parties); Rule 8.4(d) (prohibiting engagement in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (prohibiting engagement in conduct prejudicial to the administration of justice).

Respondent also admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR ("It shall be a

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single matter in which Law Firm was asked to handle an insurance defense matter on which suit was never filed. Respondent ultimately worked for the personal representative of the estate connected with the insurance defense matter and billed the case as one of his moonlighting cases. Respondent later forwarded the $3,022.50 he collected in that matter to Law Firm.

ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent. Within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission or enter into a reasonable repayment plan. Further, within one (1) year of the date of this opinion, Respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Harrison Shelby Nelson, Appellant/Respondent,

v.

Melissa Starr Nelson, Respondent/Appellant.

Appellate Case No. 2017-000291

Appeal From Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5678
Heard May 16, 2019 – Filed August 21, 2019

AFFIRMED

Joseph P. Cerato, of Joseph P. Cerato, P.A., of Charleston, for Appellant/Respondent.

Alexander Blair Cash, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent/Appellant.

THOMAS, J.: In this cross-appeal arising from an action for divorce, Harrison Shelby Nelson (Husband) appeals the family court's final order and final amended order. Melissa Star Nelson (Wife) appeals the family court's order granting Husband's motion pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. On appeal, Husband argues the family court erred in (1) finding the parties' property at 6 Judith Street had no mortgage; (2) valuing the property at 6 Judith Street; (3) finding Husband had a 50% ownership interest in 6 Judith Street;

(4) valuing the parties' property at 109 North Shelmore Boulevard; (5) failing to equitably divide the parties' debt; (6) including a vehicle owned by Wife's father as a marital asset and the loan to finance that vehicle as a marital debt; (7) making numerous findings not supported by the record; (8) failing to credit Husband for using the sale of proceeds from an investment property at 18 Reid Street for marital purposes; (9) failing to equitably divide the parties' personal property; and (10) requiring Husband to contribute to Wife's attorney's fees. In her cross-appeal, Wife argues the family court erred in (1) finding excusable neglect existed to grant Husband's Rule 60(b) motion; (2) causing her unfair prejudice by granting Husband's Rule 60(b) motion; and (3) failing to find Husband was estopped from seeking relief under Rule 60(b) due to his own bad conduct. We affirm.

FACTS/PROCEDURAL HISTORY

Husband filed this action for divorce in May 2015 after eighteen years of marriage with Wife. The parties reached a settlement agreement regarding the custody and visitation of their two daughters in June 2016, and tried the remaining issues of equitable apportionment and attorney's fees in September 2016.

At the outset of the trial on the financial and property issues, Husband and Wife stipulated each party would retain the ownership interests and liabilities to their respective businesses, as well as the ownership interests in their business property, and agreed the approximate values of those assets were equal for the purposes of equitable apportionment. The remainder of the marital estate consisted predominately of the marital home, numerous real estate investments, tax debts, and personal property. The parties agreed the family court should apportion the total marital estate on an equal 50/50 basis, but disputed the values of certain assets and how the assets and liabilities should be distributed.

I. Property at 6 Judith Street

In 2007, Husband and his cousins, Hill Carter Redd and Samuel Cornelius Range Redd (collectively, the Redds), purchased an investment property at 6 Judith Street in Charleston for $920,000. Although only the Redds were listed on the deed to the property, Husband admitted in his financial declarations and at trial he used his commission from the sale of 6 Judith Street, $50,000, to purchase an interest in the property. In his initial financial declaration, Husband claimed he had a 50% interest in the property. However, in his subsequent financial declarations, he

claimed he only had a "contingent interest." At trial, Husband claimed he was not sure what this interest was worth and did not know the terms of his agreement with his partners; however, he acknowledged the Redds invested approximately $450,000 in the property.

Wife testified Husband informed her of the $50,000 investment in 6 Judith Street shortly after he made the decision to invest in the property. According to Wife, Husband stated he would have "50 percent ownership in [the] property." Additionally, Wife recalled Husband stated he would receive $800 per month to manage the property.

Husband initially filed a sworn financial declaration indicating there was a $1.1 million mortgage on the property; however, in his subsequent declarations, he listed the mortgage owed as "UNKNOWN." At trial, Husband testified he believed the property was mortgaged, his partners handled the mortgage, and he "had nothing to do with the mortgage." He also testified the $1.1 million mortgage listed in his initial financial declaration was not correct. Husband admitted he failed to produce any documentation of any mortgage on the property despite Wife's attorney's request for these documents. Other than his testimony and his initial claim of a $1.1 million mortgage, Husband did not produce evidence of a mortgage on the property until after trial.

During Husband's cross-examination, Wife introduced the following documents she obtained from the Charleston County Register of Mesne Conveyances's office: a copy of the deed to the property in the name of Husband's partners, a copy of the original mortgage, and a document showing the satisfaction of the original mortgage. Husband objected to the introduction of these documents, arguing there was no foundation for their introduction because he previously testified he had never seen them before. Wife argued Husband testified he had an ownership interest in the property and the property was mortgaged; therefore, she sought to impeach his testimony using public records. Husband stated, "I would withdraw [the objection] if the purpose of their being put in, your [h]onor, is for impeachment of my client's financial declaration, I withdraw the objection." However, when each document was subsequently introduced, Husband stated he had no objection. After Wife introduced these documents, Husband testified he was not aware the mortgage had been satisfied but acknowledged there was currently not a mortgage on the property.

In his first two financial declarations, Husband claimed the property had a value of $1 million. In his third financial declaration, Husband listed the value of the property as "UNKNOWN." At trial, Husband acknowledged he listed the property for sale for $1.2 million, but he did not receive any offers. However, he stated he never listed the property for a lower price. He also admitted the property generated roughly $87,000 of rental income per year. Husband claimed the property was in poor condition due to lack of maintenance and testified he believed the property was not worth more than the $920,000 he and his partners paid for it. However, he also claimed he spent large sums of money to make repairs and improvements to the property. Wife testified she had "no idea how much money [was] in [6 Judith Street]" but, according to an estimate she found on the internet, she believed the property was worth roughly $1.2 million.

The family court found Husband's testimony regarding 6 Judith Street was not credible because he offered conflicting information in his financial declarations and gave conflicting testimony regarding the value of the property, his ownership interest, and the mortgage. The family court determined the property was worth $1 million and it was not mortgaged. Further, the family court found Husband and his cousins entered into a partnership to purchase and manage 6 Judith Street as a rental property because the evidence presented at trial reflected Husband and his partners agreed they would receive their initial investment and split the remaining profit in half when they sold the property. Accordingly, the family court found the marital value of Husband's investment in the property was $300,000.

II. Property at 109 North Shelmore Boulevard (Marital Home)

Wife purchased the marital home at 109 North Shelmore Boulevard in the I'On neighborhood of Mount Pleasant in 2004. In his initial financial declaration, Husband claimed the property was worth $900,000; however, in his subsequent declarations, he claimed the property was worth at least $1.13 million. Husband's expert witness, a real estate appraiser, testified he believed the property was worth $1.13 million. However, on cross-examination, Husband's expert acknowledged three of the five properties he used to value 109 North Shelmore sold for prices ranging from $938,000 to $995,000, and the other two properties had significantly more square footage than the marital home. He also admitted that out of the seventy recent sales in the I'On neighborhood, no houses with similar square footage sold for over $1 million. Husband's expert acknowledged he did not use sales of multiple properties similar in size to 109 North Shelmore, including a

home within a block of the marital home that sold for $899,000 four months before trial.

In her financial declaration, Wife stated she believed the property was worth $975,000. Wife also presented an expert witness, a realtor, who testified the property had a value of between $925,000 and $955,000. Wife's expert stated the home was "incredibly dated" compared to other homes in the area. Furthermore, Wife's expert testified all of the comparable homes she used sold within four months of trial and all of them sold for less than $1 million, including two properties with nearly the same square footage as the marital home, which each sold for less than $900,000. However, on cross-examination, Wife's expert admitted that when she initially valued the home at $875,000, she believed the home measured 2,800 square feet and valued the property at $312.50 per square foot. She acknowledged the property's tax records indicated the marital home was actually 3,313 square feet and that at her previous price per square foot, it would have a value of just over $1.03 million.

The family court found that although both experts presented credible testimony, Husband's expert did not rely upon many recent sales of comparable homes on the same street. The family court noted Husband's expert acknowledged most of the comparable home sales were for less than $1 million. Accordingly, the family court found 109 North Shelmore had a value of $975,000.

III. Teton Ranch, LLC and Tetonas, LLC

In his financial declarations, Husband claimed he had a 25% interest in Teton Ranch, LLC, which owned two properties in Idaho. In his first two financial declarations, Husband claimed a net loss of $38,500 and $53,750, respectively. However, in his final financial declaration and at trial, Husband indicated both of the properties had been foreclosed on, there were no deficiencies, and one of the properties had no 1099 tax liability and any 1099 liability for the other property was unknown. Husband admitted the mortgages on the Teton Ranch, LLC's properties were nonrecourse loans and he had no exposure to any deficiency judgment.

In addition to Teton Ranch, LLC, Husband also claimed he had a 25% interest in Tetonas, LLC, which owned two other properties in Idaho. Husband's initial financial declarations indicated the properties had large negative net values.

However, his final financial declaration indicated a negative net value in Tetonas, LLC of approximately $5,000 from the properties. Husband also claimed he owed $13,705 in unpaid capital calls. At trial, Husband acknowledged the mortgages on these properties were nonrecourse debts and he had no personal exposure unless he incurred any 1099 tax liability. He also maintained he owed money for unpaid capital calls but acknowledged he did not provide any documentation regarding previous capital calls, expenses, and rents for Tetonas, LLC. Husband claimed he asked the managing partner of Tetonas, LLC for the documentation but the managing partner refused to give him the information. He later admitted the managing partner was a friend he had known for thirty to forty years but stated they had a falling out recently due to failed business ventures. Husband also admitted he and the managing partner shared an office and saw each other nearly every day.

The family court found the Teton Ranch, LLC's properties were foreclosed on without any deficiency judgment. The family court noted Husband could be liable for some 1099 tax liability in the future; however, the family court determined Husband failed to present any credible evidence on what that amount would be. Additionally, the family court found Tetonas, LLC had a negative net value of approximately $5,000; however, because the loans were nonrecourse, the value to Husband was effectively zero. The family court also determined Husband's testimony regarding the alleged capital call debt to Tetonas, LLC was not credible because he failed to provide any documentation to support his claim. Accordingly, the family court found the net value of these properties was zero.

IV. Investment Properties in Costa Rica

Husband and Wife owned a 50% interest in three rental homes in Costa Rica. At trial, Husband stated the property was listed for $350,000 and believed a sale would net $300,000. He testified he owed his mother $50,000 for a loan that was to be paid upon the sale of the Costa Rica property. Husband also claimed he owed his mother interest on this loan, bringing the total amount he claimed was due to his mother to $74,432. In his first two financial declarations, Husband stated he owed his mother $50,000; however, in his final financial declaration, he claimed the amount was $74,432. Husband's mother appeared at trial. Although she did not testify about the loan or the Costa Rica property, she acknowledged she regularly gave Husband substantial monetary gifts of up to $15,000 each year.

Husband claimed he incurred $28,487 in net costs from the Costa Rica property since the filing of the divorce action. However, the records Husband used to support this claim did not include any information on the rental income for the properties. Further, these records showed Husband's partners in the Costa Rica property only contributed $10,000 to cover these costs. Husband claimed he did not have any records of the property's rental income and could not get them because they were in Costa Rica. Husband also submitted bank records showing various transfers to a bank in Costa Rica totaling $21,760 since he filed the divorce action. Husband testified he typically rented out the Costa Rica property three to four times per year at a rate of $3,000 per week.

The family court determined the Costa Rica property was worth $300,000 and Husband and Wife's 50% interest was worth $150,000. The family court also determined Husband's records for the property were not reliable due to the lack of rental income and the disparity between Husband's and his partners' contributions, which the family court found was evidence Husband was sending payments on behalf of all of his partners. Instead, the family court relied on Husband's bank records showing he transferred approximately $22,000 to Costa Rica to maintain the property. The family court also relied on Husband's testimony to determine the parties received approximately $12,000 in rental income to offset the $22,000 in costs, leaving a balance of $10,000, $5,000 of which was Husband's responsibility due to his 50% interest in the property.

The family court also determined Husband owed his mother $50,000 for the loan which was to be paid from the sale proceeds of the Costa Rica property. However, the family court did not find Husband's claim his mother would collect interest in the loan credible and believed that even if she did, she would likely return that money in the form of a gift.

V. Tax Debts and Other Debts

Although Husband and Wife filed joint tax returns in 2013, they filed separate returns beginning in 2014. Just before trial, Husband produced copies of drafts for his 2014 and 2015 tax returns. According to his draft returns, Husband owed $7,470 in federal taxes for 2014 and $2,710 in penalties and interest for filing late. Husband also owed $1,853 in South Carolina state taxes and $703 in interest and penalties for filing late. Husband's draft 2015 tax returns claimed he owed $42,121 in federal taxes and $11,549 in penalties and interest for filing late. Of the $42,121

in federal taxes owed, he claimed $26,874 were from capital gains due to the sale of properties at 51 and 18 Reid Street. However, Husband's Form 4797 ("Sales of Business Property") from his draft 2015 return was not filled out with all of the necessary information needed to determine his tax liability for the sale of properties at 51 and 18 Reid Street. He also claimed to owe $6,443 in South Carolina state taxes for 2015 and $1,918 in penalties and interest for filing late.

The family court found the late fees and interest Husband incurred were not part of the parties' marital debt because they were incurred due to Husband's failure to file his tax returns and pay taxes in a timely manner. The family court found the remaining amount of Husband's 2014 taxes, $7,470, was marital debt and apportioned to him. The family court's order did not address Husband's 2014 and 2015 South Carolina state taxes.

The family court found the capital gains tax from the sale of the Reid Street properties in 2015 was marital debt. However, the family court took issue with Husband's draft 2015 federal tax return because his Form 4797 was incomplete and did not provide the details necessary to determine the taxable gain solely from the sale of the Reid Street properties. The family court noted Husband did not call his accountant to testify to why this form was incomplete. The family court determined it would not use the $26,874 figure listed in Husband's Schedule D because it was the total tax on all income, including his business income. However, the family court noted line 29 of Husband's Schedule D was helpful for determining the capital gains tax for the Reid Street properties. Relying on the best evidence presented, the family court found the capital gains tax Husband incurred from the sale of these properties was $14,783. The family court then apportioned the 2015 capital gains tax debt to Husband.

Husband also claimed a debt of $23,671 for their children's private school tuition and $4,400 in medical bills were marital debts and should be equitably apportioned. The family court did not address these debts in its final order.

VI. Wife's Vehicle

Husband and Wife acknowledged Wife owned a 2012 Honda and Wife's father took out a loan in his name to finance the purchase of the vehicle. The family court admitted the loan document into evidence without objection. Wife testified the car and loan were in her father's name due to her low credit score but she had

been making the payments. The family court found this vehicle and loan were part of the marital estate and apportioned both to Wife.

VII. Personal Property

Husband and Wife owned multiple pieces of personal property at issue in this divorce action. At trial, Husband introduced a list of seventy-five items he claimed were in Wife's possession into evidence. He requested the family court equitably divide the marital property and return all items of nonmarital property.

Wife introduced a proposal on how the property should be divided into evidence. She also testified extensively about these items, stating some were already in Husband's possession, some had been lost or destroyed, some were worth far less than Husband believed, and others he was welcome to take. Wife testified the total value of the personal items she wanted to keep was approximately $6,120 and the total value of what Husband would receive or keep was approximately $10,475.

The family court determined Wife's proposed distribution gave more realistic values to the personal property, Wife was more credible, and Wife had a better recollection of what happened to various pieces of personal property. Accordingly, the family court found each party would keep the personal property in their possession, with the exception of eight items that Husband requested.

VIII. Attorney's Fees

Both Husband and Wife claimed they were entitled to attorney's fees and costs. The family court initially determined whether attorney's fees and costs should be awarded using the factors enumerated in *E.D.M. v. T.A.M.*[1] First, the family court found Husband was able to pay nearly all of his $60,000 in legal fees and costs, but Wife had to borrow money from her father and owed approximately $52,000 in legal fees and costs to her attorney. Second, the family court determined Wife was the prevailing party with regards to many issues in the case, including primary child custody, child support, and equitable apportionment of the marital estate. The family court noted Husband made numerous false claims regarding the values of various assets and liabilities, particularly with regard to his interest in 6 Judith Street. Third, the family court found Wife made roughly $5,835 per month. Husband claimed his monthly income was only $5,000; however, the family court

[1] 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992).

found his income was difficult to determine due to his lack of credibility and inconsistent claims. The family court found Husband's income was much greater than he claimed and determined his minimum average monthly income was approximately $10,000. Accordingly, the family court found Husband had a greater earning capacity than Wife. Fourth, the family court determined Wife would not have the ability to pay her attorney's fees and maintain the marital home. The family court reasoned it would be detrimental to Wife's and the children's standard of living if it required her to pay attorney's fees and possibly have to sell the marital home. Accordingly, the family court found it appropriate to award Wife attorney's fees and costs.

Next, the family court determined the amount of attorney's fees Wife should be awarded using the factors enumerated in *Glasscock v. Glasscock*.[2] After a lengthy analysis of these factors, the family court found Wife was entitled to an award of $35,000 in attorney's fees.

IX. Posttrial Motions

At the conclusion of the testimony, the family court asked both parties to submit proposed orders in lieu of closing arguments. The family court issued its final order and decree of divorce on November 2, 2016. Husband appealed this order.

Husband filed a motion entitled "Motion to Reconsider (Rule 52(b) and Rule 59)" on November 9, 2016; however, the motion did not contain any grounds for which Husband sought relief. Instead, the motion referenced a memorandum in support of the motion that would be drafted upon the receipt of the trial transcript and filed at a later date. Husband filed and served Wife with a memorandum in support on December 28, 2016, one day before the hearing on the motion. In response to Husband's memorandum of support, Wife argued the family court should not consider the memorandum because she was prejudiced by not having the grounds for Husband's motion within ten days of the final order. Specifically, Wife contended Husband's thirty-six page memorandum she received the day before the hearing was untimely and prejudicial. Furthermore, she argued the motion filed on November 9 failed to meet the requirements of Rule 7(b) of the South Carolina Rules of Civil Procedure because the motion failed to state the grounds for which he sought relief.

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[2] 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court agreed with Wife's position that Husband's memorandum was untimely and prejudicial and declined to consider the memorandum in ruling on Husband's motion to reconsider. Thus, the family court dismissed Husband's motion to reconsider because it failed to state with particularity the grounds for his motion to reconsider. Husband did not appeal this order.

In addition, after receiving the family court's final order, Husband discovered the original mortgage on 6 Judith Street had been refinanced and there was still a mortgage on the property. Husband filed a motion entitled "Motion for Relief from Judgment or Order Pursuant to Rule 60(b)" on November 9, 2016, arguing he was entitled to a modification of the final order based upon (1) mistake, inadvertence, surprise, or excusable neglect; and (2) fraud, misrepresentation, or other misconduct of an adverse party. Wife argued there was no evidence of fraud or excusable neglect because Husband had ample opportunity to present evidence of a mortgage on 6 Judith Street throughout the course of litigation yet failed to do so. Accordingly, Wife asserted Husband's failure to present this information did not amount to excusable neglect.

The family court found that although the mortgage information was knowable by Husband and he had a duty to disclose accurate information about the property on his financial declaration, there was excusable neglect on the part of both Husband and Wife for presenting incomplete evidence regarding the existence of a mortgage on 6 Judith Street. Accordingly, the family court granted Husband's 60(b) motion and issued an amended final order including the newly discovered mortgage. After amending the final order and accounting for the refinanced mortgage, the family court found Husband's net equity in the property was only $62,516. Wife appealed this order, and her appeal was consolidated with Husband's.

STANDARD OF REVIEW

"In appeals from the family court, [the appellate c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). Although an appellate court reviews the family court's findings de novo, it is not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011).

> [T]his standard does not abrogate two long-standing principles still recognized by [South Carolina appellate] courts during the de novo review process: (1) a trial [court] is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial [court].

Stoney v. Stoney, 422 S.C. 593, 595, 813 S.E.2d 486, 487 (2018). However, when reviewing a family court's evidentiary or procedural rulings, the appellate court reviews using an abuse of discretion standard. *Id.* at 594 n.2, 813 S.E.2d at 486 n.2; *see also Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013) ("The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP[,] is within the sound discretion of the trial [court].").

LAW/ANALYSIS

I. Excusable Neglect and Rule 60(b) Motion

Wife argues the family court erred in finding excusable neglect on Husband's part and granting his Rule 60(b) motion because Husband acted in bad faith due to his failure to produce the mortgage documents before or at trial. Additionally, Wife argues she was unfairly prejudiced when the family court granted Husband's Rule 60(b) motion because if she knew there were still a mortgage on 6 Judith Street, she would have requested more than a 50/50 division of the marital assets. Furthermore, Wife contends the family court erred by failing to find Husband was estopped by his own bad conduct from seeking relief under Rule 60(b). We disagree.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . [and] (3) fraud, misrepresentation, or other misconduct of an adverse party . . . ." Rule 60(b), SCRCP. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). "In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact

has been made . . . ." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009). "In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (quoting *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

"An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision." Rule 26(a), SCRFC. "However, when an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, whe[n] the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" *Griffith v. Griffith*, 332 S.C. 630, 646–47, 506 S.E.2d 526, 535 (Ct. App. 1998) (quoting *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)).

We find the family court did not err in granting Husband's Rule 60(b) motion because there was excusable neglect due to a good faith mistake on Wife's part. *See Williams*, 384 S.C. at 324, 681 S.E.2d at 917 ("In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made . . . ."). Initially, we note Husband had numerous opportunities to retrieve the mortgage information, either by contacting to his partners or conducting a record search, and disclose it to Wife and the family court, yet he failed to do so. We also note the family court made numerous findings as to Husband's lack of credibility throughout its final order and amended order, including noting his "outright fabrications and attempt[s] to downplay his actual net worth" in relation to the property. However, Wife introduced an incomplete property records search at trial showing the satisfaction of the original mortgage on the property but not showing the new mortgage that replaced the original mortgage when the property was refinanced. We find Wife's mistake was in good faith because the record contains no evidence this oversight was due to anything other than the new mortgage not appearing in Wife's property records search. Additionally, we agree with the family court that "[t]o find otherwise would result in a windfall to [Wife] to which she may not otherwise be entitled."

Furthermore, we find an analysis of the factors for determining whether to grant a motion made pursuant to Rule 60(b)(1) supports the family court's decision to grant Husband's motion. *See Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208 ("In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" (quoting *Mictronics*, 345 S.C. at 510–11, 548 S.E.2d at 226)). We note the family court did not make specific findings with regards to the *Rouvet* factors in its order granting Husband's Rule 60(b) motion. *See* Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."). However, we find the record is sufficient to make our own findings in accordance with the preponderance of the evidence. *See Griffith*, 332 S.C. at 646–47, 506 S.E.2d at 535 ("[W]hen an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" (quoting *Holcombe*, 304 S.C. at 524, 405 S.E.2d at 822)).

We find the first factor, the promptness with which relief is sought, is close; although Husband could have discovered and disclosed the mortgage prior to or at trial by contacting to his partners or conducting a property records search, he timely moved for relief under Rule 60(b) when he discovered the existence of the new mortgage. Next, we find Husband's failure to act promptly by obtaining and disclosing the mortgage information prior to or at trial weighs in Wife's favor. However, we find the existence of the refinanced mortgage is a meritorious defense favoring Husband. Finally, although Wife would suffer some prejudice due to Husband's failure to produce the mortgage information at an earlier stage of litigation, we find not granting the Rule 60(b) motion would result in a windfall to Wife to which she would not otherwise be entitled; therefore, we find this factor weighs in favor of Husband. As a whole, we find these factors, particularly the existence of a meritorious defense and limited prejudice to Wife, weigh in favor of granting relief.

Additionally, we find Wife's argument that Husband should be estopped from seeking relief due to his own bad faith conduct is not preserved for review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[A]n issue cannot be raised for the first time on appeal,

but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))). Although Wife raised the issue of estoppel in her return to Husband's Rule 60(b) motion, the family court did not address this argument in its order granting Husband's motion for relief and Wife did not raise it again in a motion to reconsider.

Based on the foregoing, we affirm the family court's order granting Husband's motion for relief under Rule 60(b).[3]

II. Value of 6 Judith Street

Husband argues the family court erred in setting the value of 6 Judith Street because no competent evidence was presented to support the property having a value of $1 million. We disagree.

"The family court has broad discretion in valuing the marital property." *Pirri v. Pirri*, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006). "A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." *Id.* "[A] property owner is ordinarily competent to offer testimony as to value of his property." *Cooper v. Cooper*, 289 S.C. 377, 379, 346 S.E.2d 326, 327 (Ct. App. 1986). Although an appellate court reviews the family court's findings de novo, it is not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52.

We find 6 Judith Street had a value of $1 million. First, we agree with the family court's finding that Husband's testimony regarding the value of this property was

[3] Because we affirm the family court's order granting Husband's Rule 60(b) motion, we find this issue of whether the family court erred in finding there was no mortgage on 6 Judith Street in its original final order is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.").

not credible. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. Husband gave conflicting testimony at trial, claiming the property was in poor condition and had not been well maintained, while also claiming to have spent large sums of money in order to keep the property in good condition. Additionally, Husband's financial declarations offered conflicting information regarding the value of this property; his initial declarations stated the property was worth $1 million, while his final declaration listed the value of the property as "UNKNOWN." Accordingly, we find Husband's testimony regarding the value of this property was not credible.

Additionally, we find the valuation of $1 million falls within the range of evidence presented. *See Pirri*, 369 S.C. at 264, 631 S.E.2d at 283 ("A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented."). Husband testified he believed the property was worth $920,000 and Wife testified she believed the property was worth over $1.2 million. Accordingly, after de novo review, we find 6 Judith Street had a value of $1 million and that value falls within the range of evidence presented at trial.

III. Husband's Interest in 6 Judith Street

Husband argues the family court erred in finding a 50% partnership interest in 6 Judith Street because it was not in either party's name; the titled owners, the Redds, were not given an opportunity to be heard or made parties; and the ownership of the property was not pled in the pleadings. He claims no credible testimony was given that he and the Redds entered into a partnership.

Wife contends Husband's arguments that the family court erred by failing to include his investment partners are not preserved for review. Additionally, Wife argues the record contains sufficient evidence, including her testimony and Husband's initial financial declaration, to support the family court's finding that Husband entered into a partnership with the Redds to purchase the property.

First, we find Husband's argument that the family court erred by failing to include his investment partners in the action is not preserved for review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733). Husband did not object to any of Wife's testimony

about the investment arrangement of 6 Judith Street. Although Husband raised the issue in his proposed final order submitted in lieu of closing arguments, the family court did not address this argument in its final order or amended final order. Furthermore, Husband failed to raise the issue in a proper posttrial motion.[4] Accordingly, we find Husband's arguments related to the inclusion of the Redds in the equitable apportionment action are not preserved for our review.

To the extent Husband's argument regarding the ownership of 6 Judith Street is preserved, we disagree with his assertion the record contained no credible evidence to support the family court's finding. Wife testified Husband informed her of the investment in 6 Judith Street and his $50,000 contribution to the purchase of the property with his partners. According to Wife, Husband stated he would have a "50 percent ownership in [the] property." Additionally, Wife recalled Husband stated he would receive $800 per month to manage the property. Husband never objected to this testimony. Husband merely claimed he had some sort of "contingent interest" in the property, but he failed to provide any support or documentation for this claim. Further, the family court found Husband's claim of a "contingent interest" was not credible. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651-52 (stating an appellate court reviews the family court's findings de novo, it is not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony). We find the evidence supports the family court's finding regarding Husband's ownership interest in 6 Judith Street. Accordingly, we affirm the family court's order on this ground.

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[4] Although Husband filed a motion to reconsider pursuant to Rules 52 and 59, SCRCP, the family court dismissed the motion without considering the merits of his claims due to Husband's late filing and service of his memorandum in support. Because this motion was dismissed and the family court did not address his arguments, we find this motion was insufficient to preserve many of his arguments for appeal. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733).

IV. Value of 109 North Shelmore Boulevard

Husband argues the family court erred in valuing 109 North Shelmore at $975,000 because Wife's expert improperly calculated the square footage of the home, leading to an undervaluation of the home. He also contends the family court failed to consider the home was on a larger lot and in a more desirable location than other homes in the community. We disagree.

We find this property had a value of $975,000. Husband's expert witness testified he believed the property was worth as much as $1.13 million and Wife's expert testified she believed the property was worth approximately $950,000. We note both parties' experts had flaws in their valuations of the property. Wife's expert calculated the square footage of the home in her initial valuation to be significantly smaller than the actual square footage. Although Wife's expert testified the property was worth $950,000, the valuation of the home at her initial price per square foot using the correct square footage would have been over $1.03 million. However, Husband's expert admitted he did not use numerous other comparable sales in the same neighborhood as 109 North Shelmore, including some sales of less than $1 million.

Despite these issues with both expert witnesses' testimonies, we find the record contains sufficient evidence to support a valuation of less than $1 million. Wife's expert testified multiple comparable homes sold for less than $1 million, including one home within a block of the property with nearly the same square footage as the marital home that sold for $899,000. Although Husband argues 109 North Shelmore was in a more desirable location and is on a larger lot than the rest of the properties in the neighborhood, we find the family court's valuation takes these factors into account. Accordingly, after de novo review, we find 109 North Shelmore had a value of $950,000 and that value falls within the range of evidence presented at trial. *See Pirri*, 369 S.C. at 264, 631 S.E.2d at 283 ("A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented.").

V. Equitable Division of Debt

Husband argues the family court erred by failing to equitably divide the debt of the parties. Specifically, Husband contends the family court ignored a negative

balance of roughly $5,000 from his real estate investment in Tetonas, LLC and the outstanding 1099 tax liability for one of the Teton Ranch, LLC's properties. He also asserts the family court ignored evidence of outstanding capital call debt for these investments. Additionally, Husband claims the family court erroneously assigned him all tax debt from 2013, 2014, and 2015 because this tax debt was marital debt and should have been divided equally. He also contends the family court erred in finding the cost to maintain the Costa Rica properties was $5,000 when he presented evidence the cost to maintain the properties was over $28,000. Husband also avers the family court ignored several other debts Husband incurred in his Costa Rica investment. Finally, Husband generally asserts throughout his argument the family court made numerous findings not supported by the evidence.

Initially, Wife contends many of Husband's arguments regarding specific debts are not preserved for review because these debts were not mentioned in the final order and Husband failed to properly raise them in his motion to reconsider. Wife argues the family court did not err by failing to equitably divide the marital debt because the family court noted on multiple occasions Husband's testimony lacked credibility, specifically his claims regarding many marital assets and debts. Wife also argues Husband received the valuable marital assets associated with the debts the family court allocated to him.

"Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution." *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005). "Marital debt should be divided in accord with the same principles used in the division of marital property and must be factored into the totality of equitable apportionment." *Pirayesh v. Pirayesh*, 359 S.C. 284, 300, 596 S.E.2d 505, 514 (Ct. App. 2004). "When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, *i.e.*, for the joint benefit of both parties during the marriage." *Wooten*, 364 S.C. at 547, 615 S.E.2d at 105.

In apportioning the marital estate, the family court "must give weight in such proportion as it finds appropriate" to "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage." S.C. Code Ann. § 20-3-620(B) (2014); *Wooten*, 364 S.C. at 546, 615 S.E.2d at 105. "[T]he words 'in such

proportion as it finds appropriate,' as used in [section 20-3-620], accord much discretion to the [family court] in providing for the payment of marital debts as a consideration in the equitable division of the marital estate." *Hickum v. Hickum*, 320 S.C. 97, 103, 463 S.E.2d 321, 324 (Ct. App. 1995). "On review, [the appellate] court will look to the fairness of the overall apportionment." *Id.*[5]

Initially, we find some of Husband's arguments are not preserved because they were not ruled upon by the family court in its final order or raised in a proper posttrial motion. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)). Specifically, we find Husband's arguments relating to debts for tuition for private school, medical bills, and Husband's 2014 and 2015 South Carolina state tax debts are not preserved. However, we find his arguments related to Teton Ranch, LLC; Tetonas, LLC; the Costa Rica property; and his federal tax debts are preserved for review and are addressed below.

A. Teton Ranch, LLC and Tetonas, LLC

We agree with the family court's finding that Husband had no liabilities from Teton Ranch, LLC. The purchase of both properties held by Teton Ranch, LLC were financed with nonrecourse mortgages, and they were foreclosed on with no deficiency judgments; therefore, Husband had no personal liability for these debts. Although Husband testified he believed he could possibly incur 1099 tax liability due to these foreclosures, he admitted no 1099 tax liability had been assessed and he was unsure what amount could be assessed. Because Husband was not personally liable for these debts due to the nonrecourse nature of the loans and any potential 1099 tax liability was speculative, we find the family court correctly determined Husband's interest in Teton Ranch, LLC had a net value of zero.

We also agree with the family court's finding that Husband had no liabilities from Tetonas, LLC. Like with Teton Ranch, LLC, all of the mortgages on the properties

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[5] We note that *Hickum*, decided prior to *Stoney*, was decided using an abuse of discretion standard of review. *See Hickum*, 320 S.C. at 97, 463 S.E.2d at 324; *Stoney*, 422 S.C. at 595, 813 S.E.2d at 487. In light of our supreme court's direction in *Stoney*, we review the fairness of the overall apportionment de novo.

Tetonas, LLC held were nonrecourse, and Husband admitted at trial he would have no personal exposure. Husband also claimed he owed over $13,705 in unpaid capital calls for this property. However, other than images of a few checks indicating payments for some past capital calls, Husband failed to provide any documentation of capital calls, expenses, and rental income for Tetonas, LLC. Although Husband claimed this was because the managing partner refused to give him the documents, he later admitted the managing partner was a longtime friend he shared an office with and saw nearly every day. We agree with the family court's finding that Husband's claims regarding this alleged capital call debt and his inability to retrieve the documents supporting these claims were not credible. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52 (stating an appellate court reviews the family court's findings de novo, it is not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony). Because Husband was not personally liable for these debts due to the nonrecourse nature of the loans and he failed to produce any credible documentation for his alleged capital call debt, we find the family court correctly determined Husband's interest in Tetonas, LLC had a net value of zero.

B. Costa Rica Property

We agree with the family court's finding that Husband incurred a loss of $5,000 for maintaining the Costa Rica property after the divorce action was filed. Specifically, we agree with the family court's finding that Husband's records for this property were not reliable. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. These records lack any indication of rental income from this property and show a large disparity between Husband's contributions of over $28,000 to maintain the property compared to his equal partners' contributions of approximately $10,000. We find this disparity supports the family court's finding that Husband appeared to be sending many of the payments to maintain this property on behalf of all of the partners. Accordingly, we find relying on Husband's bank account transfers was the most reliable way to determine Husband's cost in maintaining the property in this case. We further find Husband's testimony regarding the rental history and rate supports the family court's finding that Husband received approximately $12,000 of rental income to offset his approximately $22,000 in costs. Thus, $10,000 in costs remained to be split evenly between the partners, meaning Husband was responsible for $5,000. Accordingly, we affirm the family court's finding as to these costs.

We also agree with the family court's finding that Husband would not have to pay interest to his mother on the $50,000 she loaned him. Husband produced a loan document, which listed the interest rates and total due as of June 2016. However, given Husband's mother's testimony that she regularly provided him with substantial monetary gifts each year and the family court's findings regarding Husband's credibility on this interest amount and throughout the case, we agree with the family court there was a strong likelihood Husband's mother will either not require him to pay this interest or return it to him as a gift shortly after he pays it. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. Accordingly, we affirm the family court's finding that the amount Husband owed on this loan was $50,000.

C. Tax Debts

We agree with the family court's valuation and apportionment of Husband's 2014 and 2015 federal tax debts. Initially, we agree that Husband's tax penalties and interest for 2014 and 2015 are not marital debt. *See Wooten*, 364 S.C. at 547, 615 S.E.2d at 105 ("When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, *i.e.,* for the joint benefit of both parties during the marriage."). We find Husband's penalties and late fees were incurred due to his own negligence in not filing his tax returns on time and was not done for the joint benefit of the parties.

Next, we agree with the family court's finding that Husband's 2015 capital gains tax debt was $14,783. We find Husband's claim the family court should have valued his 2015 capital gains tax at $53,670 is without merit. First, that figure included Husband's penalties and interest for 2015. Second, the remaining $42,121 in federal taxes was Husband's total federal tax liability for 2015, not just his capital gains. We agree with the family court's assessment that Husband's Schedule D was not reliable because it was mostly incomplete and did not contain any information about the Reid Street properties. However, his Schedule D worksheet provided some direction. The total taxable income indicated on this worksheet was listed as $26,874; however, this figure included all of Husband's capital gains and qualified dividends, including income from his business. We find the best evidence in the record indicating Husband's capital gains from 2015 was the figure of $14,783 on line 29 of Husband's Schedule D worksheet. Accordingly,

we affirm the family court's findings regarding the 2014 and 2015 tax debts and their equitable apportionment.

D. Summary of Debts

Based on the foregoing, we find the family court's valuing and equitable apportionment of the debts as a whole was accurate and fair given the credible evidence presented at trial. *Hickum*, 320 S.C. at 103, 463 S.E.2d at 324 ("[T]he words 'in such proportion as it finds appropriate,' as used in [section 20-3-620], accord much discretion to the [family court] in providing for the payment of marital debts as a consideration in the equitable division of the marital estate."); *id.* ("On review, [the appellate] court will look to the fairness of the overall apportionment.").[6] Accordingly, we affirm the family court's apportionment of the parties' debts.

VI. Vehicle in Wife's Father's Name

Husband argues the family court erred in finding a vehicle titled in Wife's father's name was a marital asset and the loan taken out to finance the vehicle was a marital debt. We find this issue is not preserved for appellate review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)). Husband failed to object to any testimony regarding the vehicle or evidence of the loan at trial, did not mention the vehicle at all in his proposed final order, and did not raise this issue in a proper posttrial motion. Accordingly, we find this issue is unpreserved.

VII. Proceeds from Sale of 18 Reid Street

Husband argues the family court erred by failing to credit him for using the sale of the proceeds from 18 Reid Street for marital purposes. Husband claims he used $23,000.88 in proceeds from 18 Reid Street to pay for various marital debts. We find Husband's argument is not preserved for review. *See id.* ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)). Husband addressed this issue in his proposed

[6] *See supra* note 5.

final order submitted in lieu of closing arguments; however, the family court only addressed the issue regarding 18 Reid Street by stating, "The Husband received $50,000 from the sale of 18 Reid Street, and has had the sole use of those funds during the pendency of the case." We find this insufficient to preserve this issue for appeal. Further, Husband failed to raise this issue in a proper posttrial motion. Accordingly, we find this issue is not preserved for review.

VIII. Equitable Division of Personal Property

Husband argues the family court erred by failing to equitably divide the parties' personal property because he only received eight of the seventy-five items set forth in the marital property list.

We agree with the family court's determination that Wife's proposed distribution gave more realistic values to the personal property, Wife was more credible, and Wife had a better recollection of what happened to various pieces of personal property. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52 (stating an appellate court reviews the family court's findings de novo, it is not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony). Although Husband received significantly fewer items than Wife, he received a distribution with a greater value. Specifically, Wife testified the items she received under her proposal, which the family court adopted, were worth approximately $6,120, while the items Husband received were worth $10,475. We find this distribution is equitable. Accordingly, we affirm the family court's distribution of personal property.

IX. Attorney's Fees

Husband argues the family court erred in awarding Wife $35,000 in attorney's fees because he was the prevailing party in many of the child custody issues that the parties settled, neither party had an excess of income, and both parties received beneficial results. We disagree.

"[A]ttorney's fees may be assessed against a party in an action brought in the family court." *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). "In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) [the] beneficial results obtained by the attorney; (3) the parties' respective financial

conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816. The reasonableness of attorney's fees should be determined by the following factors: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock*, 304 S.C. at 161, 403 S.E.2d at 315. "[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Initially, we disagree with Husband's argument that both parties received beneficial results. Although Husband did receive significant time with the children pursuant to the parties' child custody settlement and the agreement included a provision he had sought preventing Wife from moving the children from the Charleston area, Wife received primary custody of both children. The agreement also contained a provision stating the parties' oldest daughter was not required to visit Husband due to their strained relationship. In addition, Wife received the marital home in the apportionment of marital assets. Finally, as discussed above, we find Wife prevailed as to the valuation of many of the marital assets, specifically 6 Judith Street and 109 North Shelmore.

Although Husband claims neither party had an excess of income, we find this fact, even if true, does not alter the analysis of the *E.D.M.* factors. According to the parties' fee affidavits, Husband had been able to pay most of his attorney's fees, while Wife had a large outstanding balance. Additionally, we find Husband had a significantly higher income than Wife. Wife made roughly $5,835 per month. Husband claimed his monthly income was only $5,000; however, as the family court found, his income was difficult to determine due to his lack of credibility and inconsistent claims. We agree with the family court that Husband's income was much greater than he claimed and find the family court's determination his minimum average monthly income was approximately $10,000 was reasonable. Based on this income disparity, we find Husband was in a significantly better financial position than Wife. Further, we agree with the family court that requiring Wife to pay her attorney's fees would have a far greater impact on her standard of living than it would have on Husband's if he was required to pay Wife's attorney's fees. Accordingly, we find the analysis of the *E.D.M.* supports an award of attorney's fees to Wife.

Husband does not contest any of the *Glasscock* factors in his brief, other than the beneficial result obtained, which we addressed above. Further, we agree with the family court's findings as to these factors and find the record contains sufficient evidence to support these remaining factors. Accordingly, we affirm the family court's award of $35,000 in attorney's fees to Wife.

CONCLUSION

Based on the foregoing, the family court's order granting Husband's Rule 60(b) motion and the amended final order are

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Porthemos Curry, Respondent/Appellant,

v.

Carolina Insurance Group of SC, Inc. and Maurice Derrick, Appellants/Respondents.

Appellate Case No. 2016-000986

Appeal From Richland County
Robert E. Hood, Circuit Court Judge
Jocelyn Newman, Circuit Court Judge

Opinion No. 5679
Heard May 16, 2019 – Filed August 21, 2019

AFFIRMED

Wesley Dickinson Peel, of Bruner Powell Wall & Mullins, LLC, and Bryan Michael James Triplett, both of Columbia, for Appellants/Respondents.

Thomas Jefferson Goodwyn, Jr., of Goodwyn Law Firm, LLC, and Rachel Gottlieb Peavy, of The McKay Firm, P.A., both of Columbia, for Respondent/Appellant.

KONDUROS, J.: In this cross-appeal involving an insurance contract, Carolina Insurance Group of South Carolina, Inc. (CIG) and Maurice Derrick (collectively, CIG/Derrick) appeal the circuit court's (1) grant of Porthemos Curry's motion for

summary judgment as to their affirmative defense of release and (2) considering extrinsic evidence in dismissing their defense of release. Curry also appeals, arguing the circuit court abused its discretion in granting CIG/Derrick's motion to amend their answer at trial to assert the affirmative defense of release. We affirm.

FACTS/PROCEDURAL HISTORY

Derrick is a licensed insurance agent for CIG, an insurance agency. In August 2013, CIG/Derrick sold Curry a three-month vacant structure policy for a building he owned in Columbia. Curry purchased another vacant structure policy from CIG/Derrick with Scottsdale Insurance Company for the same building in December 2013. On February 21, 2014, a vehicle collided with the building, starting a fire that caused severe damage to the building. Scottsdale refused to pay the claim, asserting the policy had begun in November 2013 and had lapsed at the time of the accident.[1]

In July 2014, Curry brought an action against Scottsdale[2] and CIG/Derrick. Curry named CIG/Derrick as agents of Scottsdale and asserted causes of action for negligence, later amending the pleading to add claims for gross negligence in the procurement of the insurance policy.[3] In Scottsdale's answer, it stated CIG/Derrick were not "agents, servants[,] or employees o[f] Scottsdale" and "any injuries or damages sustained by [Curry] . . . were the result of the acts or omissions of others not in the employ or control of [Scottsdale]." In their answer, CIG/Derrick also denied they were agents of Scottsdale. Additionally, in Derrick's deposition on April 16, 2015, he testified he was not employed by Scottsdale and was not a producing agent for Scottsdale. In CIG's 30(b)(6), SCRCP, deposition on June 4, 2015, the president of CIG testified CIG had no relationship with Scottsdale.

In November 2015, Curry settled with Scottsdale and executed a release (the Release) in exchange for payment of $85,000 by Scottsdale. The Release, dated December 10, 2015, stated it released and "discharge[d] Scottsdale Insurance Company, its agents, servants, employees, successors[,] and assigns of and from

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[1] The insurance policy—signed December 4, 2013—stated the policy period was from November 21, 2013, to February 21, 2014.

[2] Curry alleged causes of action against Scottsdale for breach of contract, statutory bad faith, and common law bad faith.

[3] Curry filed a second amended complaint on October 1, 2015.

any and all actions, causes of action, demands[,] and/or claims of whatsoever kind or nature prior to and including the date hereof." Attorneys for Curry, Scottsdale, and CIG/Derrick all signed a stipulation of dismissal as to Scottsdale only on December 10, 2015. The stipulation stated it did not affect Curry's case against the remaining defendants.

On April 15, 2016, CIG/Derrick filed a motion for summary judgment. They argued the Release amounted to a full compensation of Curry's claims and thus Curry was precluded from receiving any additional damages. On April 18, 2016, CIG/Derrick filed an amended motion for summary judgment, asserting, in addition to their previous argument, Curry's release of Scottsdale also released CIG/Derrick from liability. CIG/Derrick argued the language of the Release indicated Curry intended to release them in addition to Scottsdale because the Release included the agents of Scottsdale and Curry's complaint stated CIG/Derrick were agents of Scottsdale. CIG/Derrick asserted a party is bound by its pleadings and Curry could have changed his allegation when he filed his amended complaint after having conducted discovery in the case. Also on April 18, CIG/Derrick filed a motion to amend their answer to assert the affirmative defense of release. CIG/Derrick asserted that Curry's accepting the amount he agreed "represented the full amount of the policy benefits" precluded him from claiming additional damages later.

Also on April 18, 2016, Curry filed a motion for summary judgment on CIG/Derrick's affirmative defense of release, asserting the Release was unambiguous and only applied to Scottsdale. Curry also asserted the record contained no evidence CIG/Derrick were agents of Scottsdale and CIG/Derrick denied they were agents of Scottsdale. Curry also filed a memorandum in opposition to CIG/Derrick's motion for summary judgment. Curry argued CIG/Derrick's attorney signed the stipulation of dismissal as to Scottsdale, which stated it only applied to Scottsdale and Curry's "case against the remaining Defendants shall not be affected by this Dismissal." Additionally, Curry noted the Release did not mention CIG/Derrick. Further, Curry provided CIG/Derrick did not pay any money towards the Scottsdale settlement and also engaged in settlement negotiations up to the eve of trial, participated in discovery, and communicated with the circuit court about the scheduling of trial. Curry asserted that if CIG/Derrick believed they were released by Scottsdale's release, which they had known about since November 2015, they could have made the argument prior to the eve of trial. CIG/Derrick requested a copy of the Release on April 8, 2016,

and Curry gave them a copy, after which settlement negotiations and depositions continued.

The trial between Curry and CIG/Derrick was set to be held April 18-19, 2016, and on April 18, the circuit court heard arguments on the motion to amend. The circuit court orally granted CIG/Derrick's motion to amend their answer to assert the affirmative defense of release.[4] Due to the timing of the motion for summary judgment based on the release argument, the circuit court scheduled a hearing on the summary judgment motions for the following week with another circuit court judge and continued the trial until May 16.

A hearing on the motions for summary judgment was held on April 26, 2016. The circuit court denied CIG/Derrick's motion from the bench and took Curry's motion under advisement. The circuit court issued an order on May 9, 2016, granting Curry's motion for summary judgment. The circuit court found CIG/Derrick were not agents of Scottsdale. The court stated that looking at the Release as a whole, the plain language showed it clearly and unambiguously released only Scottsdale and not CIG/Derrick from the action. The court found the intent of the parties was to encompass claims against only Scottsdale. The court noted the Release did not mention CIG/Derrick. The court also found the record contained no evidence CIG/Derrick were agents, servants, or employees of Scottsdale. Specifically, the court noted CIG/Derrick testified no agency relationship whatsoever existed between CIG/Derrick and Scottsdale. Additionally, the court found CIG/Derrick's counsel executed the stipulation of dismissal in December 2015, which stated the dismissal did not affect Curry's case against CIG/Derrick. Finally, the circuit court found unpersuasive CIG/Derrick's argument Curry made a "judicial admission" by alleging in his complaint that CIG/Derrick were agents of Scottsdale. The court stated Curry made a mere allegation in his complaint and CIG/Derrick denied it, repeatedly; thus, no "admission" was made under South Carolina law. The circuit court found CIG/Derrick's argument regarding full payment to be without merit because Curry's claims against Scottsdale were distinct from those pending against CIG/Derrick and could result in an award of different types of damages. The court found the argument was not supported by common law or the South Carolina Contribution Among Tortfeasors Act (the Act), S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2018).

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[4] The circuit court issued a written order granting the motion to amend on May 24, 2016.

On January 31, 2017, Curry filed a motion for relief pursuant to Rule 60(b), SCRCP, requesting the circuit court vacate its grant of CIG/Derrick's motion to amend their answer. CIG/Derrick filed a motion in opposition. The circuit court denied the motion via form order dated August 1, 2017. These appeals followed.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Pallares v. Seinar*, 407 S.C. 359, 365, 756 S.E.2d 128, 131 (2014). "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011). "Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." *Id.*

LAW/ANALYSIS

I. APPEAL OF CIG/DERRICK

A. Summary Judgment[5]

1. CIG/Derrick as Agents

CIG/Derrick argues the circuit court erred in granting Curry's motion for summary judgment as to their affirmative defense of release because Curry asserted they were agents of Scottsdale in three versions of his complaint, which are judicial admissions that are conclusively binding on him; thus, he cannot claim the release of Scottsdale and its agents did not also release CIG/Derrick. Additionally,

[5] CIG/Derrick raise these as separate issues, but we discuss both issues 1 and 2 in this section. We also address their issue 2 before their issue 1.

CIG/Derrick further argues the circuit court erred in looking at CIG/Derrick's answer and testimony to determine the parties' intent when the Release contained no ambiguity.[6] We disagree.

"A release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties[,] and[] in determining that intention, the court looks to the language of the contract." *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993)). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* at 455, 756 S.E.2d at 161 (alteration by court) (quoting *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)). "Generally, 'the construction of contracts is a question of law for the court.'" *Id.* (quoting *Hope Petty Motors of Columbia, Inc. v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992)).

"Allegations in a [c]omplaint denied in [an] answer are evidence of nothing." *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990); *but see Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) (noting the general rule is "the parties to an action are judicially concluded and bound by [the pleadings] unless withdrawn, altered[,] or stricken by amendment or otherwise. The allegations, statements[,] or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts [that] are admitted by the pleadings

[6] As an initial note, the circuit court also denied CIG/Derrick's motion for summary judgment on their affirmative defense of release. "[T]he denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). Therefore, had CIG/Derrick not argued the circuit court erred in granting Respondent's motion for summary judgment, we would not have addressed this issue in any aspect.

are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.").

The court denied CIG/Derrick's motion for summary judgment based on Scottsdale's release and granted Curry's cross-motion for summary judgment based on CIG/Derrick's affirmative defense of release. The circuit court did not err in granting Curry's motion for summary judgment because the language in the Release was unambiguous, the record contained evidence CIG/Derrick were not agents of Scottsdale, and CIG/Derrick's counsel signed the stipulation of dismissal stating Curry's case against CIG/Derrick was not affected by the dismissal. Further, the circuit court correctly found Curry made an allegation in his complaint and CIG/Derrick denied it repeatedly; thus, under South Carolina law Curry did not make a judicial admission.

2. Release as Full Compensation

CIG/Derrick also argues the circuit court erred in granting Curry's motion for summary judgment as to their affirmative defense of release because the Release on its face operated as full compensation amounting to a satisfaction of Curry's damages. CIG/Derrick argues the Release between Curry and Scottsdale states it is a "full payment for all damages" and that by accepting full payment, Curry received "full compensation amounting to a satisfaction." CIG/Derrick also asserts the amount of funds due under the policy is the only measure of damages against Scottsdale or the agent; thus, Curry suffered no other damages or losses. CIG/Derrick argues because the Release amounted to a full satisfaction of Curry's damages, the Release also applied to CIG/Derrick. We disagree.

Section 15-38-50 of the Act provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> > (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any

> amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . .

S.C. Code Ann. § 15-38-50 (2005).

The Release stated the settlement amount paid by Scottsdale "constitute[d] full payment for all damages, losses[,] or injuries." The circuit court found CIG/Derrick's reliance on *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971), to be unpersuasive because no evidence was presented Curry received "full compensation amounting to a satisfaction" and moreover Curry testified the amount he received from Scottsdale did not cover all of his damages. The court also found CIG/Derrick's argument the release was a "full compensation amounting to a satisfaction" under *Ecclesiastes Production Ministries*, 374 S.C. at 494-96, 649 S.E.2d at 499-501, failed because the court defined satisfaction as "the discharge of an obligation by paying a party what is due to him" and CIG/Derrick did not pay any money to Curry.

The circuit court found the Release and the Act did not discharge CIG/Derrick but merely would provide them a means to assert a setoff argument at the postverdict stage of the trial if they were successful in asserting they are joint tortfeasors under the Act. As discussed above, the Release between Scottsdale and Curry did not release CIG/Derrick. The circuit court did not err in finding the Act and *Bartholomew* did not discharge CIG/Derrick because the parties did not intend it to and Curry testified the amount he received from Scottsdale did not cover all his damages but merely provided them a means to assert a setoff argument at the postverdict stage of the trial if they are successful in asserting they are joint tortfeasors under the Act.

B. Extrinsic Evidence

CIG/Derrick argues the circuit court improperly considered extrinsic evidence in dismissing their defense of release when it found the Release to be unambiguous. Specifically, CIG/Derrick asserts the court should not have considered confidential communications and testimony arising from the mediation and settlement negotiations. We disagree.

"A release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries*, 374 S.C. at 497, 649 S.E.2d at 501. "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties[,] and[] in determining that intention, the court looks to the language of the contract." *Watson*, 407 S.C. at 454-55, 756 S.E.2d at 161 (quoting *Sphere Drake Ins. Co.*, 313 S.C. at 473, 438 S.E.2d at 277). "When construing terms in a contract, a court 'must first look at the language of the contract to determine the intentions of the parties.'" *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (quoting *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Watson*, 407 S.C. at 455, 756 S.E.2d at 161 (alteration by court) (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707). "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." *Bates v. Lewis*, 311 S.C. 158, 161 n.1, 427 S.E.2d 907, 909 n.1 (Ct. App. 1993). "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707. "Resort to construction by a party is only done when the contract is ambiguous or there is doubt as to its intended meaning." *Id.*

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary[,] or explain the written instrument." *Bluffton Towne Ctr., LLC*, 412 S.C. at 571, 772 S.E.2d at 891 (alteration by court) (quoting *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009)). "Whe[n] a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties." *Id.* (quoting *McGill*, 381 S.C. at 188, 672 S.E.2d at 576. "Under the parol evidence rule, the terms of the writing are controlling, even if extrinsic evidence is admitted without objection or admitted over appropriate objection." *Id.*

Initially, Curry asserts this issue is not preserved for our review because CIG/Derrick did not object when the circuit court asked for the affidavits after the denial of their motion and did not file a motion for reconsideration of the court's order. We find this issue is preserved. CIG/Derrick objected when Curry sought to introduce the documents, arguing (1) the documents were only admissible if the

language of the release is ambiguous because the documents were outside evidence and (2) the documents were protected by the South Carolina Alternative Dispute Resolution (ADR) Rules because they are detailed as to settlement negotiations and mediation discussions. Accordingly, the issue is preserved.

As to the merits, the circuit court did not err in finding the Release was unambiguous because looking at the Release as a whole, the plain language showed it clearly and unambiguously released only Scottsdale from the action and did not name CIG/Derrick. CIG/Derrick asserts they were released as agents of Scottsdale, but their answers and deposition testimony denied they were agents of Scottsdale; thus, the record contained evidence CIG/Derrick were not agents of Scottsdale. Further, CIG/Derrick's counsel signed the stipulation of dismissal stating Curry's case against CIG/Derrick was not affected by the dismissal. The circuit court's order does not specifically mention it considered the confidential communications and testimony arising from the mediation and settlement negotiations. Accordingly, the circuit court did not err in granting Curry's motion for summary judgment.

II. CURRY'S APPEAL

A. Motion to Amend Answer

Curry contends the circuit court abused its discretion in granting CIG/Derrick's motion to amend their answer at trial to assert the affirmative defense of release, arguing the motion lacked factual support and he suffered substantial prejudice as a result of the amendment. He maintains CIG/Derrick stated they had no knowledge of the language in the Release between Scottsdale and Curry until they received a copy on April 8, 2016, and Curry had failed to produce the Release in discovery. However, Curry asserts CIG/Derrick actually received the unsigned Release on November 30, 2015, and thus had notice four months prior to making their motion. We disagree.

Rule 15(a), SCRCP, provides:

> A party may amend his pleading once as a matter of course at any time before or within [thirty] days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action

> has not been placed upon the trial roster, he may so amend it at any time within [thirty] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; . . . leave shall be freely given when justice so requires and does not prejudice any other party.

"The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998).

"[A] motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

The circuit court did not err in allowing CIG/Derrick to amend their answer because Curry was not prejudiced by it. Curry knew the contents of the Release, and the court allowed him time to brief and argue the issue of release. Accordingly, we affirm the circuit court's grant of the motion.[7]

B. Rule 60(b) Denial

Curry also argues the circuit court erred in denying his motion for relief pursuant to Rule 60(b), SCRCP. Curry argues CIG/Derrick never informed the court it

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[7] Curry asserts that if we find the circuit court abused its discretion in granting CIG/Derrick's motion to amend their answer, CIG/Derrick's appeal from the grant of Curry's motion for summary judgment would be moot. *See Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) ("This [c]ourt will not pass on moot and academic questions or make an adjudication whe[n] there remains no actual controversy."). Based on our decision to affirm the circuit court's grant of the motion to amend, we do not need to address this contention. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

received a copy of the Release on November 30, 2015, more than four months before trial. Therefore, he asserts the circuit court's order is based on factual conclusions without evidentiary support and should be reversed. We disagree.

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > **(1)** mistake, inadvertence, surprise, or excusable neglect;
> > **(2)** newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[, SCRCP];
> > **(3)** fraud, misrepresentation, or other misconduct of an adverse party;
> > **(4)** the judgment is void;
> > **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP.

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006). The appellate "standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises whe[n] the judge issuing the order was controlled by an error of law or whe[n] the order is based on factual conclusions that are without evidentiary support." *Id.* at 551, 633 S.E.2d at 502-03.

"Pursuant to Rule 60(b)(2), SCRCP, a court may order relief from judgment based on newly discovered evidence 'which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).'" *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004). "Likewise, 'a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud whe[n] he or she

has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct.'" *Id.* (quoting *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d 25, 29 (1st Cir. 1988)); *see also Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) (holding when a party could have discovered the new evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2) or (3)).

Curry based his Rule 60(b) motion on the premise that CIG/Derrick was disingenuous when they represented to the circuit court they had first received a copy of the Release between Scottsdale and Curry on April 8, 2016, because they had previously received an unexecuted version of the release on November 30, 2015. He asserts that the circuit court should have granted his Rule 60(b) motion because of this representation. The circuit court did not err in denying Curry's Rule 60(b) motion because he has not shown any of the grounds for relief provided by the rule were present. Accordingly, the circuit court did not err in denying Curry's motion for relief.

CONCLUSION

The circuit court's grant of summary judgment to Curry, the grant of CIG/Derrick's motion to amend, and the denial of Curry's motion for relief pursuant to Rule 60(b), SCRCP, are

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Steven Newbern and Claudia Newbern, Appellants,

v.

Ford Motor Company, Respondent.

Appellate Case No. 2016-002209

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

Opinion No. 5680
Heard June 4, 2019 – Filed August 21, 2019

AFFIRMED

William E. Applegate, IV, of Yarborough Applegate, LLC, of Charleston, Kathleen Chewning Barnes, of Barnes Law Firm, LLC, of Hampton, and Stephen E. Van Gaasbeck, of Law Offices of Stephen E. Van Gassbeck, of Helotes TX, for Appellants.

Joseph Kenneth Carter, Jr. and Carmelo Barone Sammataro, both of Turner Padget Graham & Laney, PA, of Columbia, Bettis Cantelou Rainsford, Jr., of Raymond J. Doumar, P.C., of Augusta GA, and Robert L. Wise, of Bowman & Brooke, LLP, of Richmond VA, for Respondent.

LOCKEMY, C.J.: Steven and Claudia Newbern sued Ford Motor Company alleging strict liability and negligence claims against Ford because of injuries Mr. Newbern suffered when the airbag in their vehicle deployed during an accident. On appeal, the Newberns argue the trial court erred in granting Ford's motion for directed verdict. Finding a lack of evidence in the record to support the Newberns' claims, we affirm.

FACTS

On December 28, 2012, the Newberns were involved in an accident with another vehicle driven by Stephen McGee. Claudia Newbern was diving the couple's 2009 Ford Focus and Steven Newbern was riding in the passenger seat when McGee's vehicle hit the right front passenger side of the Newberns' Focus. The Newberns' driver and passenger airbags deployed during the accident. Mr. Newbern suffered severe injuries to his face and eye resulting in loss of his right eye. The Newberns filed suit against Ford in May 2013 claiming these injuries were the result of a defective airbag system. The Newberns claim Ford should be held responsible under strict liability and negligence theories.

During the trial before a jury, the Newberns called Ramaniyam Krishnaswami, a Ford employee, as an adverse witness to testify as to the design of the airbag sensing system. At the close of the Newberns' case, Ford moved for a directed verdict arguing the Newberns did not prove the existence of a design defect and did not present expert testimony on the defectiveness of the design or a feasible alternative design. The next day, September 16, 2016, the trial court granted Ford's motion. The Newberns filed a motion for a new trial, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

When ruling on a motion for directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The appellate court applies the same standard in reviewing the trial court's grant or denial of a motion for directed verdict. *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). "An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed

verdict." *Graves v. Horry-Georgetown Tech. Coll.*, 391 S.C. 1, 7, 704 S.E.2d 350, 354 (Ct. App. 2010).

LAW/ANALYSIS

The Newberns claim the airbags in their 2009 Ford Focus deployed when they should not have due to a defectively designed airbag system. The Newberns brought this cause of action under the crashworthiness doctrine. As explained by our supreme court in *Donze v. General Motors, LLC*, 420 S.C. 8, 19, 800 S.E.2d 479, 485 (2017), the underlying premise of the crashworthiness doctrine is that "manufacturers are only liable for enhanced damages caused by a design defect when the defect does not cause the initial collision . . . ." "Liability for a design defect may be based on negligence, strict liability or warranty." *Priest v. Brown*, 302 S.C. 405, 411, 396 S.E.2d 638, 641 (Ct. App. 1990). The Newberns alleged strict liability and negligence as the bases of their claims.

Under South Carolina law, in order to recover in a products liability action, a plaintiff must prove: "(1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). If the product liability action is based on strict liability when a design defect is alleged, "the plaintiff must prove the product, as designed, was in an unreasonably dangerous or defective condition. The focus here is on the condition of the product, without regard to the action of the seller or manufacturer." *Id.* at 540, 462 S.E.2d at 326 (citations omitted). S*ee also* S.C. Code Ann. § 15-73-10 (2005) (imposing liability on seller for defective products). In *Branham v. Ford Motor Company*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010), our supreme court adopted the risk-utility test as the exclusive test in products liability design cases. Under the risk-utility test, a product is "unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328. In order to satisfy this test, the plaintiff must present proof of a feasible alternative design that would have made the product safer. *Miranda C. v. Nissan Motor Co.*, 402 S.C. 577, 591, 741 S.E.2d 34, 42 (Ct. App. 2013).

If the design defect claim is brought under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant "failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326.

At trial and on appeal, Ford argued the Newberns failed to provide evidence of the design defect and under the required risk-utility test, the Newberns failed to provide evidence of a safer alternative design. During the trial, the Newberns did not call their own automotive design expert. Instead, the Newberns called Krishnaswami, who Ford designated as its representative and airbag design expert prior to the trial, to prove both negligent design and strict liability.

Krishnaswami began working for Ford in 1993 and at the time of the trial, Ford employed him as a design analysis engineer, but he was not involved in the design of the 2009 Ford Focus. Krishnaswami testified as to Ford's design process. He explained Ford performs hundreds of crash tests during the design of a new car. Ford uses the crash test data to determine how to calibrate and where to put the airbag sensors, which tell the vehicle's restraint system it has been in a crash and whether an airbag should deploy. Krishnaswami testified to the jury that Ford purchases its sensors from Bosch. Ford sends Bosch requirements for the sensors based on the crash tests it performed. The Newberns asked Krishnaswami about a specific crash test, 15978, which they purport and Krishnaswami agreed is the most similar to the Newbern's crash. Based on this crash test, Krishnaswami testified that if the passenger is wearing a seatbelt, the airbag should be suppressed – meaning not deployed. The calibration report for this crash also indicates no airbag deployment. Ford sent this information to Bosch. However, Bosch's calibration resulted in deployment for this type of crash. Krishnaswami acknowledged, "[Bosch] did not - - they were not able to achieve the initial targets . . . ."

Krishnaswami also conceded airbags can cause injuries, including eye injuries. He acknowledged no one wants to have an airbag deploy when it is not necessary. Lastly, Krishnaswami testified as follows while being examined by the Newberns' counsel:

> Q. Would it be unreasonably dangerous to provide a person with a system that will deploy airbags when they are not needed?

A. Yes. It depends on the occupant kinematics.

The Newberns assert Krishnaswami's testimony along with the supporting calibration report provide evidence of a design defect because the airbag deployed when Ford's own data indicated that it should not deploy. We disagree.

Krishnaswami's testimony centered on Ford's design process. Krishnaswami did not offer testimony opining on the dangerousness or defectiveness of the 2009 Focus's airbag system. Krishnaswami explained the requirements Ford sent to Bosch were "initial targets," rather than requirements. If the targets sent to Bosch are not met, then Ford studies those targets and determines whether it can accept the calibration. Krishnaswami acknowledged design changes could be made if the calibration does not meet the target, but he advised the calibration has to take into account many crash modes. Krishnaswami stated the crash modes are interconnected. The calibration in one crash mode can affect the airbag's performance in another crash mode. Krishnaswami explained as follows:

> The thing is if you delay the airbag for a certain crash mode you may end up delaying for other modes too. That's why the system has to be optimized. Then we go back and study is it okay or is it absolutely okay to deploy an airbag in this crash mode based on the studies and tests and then we can accept it.

He added,

> [Y]ou cannot look at one crash test in isolation and that's what I was trying to say. What you do in one crash affects other crashes because the system is tied together. One crash mode is not independent of another crash mode. The signal pattern, even though it varies, it is very important to bring all the data together and look as [sic] a system as a whole. And that's why we would deploy in some modes where the initial target was not to deploy to begin with.

Ford accepted what it found to be the optimal calibration as Ford was satisfied with the overall target. Krishnaswami described the calibration accepted by Ford as "good." Krishnaswami's testimony does not indicate that the restraint system was

defective. To the contrary, his testimony serves to explain how Ford came to the calibration it adopted for the 2009 Focus. In our review of Krishnaswami's testimony, in addition to the record as a whole, we did not find any evidence to support the Newberns' allegations that the airbag system was unreasonably dangerous or defective.

In addition, we do not find evidence of an alternative design that would have made the airbag system safer as required by *Branham*. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 ("[I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.").

Krishnaswami testified that if Ford found the exceptions in the calibration report unacceptable, Ford could move the position of the sensor, add reinforcement to the crash path, or increase the crash threshold. The Newberns rely on this testimony to support a claim of a feasible alternative design. However, Krishnaswami did not offer any testimony as to how employing these alternatives would have made the airbag system safer or otherwise satisfied a risk-utility analysis. Furthermore, his testimony indicates that because the crash modes are interconnected—redesigning the sensing could result in an airbag not deploying when Ford determined it should deploy. Therefore, modifications to the airbag system could result in a more dangerous product rather than a less dangerous product.

After reviewing the record, and more specifically Krishnaswami's testimony, we fail to find evidence of both defective design and a feasibly alternative design that would have made the airbag system safer. Therefore, the trial court did not err in granting Ford's motion for a directed verdict on the strict liability cause of action.

The Newberns also alleged Ford is liable due to its negligent design of the airbag system. However, the Newberns failed to present evidence of Ford's failure to exercise due care.

The Newberns assert Ford's deviation from its own internal policies demonstrates its deviation from the standard of care. They cite to Ford's haste in getting the Focus into production as the reason Ford was willing to make exceptions in the sensor calibration. Several South Carolina cases support the Newberns' position that deviation from a company's own policies is relevant to show the company deviated from the standard of care. *See Madison ex rel. Bryant v. Babcock Ctr.,*

Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) ("The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines."); *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) ("Although federal regulations provide the standard of care, Respondents' deviation from their own internal policies is, nevertheless, admissible as evidence that Respondents deviated from that standard of care.").

The record provides little evidence of Ford's actual policies. The Newberns did not offer any experts to testify that Ford violated any policies or breached any standard of care. While Krishnaswami stated modifications are possible, he did not testify about a Ford policy requiring modifications when it did not meet the initial targets. Moreover, the Newberns did not offer any evidence as to how Ford violated its policies in the design of the 2009 Ford Focus. Therefore, the trial court correctly granted Ford's motion for a directed verdict on the Newberns' negligence cause of action.[1]

CONCLUSION

Based on our review of the record, and more specifically Krishnaswami's testimony, we are unable to find any evidence in the record to support a finding that the airbag system in the Newberns' Ford Focus was unreasonably dangerous and defective to the point that the use of the product outweighs its utility. Therefore, the trial court correctly granted the directed verdict and its order is

AFFIRMED.

SHORT and MCDONALD, JJ., concur.

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[1] Ford also argued the lack of expert testimony as an additional ground for its motion for directed verdict. Specifically, Ford argued that expert testimony is required to prove defective design, citing to our supreme court's decision in *Watson v. Ford Motor Company*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). In light of our disposition of the case, it is not necessary to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin, Respondents.

Appellate Case No. 2017-000866

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

Opinion No. 5681
Heard May 15, 2019 – Filed August 21, 2019

REVERSED AND REMANDED

G. Dana Sinkler, of Gibbs & Holmes, of Wadmalaw Island, and Ainsley Fisher Tillman, of Ford Wallace Thomson LLC, of Charleston, both for Appellants.

George Hamlin O'Kelley, III, of Buist Byars & Taylor, LLC, of Mt. Pleasant, for Respondents.

GEATHERS, J.: This case involves a property dispute on Seabrook Island between neighbors Richard and Eugenia Ralph ("the Ralphs"), and Paul and Susan McLaughlin ("the McLaughlins"). The dispute in question concerns the destruction of a drainage easement by the McLaughlins that, the Ralphs allege, exacerbated drainage issues on the Ralphs' property. At trial, the jury found for the Ralphs on

their cause of action for trespass and awarded them $1,000 in nominal damages. On appeal, the Ralphs argue the circuit court erred in 1) failing to apply the rulings and factual determinations from a previous grant of summary judgment to a third-party defendant as the law of the case; 2) entering a directed verdict for the McLaughlins on the issue of punitive damages; 3) failing to find the McLaughlins trespassed as a matter of law; and 4) failing to grant the Ralphs a new trial absolute, a new trial *nisi additur*, or a new trial on damages. We reverse and remand the case for a new trial on compensatory damages and punitive damages.

FACTS

In 1984, E.M. Seabrook, Jr. prepared and recorded a plat depicting blocks 32 and 33 of Seabrook Island ("the Seabrook plat"). In 1987, he similarly prepared and recorded a second plat depicting blocks 32 and 33. To alleviate drainage issues concerning several lots on block 32, Seabrook established a twenty-foot-wide drainage easement and a corresponding no-build area across the back of lots 21 through 28, which are reflected in the plats. The plats also reflect a twenty-foot-wide drainage easement running between the property lines of lots 21 and 22, extending ten feet into each lot. The drainage easements contained a pipe that began at the front corner of lot 22, ran down the property line, turned ninety degrees, and extended across lots 22 through 28 before emptying into a water hazard on the neighboring golf course.[1]

In 1997, the Ralphs purchased lot 23 and recorded their deed, which granted them the property "with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining." The deed also indicated the property was subject to "the Covenants, Conditions, Restrictions, Limitations, Affirmative Obligations and Easements of Record . . . ." Similarly, in 1998 or 1999, Carroll and Lorraine Gantz ("the Gantzes") purchased lot 22 and recorded their deed. The Gantzes' deed indicated lot 22 was subject to "a twenty[-]foot (20') easement for drainage and a ten[-]foot (10') easement for drainage as shown on the [Seabrook plat]," as well as "the area designated as 'No Build Area' shown on the [Seabrook plat]."

In 2002, the Gantzes, predecessors in title to the McLaughlins, approached the Seabrook Island Property Owners Association ("SIPOA") about eliminating the twenty-foot drainage easement and no-build area on the back of lot 22. Thereafter,

[1] Lots 23 through 28 are downstream from lot 22.

SIPOA unanimously voted to give the easement back to the owners of lot 22. On September 11, 2002, a new plat prepared by Forsberg Engineering ("the Forsberg plat") entitled "Plat Showing Abandonment of an Existing 20' Drainage Easement Lot 22, Block 32," was recorded. The Forsberg plat also indicated the current no-build area was to be abandoned.

In October 2002, the Gantzes conveyed lot 22 to the McLaughlins, and the deed was recorded. The legal description of the property indicated that it remained subject to the ten-foot drainage easement depicted in the Forsberg plat and "all Restrictions, Covenants, Easements, Rights-of-Way, Matters and Conditions of record affecting said property . . . ." Mr. McLaughlin indicated he never discussed the twenty-foot easement with the Gantzes or SIPOA prior to closing, but he maintained that the real estate agent asserted the easement had been abandoned.[2] Mr. McLaughlin also testified his closing attorney brought the twenty-foot easement to his attention before indicating that it had been abandoned, telling him "everything was appropriate and in order."

In 2006, the McLaughlins approached SIPOA's Architectural Review Board about building a house on their property. According to the plans, part of the house was to be sited over the twenty-foot easement and no-build area. At an August 15, 2006 SIPOA meeting, the preliminary plans were unanimously approved subject to several stipulations.[3] Thereafter, the McLaughlins received a letter from the administrator of the Architectural Review Board, dated August 18, 2006, stating:

> The Architectural Review Board has approved the Preliminary Plans submitted for Block 32 Lot 22, Seabrook Island, SC. Please address the following comments of the ARB and re-submit plans for Conditional Review.

[2] However, Mr. McLaughlin conceded that the real estate agent had never shown him any documents concerning the abandonment of the easement.

[3] These stipulations are identical to the comments included in the letter from the administrator of the Architectural Review Board. *See infra*.

1. Owner is to assume all responsibility for the underground drainage line at the 20' drainage easement/driveway.[4]
2. Owner is to assume all responsibility for the abandoned drainage easement that may contain a pipe.
3. Property lines must be located prior to any grading because of the Right-Of-Way for the SIPOA 20' drainage easement.

In June 2007, the McLaughlins received a letter from SIPOA regarding a plan to address the drainage pipe and eliminate the twenty-foot easement. The Ralphs received the same letter. After receiving the letter, Mr. Ralph met with John Thompson, the executive director of SIPOA, to voice his objections regarding any plans to remove the drainage pipe.

Over the course of the next year, the McLaughlins sought financing for their construction, closing on a loan in June 2008. At some point, the McLaughlins received a call from the chair of the SIPOA legal committee indicating there were some issues concerning the drainage pipe. On September 22, 2008, Thompson sent an email to the owners of lots 21 through 28 seeking to schedule a meeting concerning the easement. The email summarized the dispute surrounding the easement[5] and indicated the drainage pipe was still functioning. The email further indicated that several neighbors objected to the removal of the pipe due to concerns

[4] In a later lawsuit, SIPOA indicated it "defined the 'cost necessary to remove the easement' to be the cost of re-working the drainage in a manner that maintains the existing drainage for other related lots, i.e., the cost of installing alternative drainage in a manner that will not undermine or adversely affect such existing drainage system 'downstream.'" Mr. McLaughlin indicated he understood this to mean the McLaughlins, "bore the financial responsibility of taking care of removing [the pipe] if [they] wanted to."

[5] In his email, Thompson indicated SIPOA had voted to give the easement back to the property owners, but only two had chosen "to take the formal action to remove the easement from the recorded documents at the [c]ounty record[]s office . . . ."

over adverse effects it would have on drainage and that SIPOA had hired an engineer, Robert George, to evaluate the consequences of removing the pipe.[6]

The meeting between SIPOA, the McLaughlins, and the affected property owners was held on September 29, 2008. At the meeting, Mr. George presented his findings and advised against removing the drainage pipe on lot 22, indicating that doing so would increase the likelihood of flooding and exacerbate existing drainage problems. Another meeting was held to discuss the issue on October 1, 2008. Following the meetings, several emails were exchanged between the affected property owners and the McLaughlins. In these emails, the property owners continued to express their concerns about the adverse impact the removal of the pipe would have on their properties, and the McLaughlins adamantly denied the existence of an easement on their lot. After the McLaughlins and their neighbors failed to reach an agreement, SIPOA indicated it had exhausted its options. On October 22, 2008, SIPOA sent a letter to the affected property owners indicating that it had rescinded the May 2002 resolution abandoning the easement.

On December 5, 2008, the McLaughlins emailed the neighboring property owners asserting that there was no easement on their property, they had been patient with SIPOA, and they would begin construction on their home. On December 9, 2008, the McLaughlins authorized their construction team to remove the drainage pipe. On the same day, SIPOA filed a lawsuit against the McLaughlins seeking a temporary restraining order to prevent the removal of the pipe.[7] However, SIPOA withdrew the lawsuit two days later on December 11, 2008.[8] Following the removal of the pipe, the McLaughlins built part of their home over the no-build area and the area formerly containing the pipe.

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[6] Additionally, the email contained an attached report prepared by Mr. George advising against the removal of the drainage pipe on lot 22.

[7] It is unclear whether the McLaughlins removed the pipe before the filing of the lawsuit. The lawsuit was filed at 11:40 a.m., and Mr. Ralph testified the pipe was removed around 2:00 or 3:00 p.m. However, Mr. McLaughlin testified the pipe was removed before the lawsuit was filed.

[8] In his deposition, Thompson indicated the lawsuit was withdrawn as moot because the pipe had already been removed.

On September 30, 2011, the Ralphs filed a complaint[9] against the McLaughlins seeking actual and punitive damages and alleging the McLaughlins caused flooding and poor drainage on the Ralphs' property by destroying the drainage easement. On December 6, 2011, the McLaughlins filed an answer and a third-party complaint against SIPOA alleging reliance on representations by SIPOA. On February 14, 2014, the Ralphs moved for partial summary judgment on their trespass claim. The McLaughlins filed a motion for summary judgment on February 19, 2014, and, a day later, SIPOA filed a motion for summary judgment. While these motions were pending, the Ralphs moved to strike the matter from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (SCRCP),[10] and the parties entered into a consent order striking the case from the docket on June 24, 2014. The Ralphs moved to restore the case to the active docket on May 11, 2015, and the case was restored by consent order on June 23, 2015, pursuant to Rule 40(j), SCRCP.[11]

After the case was restored, the parties refiled their motions for summary judgment. On May 11, 2016, the Honorable G. Thomas Cooper, Jr.,[12] heard all three motions for summary judgment, denying both the Ralphs' motion and the McLaughlins' motion. However, Judge Cooper granted SIPOA's motion for summary judgment, finding there was no evidence to show SIPOA had made any promises to the McLaughlins and, as a matter of law, the McLaughlins could not have reasonably relied on SIPOA.

At trial, the Ralphs presented Howard Yates as an expert in real property. Yates indicated that he examined the chains of title for the Ralphs and McLaughlins and opined that both properties became subject to the drainage easement after the properties were first purchased according to the Seabrook Island plat. Yates explained the lot owners each held a special property interest in the easement. Yates

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[9] The Ralphs filed an amended complaint on July 17, 2013, pleading trespass, punitive damages, and intentional infliction of emotional distress.

[10] Pursuant to Rule 40(j), "[a] party may strike its complaint . . . from any docket one time as a matter of right, provided that all parties adverse to that claim . . . agree in writing that it may be stricken . . . ."

[11] Pursuant to Rule 40(j), "[u]pon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule."

[12] While Judge Cooper ruled on the motions for summary judgment, the rest of the case was before the Honorable Roger M. Young, Sr.

further testified SIPOA could not unilaterally abandon the easement, indicating abandonment would require the consent of everyone who held a special property interest. Additionally, while Yates conceded that lot 22 was subject to the Forsberg plat, he maintained that it was still subject to the earlier plats as well. Yates further testified that determining whether SIPOA had authority to abandon the easement would require an attorney to look at the deed and plats and that such a review would only take twenty to thirty minutes.

The Ralphs also presented Robert George as an expert in civil engineering, registered land surveying, and storm-water drainage. George testified that the Ralphs' yard is a trough and the original design for Seabrook Island was meant to alleviate this issue. George further explained this design was interrupted by the McLaughlins' removal of the pipe, leading to increased water flow into the Ralphs' yard, increased "ponding,"[13] and poor drainage. Additionally, Mrs. Ralph indicated the standing water in their yard could reach a depth of eight inches and could take several days to drain, whereas the water would typically dissipate within a day and a half before removal of the pipe.

Concerning damages, the Ralphs estimated their house was worth $775,000 without the backyard ponding issues. After removal of the pipe, both of the Ralphs testified that they believed the value of their property had dropped by at least $200,000. The Ralphs also presented Nick Thompson as an expert in commercial and residential appraisal. Thompson indicated he had trouble appraising the Ralphs' property because he had not been able to find any sales with a similar problem. According to Thompson, the lack of comparable sales indicated that either the Ralphs' drainage problems were unique and a similar situation had never existed before or property owners with the same problems had not been able to find a buyer. Thompson then estimated the Ralphs' property had decreased in value by ten, fifty, or sixty percent. Thompson further indicated he believed the Ralphs' property to be worth approximately $567,000 before the pipe was removed, opining that the Ralphs would be lucky to sell their property for half that price afterwards. Additionally, Mrs. Ralph testified that they had paid Mr. George $17,000 in an attempt to alleviate the drainage problem, but no solution could be implemented.

After the Ralphs rested their case, the McLaughlins moved for a directed verdict on several issues, including punitive damages. The Ralphs argued Mr.

[13] The term "ponding" was used to describe the accumulation of standing water as a result of poor surface absorption caused by the high water table on Seabrook Island.

McLaughlin's testimony indicated that he acted with reckless disregard for the rights of his neighbors.[14] The circuit court indicated it did not think punitive damages were applicable because Mr. McLaughlin believed he had the right to remove the pipe. Ultimately, the circuit court found, "I don't think he was acting malevolently, certainly not to the level of clear and convincing, so I'll grant their motion for punitive damages."

After this ruling, the Ralphs made two additional arguments in support of punitive damages. First, the Ralphs argued that, under South Carolina law, a purchaser is imputed with knowledge of all the other deeds in his chain of title and the act of digging up the pipe could be construed as willful because the McLaughlins are presumed to have known the easement ran across their property. The circuit court responded, "Well, I got to disagree with you on that. That's language in the deed. I doubt there's probably anybody in this room, including all the lawyers, who read the deed when they bought their piece of property. They had their lawyer read it, and it's there." Second, the Ralphs argued the conclusion in Judge Cooper's unappealed grant of summary judgment—that the McLaughlins could not rely on any representations by SIPOA—was the law of the case. As such, the Ralphs argued this conclusion should be binding, and they should be allowed to argue to the jury that the removal of the pipe was intentional and punitive damages applied. However, the circuit court ruled the grant of summary judgment to SIPOA was not binding on the jury. After dismissing these arguments, the circuit court reiterated that it was granting the directed verdict on punitive damages.

The McLaughlins' case centered on the theory that they had justifiably relied on SIPOA and the purported abandonment of the easement in removing the pipe. The McLaughlins also testified they had observed significant amounts of standing water in the Ralphs' yard when visiting their property prior to construction. Additionally, Mr. McLaughlin explained that when determining where to site their house, SIPOA's Architectural Review Board required the McLaughlins to preserve a large oak tree in the middle of their property. As such, the McLaughlins had the option to site the house on the front or back side of the oak tree, and they ultimately

[14] Mr. McLaughlin testified he attended the SIPOA meeting where Mr. George presented his findings, was aware removing the pipe could have adverse effects on the downstream lots, and proceeded with construction despite the concerns of his neighbors.

decided to site the house on the back side.[15] Mr. McLaughlin further indicated he removed the pipe because he was frustrated; he had not asked any of his neighbors for permission to remove the pipe or begin construction; and following construction, he told SIPOA that it could take on the responsibility of providing a solution to the Ralphs' drainage problem.

After the close of the McLaughlins' case, the Ralphs moved for a directed verdict on trespass, arguing SIPOA's purported abandonment of the drainage easement would not have affected the Ralphs' property rights. The circuit court denied the motion, finding the issues of trespass and abandonment were both for the jury. After closing arguments, the circuit court charged the jury on, among other things, the law of easements, trespass, abandonment, and nominal damages. After deliberating for about five hours, the jury indicated it was deadlocked, and the circuit court issued an *Allen*[16] charge. After resuming deliberations for a little over an hour, the jury returned the following verdict: "We, the jury, find for the plaintiff against the defendant in the amount of $1,000 actual nominal[17] damages . . . ."

On February 3, 2017, the Ralphs moved for, in the alternative, a new trial absolute, a new trial as to damages, or a new trial *nisi additur* pursuant to Rule 59, SCRCP. In denying the motions for a new trial absolute and a new trial *nisi additur*, the circuit court found it was the jury's intention to award nominal damages and that such an award was supported by the evidence at trial. Additionally, in denying the motion for a new trial as to damages, the circuit court cited the same rationale and indicated a new trial as to damages was not warranted because a directed verdict on the issue of trespass would not have been proper. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by failing to apply the rulings and factual determinations in the previous grant of summary judgment to SIPOA as the law of the case?

2. Did the circuit court err by entering a directed verdict for the McLaughlins on the issue of punitive damages?

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[15] The drainage easement and no-build area ran along the back side of the property.
[16] *Allen v. United States*, 164 U.S. 492 (1896).
[17] The verdict form only had a space for actual damages, but the jury wrote in the word nominal underneath.

3. Did the circuit court err in failing to find the McLaughlins trespassed as a matter of law?

4. Did the circuit court err in failing to grant the Ralphs a new trial absolute, a new trial *nisi additur*, or a new trial on damages?

STANDARD OF REVIEW

Directed Verdict

"In reviewing [] a motion for directed verdict . . . , the appellate court applies the same standard as the circuit court." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 910 (Ct. App. 2011) (second alteration in original) (quoting *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005)). As such, "this [c]ourt must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012). "In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 608, 579 S.E.2d 136, 142 (Ct. App. 2003). "The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93, 108–09, 780 S.E.2d 611, 619 (Ct. App. 2015) (second alteration in original) (quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)).

New Trial

"A [circuit court]'s order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence[] or the conclusion was controlled by an error of law." *Curtis v. Blake*, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011) (quoting *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990)). "Review by an appellate court of the grant or denial of a new trial is 'limited to consideration of whether evidence exists to support the [circuit] court's order.'" *Id*. at 505–06, 709 S.E.2d at 85 (quoting *Lane v. Gilbert Constr. Co., Ltd.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must

consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

New Trial *Nisi Additur*

"The denial of a motion for a new trial *nisi* is within the [circuit court]'s discretion and will not be reversed on appeal absent an abuse of discretion." *Vinson*, 324 S.C. at 406, 477 S.E.2d at 723. "This [c]ourt has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Id*. at 406, 477 S.E.2d at 723–24. "We will only reverse if the [circuit court] abused [its] discretion in deciding a motion for new trial *nisi additur* to the extent that an error of law results." *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). "The [circuit court] who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Vinson*, 324 S.C. at 405–06, 477 S.E.2d at 723 (internal citation omitted). "Therefore, on appeal of the denial of a motion for a new trial *nisi,* this [c]ourt will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute." *Id*. at 406, 477 S.E.2d at 724.

LAW/ANALYSIS

I. Law of the Case

The Ralphs argue the circuit court erred in failing to apply the findings of fact and conclusions of law in the grant of summary judgment to SIPOA as the law of the case. The McLaughlins argue the circuit court properly refused to apply the findings of fact and conclusions of law in Judge Cooper's summary judgment order as the law of the case because there was no ruling in his order applying to the Ralphs and McLaughlins; Judge Cooper denied the summary judgment motions of the Ralphs and the McLaughlins; and Judge Cooper ruled on the issue of indemnity, not trespass or punitive damages. We agree with the Ralphs.

"An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *see also Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("There is no appeal from this ruling, and thus, it becomes the law of the

case."). "Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'" *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (quoting *Ashy v. WeCare Distribs., Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986)). "The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). "This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785.

In *Shirley's*, our supreme court found that previous unappealed orders by separate judges did not constitute the law of the case because the issues in question were distinctly different. *Id*. In so holding, the supreme court found that neither of the previous unappealed orders specifically ruled on the issue in question. *Id*. Similarly, in *Binkley v. Burry*, this court found that a previous judge's unappealed order in regard to notice of the existence of an easement did not constitute the law of the case concerning notice of the scope of the easement. 352 S.C. 286, 294–95, 573 S.E.2d 838, 843 (Ct. App. 2002). The *Binkley* court held, "the question of notice regarding the existence of an easement is distinct from the question of notice as it relates to the scope and enforceability of the easement." *Id*. at 294, 573 S.E.2d at 843. The court further held that while "the law of the case doctrine may preclude [] challenging [the] finding that the Binkleys did not have notice of the scope and enforceability of the easement, the doctrine does not prevent [] raising the issue of when the Binkleys had notice of the existence of the easement." *Id*. at 294–95, 573 S.E.2d at 843.

Here, Judge Cooper's grant of summary judgment made explicit rulings and findings of fact concerning the McLaughlins. Specifically, Judge Cooper ruled "as a matter of law, there is simply no genuine issue of material fact that the McLaughlins reasonably relied on the unambiguous acts, representations, and writings of SIPOA or otherwise reasonably based their decision to remove the pipe in 2008 . . . ." Judge Cooper's grant of summary judgment was not appealed. As such, the finding that the McLaughlins could not claim reliance on SIPOA in removing the pipe was the law of the case. *See Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance.").

The issue of whether the McLaughlins could rely on SIPOA is the exact issue the Ralphs raised to the circuit court in arguing that Judge Cooper's order constituted the law of the case. Accordingly, we find the circuit court erred in ruling that Judge Cooper's findings were not binding on the court and the jury. We note the

McLaughlins' defense was significantly based on the theory that they were acting in reliance on SIPOA. Moreover, the circuit court's decision to grant the directed verdict on punitive damages was based largely on its determination that the McLaughlins believed they had the right to remove the pipe based on SIPOA's representations. We address the impact of this error below.

II. Punitive Damages

The Ralphs argue the circuit court erred in granting a directed verdict as to punitive damages because more than one reasonable inference could be drawn from the evidence as to whether the McLaughlins acted with reckless disregard for the property rights of the Ralphs. We agree.

Preservation

At the outset, the McLaughlins argue this issue is not preserved because the Ralphs did not raise the issue of punitive damages in their post-trial motions and did not object when the directed verdict was granted. We disagree.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error." *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546. "If the losing party has raised an issue in the lower court, *but the court fails to rule upon it*, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file such a motion when an issue or argument has been raised, *but not ruled on*, in order to preserve it for appellate review." (second emphasis added)). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724. However, "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial . . . ." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). As such, the mere fact that a party received

an unfavorable ruling does not require that party to re-raise the issue in a Rule 59(e) motion to preserve it. *See Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) ("The 'raised to and ruled on' rule of error preservation requires only a ruling, *not necessarily a favorable one*." (emphasis added)).

The issue of punitive damages was raised to the circuit court when the McLaughlins moved for a directed verdict. In opposing the motion, the Ralphs argued that evidence in the record supported the inference that the McLaughlins acted recklessly, that the McLaughlins had imputed knowledge of the easement through their chain of title, and that the law of the case precluded the McLaughlins from claiming reliance on SIPOA. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). After hearing arguments from both sides, the circuit court granted a directed verdict in favor of the McLaughlins. *See Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error."). Accordingly, because this issue was raised to and ruled upon by the circuit court, the Ralphs were not required to make an objection or raise the issue in a post-trial motion to preserve it for appellate review. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("If the losing party has raised an issue in the lower court, *but the court fails to rule upon it*, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." (emphasis added)); *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial . . . .").

Merits

The Ralphs argue the circuit court erred in failing to submit the issue of punitive damages to the jury. The McLaughlins argue the circuit court properly granted a directed verdict on punitive damages because there was no evidence to support the inference that the McLaughlins acted recklessly, willfully, or wantonly. We agree with the Ralphs.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Wimberly v. Barr*, 359 S.C. 414, 423, 597 S.E.2d 853, 858 (Ct. App. 2004). "Punitive damages may be awarded for trespass when a defendant's acts have been willful, wanton or in reckless disregard of the rights of

another." *Id*.; *see also Hinson v. A. T. Sistare Constr. Co.*, 236 S.C. 125, 131, 113 S.E.2d 341, 344 (1960) ("Trespass through mere negligence affords no ground for punitive damages; but such damages may be awarded whe[n] the trespass is wil[l]ful and deliberate."), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). "'Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.'" *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Id*. Moreover, "[a] jury may award punitive damages even 'when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights.'" *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 353–54, 683 S.E.2d 818, 823 (Ct. App. 2009) (quoting *Camp v. Components, Inc.*, 285 S.C. 443, 444, 330 S.E.2d 315, 316 (Ct. App. 1985)).

"When ruling on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis*, 394 S.C. at 393–94, 714 S.E.2d at 909–10 (quoting *Mishoe*, 366 S.C. at 200, 621 S.E.2d at 366). "It is not the duty of the [circuit] court to weigh the testimony in ruling on a motion for a directed verdict." *Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411. Rather, "[t]he issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366). Once the issue has been submitted to the jury, "the plaintiff has the burden of proving [punitive] damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). Accordingly, in ruling on a directed verdict motion as to punitive damages, the circuit court must determine whether there are any reasonable inferences from the evidence to support the conclusion that the defendant's behavior was reckless. If such an inference can be made, the issue should be submitted to the jury, who in turn must determine whether recklessness was proven by clear and convincing evidence.

As referenced above, this court has previously addressed when the issue of punitive damages must be submitted to the jury in *Mishoe* and *Hollis*. In *Mishoe*,

the plaintiff suffered serious injuries to her left ankle and right knee when her foot got caught in a hole while walking across the pavement near a hospital's emergency room exit. 366 S.C. at 199, 621 S.E.2d at 365. In determining that the circuit court correctly denied the defendant's motions for a directed verdict and a judgment not withstanding the verdict, this court noted that the chief executive officer of the hospital was provided with actual, written notice of the hole almost a year before the plaintiff's accident. *Id*. at 201, 621 S.E.2d at 366. The court then stressed that, despite such notice, the hospital took no action to repair the hole or to warn visitors or patients of its existence. *Id*. at 201–02, 621 S.E.2d at 366. Accordingly, the court determined "evidence of this written notice [was] sufficient to submit the issue of [Defendant]'s willful, wanton, reckless, or malicious conduct to the jury." *Id*. at 202, 621 S.E.2d at 366.

In *Hollis*, this court again found that the circuit court properly denied a directed verdict on the issue of punitive damages. 394 S.C. at 390, 714 S.E.2d at 907–08. In the case, the defendant purchased property directly upstream from the plaintiffs for the purpose of developing a residential subdivision. *Id*. at 390, 714 S.E.2d at 908. As a result of the defendant's development, the plaintiffs experienced severe flooding on their property that inhibited access to their home and filled their ponds with up to four feet of sediment. *Id*. In determining the issue was correctly submitted to the jury, the *Hollis* court noted that the defendant "ignored regulations regarding erosion control, stormwater runoff, and even its own engineer's plans; took no action to prevent or correct damage it knew it was causing to the ponds; and used threats and deception to avoid the consequences of its misconduct." *Id*. at 394, 714 S.E.2d at 910. The court then highlighted the circuit court's summary of the evidence, finding that the plaintiffs had expressed concerns about the development's effects on their property both before and during construction, the South Carolina Department of Health and Environmental Control and Richland County had put the defendant on notice that it was not maintaining its stormwater management plan, the defendant inadequately maintained the stormwater management system, and the defendant attempted to bully and threaten the plaintiffs. *Id*. After reviewing the record, the *Hollis* court found that the circuit court "correctly denied the motion because, viewing the evidence in the light most favorable to the [plaintiffs], the jury had ample evidence from which to find [defendant] acted in reckless disregard of the rights of others." *Id*. at 395, 714 S.E.2d at 910.

We find the decision to grant the directed verdict was based on an error of law, as the circuit court's determination that the McLaughlins justifiably relied on

SIPOA's representations in removing the pipe was in direct contravention of Judge Cooper's determinations of law.[18] *See Zinn*, 415 S.C. at 108–09, 780 S.E.2d at 619 ("The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion [] when . . . the ruling is controlled by an error of law." (second alteration in original) (quoting *Law*, 368 S.C. at 434–35, 629 S.E.2d at 648)). However, even absent Judge Cooper's ruling, the circuit court should have submitted the issue of punitive damages to the jury.

First, the jury could have found the McLaughlins knew or should have known that their downstream neighbors had property interests in the drainage easement and no-build area before the McLaughlins removed the pipe and built their house. Mr. McLaughlin indicated he relied on the representations of his real estate agent and did not speak to SIPOA about the existence of the easement before purchasing the property. However, under South Carolina law, the McLaughlins had a duty to inquire into the property rights in the easement, as they are presumed to have knowledge of the recorded easements in their chain of title. *See Moyle v. Campbell*, 126 S.C. 180, 193–94, 119 S.E. 186, 190 (1923) ("The law imputes to a purchaser of real estate notice of the recitals contained in the written instruments[] forming his chain of title *and charges him with the duty of making such reasonable inquiry and investigation* as is suggested by the recitals and references therein contained." (emphasis added) (internal citations omitted)); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) ("Notice of a deed is notice of its whole contents . . . and *it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue*." (alteration in original) (quoting 66 C.J.S. *Notice* § 19, at 454 (1998))); *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) ("A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title.").[19] Additionally, SIPOA notified the McLaughlins that if they removed the drainage pipe, they bore the responsibility of doing so in a manner that maintained the

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[18] *See supra* Section I.

[19] As such, we do not agree that the circuit court's contention that most people do not read their deeds overcomes this presumption, particularly when considering Mr. Yates's testimony that an attorney could have discovered the easement after twenty to thirty minutes of searching the title. *See Moyle*, 126 S.C. at 194, 119 S.E. at 190 ("Generally the means of knowledge and the duty of using them are equivalent to knowledge.").

drainage system for the downstream lots. Despite receiving such notice and hearing the objections of their neighbors, the McLaughlins refused to acknowledge the existence of the easement. Finally, Mr. McLaughlin conceded that he authorized his contractors to remove the pipe after getting "frustrated" with SIPOA's inability to provide a solution that allowed the McLaughlins to build their house as sited. Therefore, when viewing the facts in the light most favorable to the Ralphs, we find the jury could have determined that a person of ordinary reason and prudence would have been on notice that the McLaughlins' downstream neighbors had property interests in the drainage easement. Thus, the jury could have reasonably found that the McLaughlins acted in conscious disregard of the rights of their downstream neighbors in removing the drainage pipe and building in the no-build area. *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 ("'Recklessness implies *the doing of a negligent act knowingly*'; it is a 'conscious failure to exercise due care.'" (emphasis added) (quoting *Yaun*, 243 S.C. at 419, 134 S.E.2d at 251)); *id*. ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care.").

Second, even if the McLaughlins believed they had the right to remove the pipe, this would not preclude a jury from finding that they acted recklessly. *See Fairchild*, 385 S.C. at 353–54, 683 S.E.2d at 823 ("A jury may award punitive damages even 'when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights.'" (quoting *Camp*, 285 S.C. at 444, 330 S.E.2d at 316)). At trial, Mr. McLaughlin acknowledged that he was aware several of his neighbors had raised concerns about the removal of the pipe. Mr. McLaughlin also acknowledged that he attended the meeting where Mr. George gave his presentation and understood removing the pipe would have adverse effects on his neighbors' properties. Finally, Mr. McLaughlin testified that the McLaughlins could have sited their house on the front or back side of the oak tree in the middle of their lot. However, the McLaughlins never attempted or offered to site the house on the front side, which would have left the drainage easement intact. When taking these facts in the light most favorable to the Ralphs, we find the jury could have determined that a person of ordinary reason and prudence would have known that removing the drainage pipe would produce negative consequences for the downstream properties that relied on the drainage easement. Thus, the jury could have reasonably determined that the McLaughlins acted in reckless disregard of the rights of their downstream neighbors by removing the pipe

and building in the no-build area. *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care.").

In ruling that a directed verdict was justified, the circuit court indicated it did not think the McLaughlins were acting recklessly or intentionally because it found the McLaughlins reasonably believed they had the right to remove the pipe. The court stressed that it did not "think [the McLaughlins were] acting malevolently, *certainly not to the level of clear and convincing* . . . ." (emphasis added). In so ruling, we find the circuit court invaded the jury's province by improperly weighing the evidence. *See Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411 ("It is not the duty of the [circuit] court to weigh the testimony in ruling on a motion for a directed verdict."). Because a reasonable juror could have found the McLaughlins acted recklessly in either 1) removing the pipe and building in the no-build area when they knew or should have known that their neighbors had property interests in the drainage easement or 2) removing the pipe with knowledge that it would adversely affect their neighbors' properties, the circuit court erred by not submitting punitive damages to the jury. *See Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 ("The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366)).

III. Directed Verdict on Trespass

The Ralphs argue the circuit court erred in failing to grant a directed verdict on the issues of abandonment and trespass because both were questions of law and not fact. The McLaughlins argue both issues were properly submitted to the jury, as they were both questions of fact. We agree with the Ralphs.

"When ruling on a directed verdict motion [], 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis*, 394 S.C. at 393–94, 714 S.E.2d at 909–10 (quoting *Mishoe*, 366 S.C. at 200, 621 S.E.2d at 366). "A case should be submitted to the jury when the evidence is susceptible of more than one reasonable inference." *Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411. However, "[o]ur courts have recognized that when only one reasonable inference can be deduced from the

evidence, the question becomes one of law for the court." *Hurd*, 353 S.C. at 609, 579 S.E.2d at 143. Thus, "[w]hen the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id*. at 609, 579 S.E.2d at 142.

"The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted." *Snow v. City of Columbia*, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991). "The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure." *Id*. "To constitute an actionable trespass, [] there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion." *Id*. at 553, 409 S.E.2d at 802. "Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act." *Id*. Accordingly, the owner of a servient estate commits trespass by intentionally destroying an easement without the consent of the easement holder. *See* Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 Real Prop. Prob. & Tr. J. 1, 4–5 (2003) (noting the majority rule since the late 19th century has been that "the owner of the servient estate commits trespass by relocating [or destroying] an easement without the consent of the holder of the easement.").

At trial, Mr. McLaughlin conceded that he authorized his contractors to remove the pipe and build part of his home over the easement and no-build area. *See Snow*, 305 S.C. at 553, 409 S.E.2d at 802. ("To constitute an actionable trespass . . . the invasion of the land must be intentional . . . ."). Additionally, Mr. McLaughlin acknowledged that he did not obtain the Ralphs' permission before doing so. *See id*. at 552, 409 S.E.2d at 802 ([I]f one *without license from the person in possession of land* walks upon it . . . he commits a trespass by the very act of breaking the enclosure." (emphasis added)). Thus, upon establishing an ownership interest in the easement, the Ralphs would be entitled to judgment as a matter of law. *See* French, *supra*, at 4–5 ("[T]he owner of the servient estate commits trespass by [destroying] an easement *without the consent of the holder of the easement.*" (emphasis added)); *see also Hurd*, 353 S.C. at 609, 579 S.E.2d at 143 ("Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court."). As we will discuss below, ownership of the drainage easement at the time it was destroyed was a

question of law. Therefore, we find the circuit court erred in submitting the issue of trespass to the jury.

The existence of the drainage easement was undisputed at trial. However, the McLaughlins argue any ownership interests in the drainage easement had been extinguished before they removed the pipe because SIPOA had unilaterally abandoned the easement. Whether SIPOA could effectively abandon the drainage easement turns on the ownership interests in the easement before it was purportedly abandoned. Because determination of such ownership interests was a question of interpreting the Seabrook Plat and subsequent deeds, it was a question of law. *See Slear v. Hanna*, 329 S.C. 407, 410–11, 496 S.E.2d 633, 635 (1998) ("The determination of the existence of an easement is a question of fact . . . [, however, if] the action is viewed as interpreting a deed, *it is an equitable matter* . . . ." (emphasis added) (internal citation omitted)).

"[W]here a deed describes land as is shown on a certain plat, such plat becomes a part of the deed." *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118, 145 S.E.2d 922, 924 (1965). "[T]he purchaser of lots with reference to the plat of the subdivision acquire[s] every easement, privilege[,] and advantage shown upon said plat . . . ." *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); *see also Corbin v. Cherokee Realty Co.*, 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956) ("Such purchasers acquire[] every easement, privilege[,] and advantage [that] the plat represent[s] as belonging to them."). "It is generally held that when the owner of land has it subdivided and platted into lots and [easements,] and sells and conveys the lots with reference to the plat, he thereby dedicates said [easements] to the use of such lot owners [and] their successors in title . . . ." *Williamson*, 247 S.C. at 118, 145 S.E.2d at 924–25. "[A]s between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made . . . ." *Outlaw v. Moise*, 222 S.C. 24, 30, 71 S.E.2d 509, 511 (1952) (citation omitted). "Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law." *Bland*, 265 S.C. at 106, 217 S.E.2d at 20 (citation omitted). Accordingly, an easement dedicated by plat is an easement appurtenant. *See Tupper v. Dorchester Cty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof."). Therefore, such easements pass with the dominant estate upon

conveyance. *See id*. ("[An easement appurtenant] passes with the dominant estate upon conveyance.").

The Seabrook Plat included the easement and no-build area across lots 21-28. Therefore, the easement was dedicated to the property owners upon conveyance of the lots in question. *See Williamson*, 247 S.C. at 118, 145 S.E.2d at 924–25 ("It is generally held that when the owner of land has it subdivided and platted into lots and [easements,] and sells and conveys the lots with reference to the plat, he thereby dedicates said [easements] to the use of such lot owners [and] their successors in title . . . ."). As such, we find the Ralphs (as owners of lot 23)—as well as the owners of lots 21, 24, 25, 26, 27, and 28—acquired ownership interests in the drainage easement and no-build area across lot 22 as a matter of law.

Consequently, because the lot owners had property interests in the drainage easement, the question of whether SIPOA's unilateral abandonment was effective was a question of law. "It is [a] well-settled principle that an *owner* of an easement may relinquish that easement by abandonment, express or implied." *Immanuel Baptist Church of N. Augusta v. Barnes*, 274 S.C. 125, 131, 264 S.E.2d 142, 144 (1980) (emphasis added). "The pivotal issue in determining whether there has been an abandonment is the *intention of the owner*." *Id*. (emphasis added). "[Intent to abandon an easement] may be inferred from the acts and conduct of *the owner* and the nature and situation of the property . . . ." *Bland*, 265 S.C. at 109, 217 S.E.2d at 21 (emphasis added). Thus, a third-party cannot unilaterally affect the rights of the easement holder or unilaterally abandon an owner's easement by recording a new plat. *See Corbin*, 229 S.C. at 24, 91 S.E.2d at 546 ("The Florenza Company could not *without the consent of [the owner]* change the location or width of [the easement]." (emphasis added)); *Bland*, 265 S.C. at 107, 217 S.E.2d at 20 ("The fact that a new plat of the property in question was made did not destroy the easement created on the [original] plat.").

Under South Carolina law, it is clear that an easement may only be abandoned by its owner. *See Barnes*, 274 S.C. at 131, 264 S.E.2d at 144 ("It is [a] well-settled principle that an *owner* of an easement may relinquish that easement by abandonment, express or implied." (emphasis added)). As such, SIPOA's purported abandonment of the drainage easement could not affect the Ralphs' interest as a matter of law. *See Bland*, 265 S.C. at 106, 217 S.E.2d at 20 ("Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law." (citation omitted)). Similarly, the recording of the Forsberg Plat could not affect the Ralphs' interest as a matter of law.

See id. at 107, 217 S.E.2d at 20 ("The fact that a new plat of the property in question was made did not destroy the easement created on the [original] plat."). Rather, Mr. Yates correctly testified that abandonment of the drainage easement would not be effective unless all of the lot owners with an interest in the easement agreed to the abandonment. *See Barnes*, 274 S.C. at 131, 264 S.E.2d at 144 ("The pivotal issue in determining whether there has been an abandonment is the *intention of the owner*." (emphasis added)). Therefore, we find the circuit court erred in submitting the issue of abandonment to the jury.

Accordingly, because the Ralphs established ownership of the easement as a matter of law and the ineffectiveness of SIPOA's abandonment as a matter of law, we find the Ralphs were entitled to enforce the easement as a matter of law. Therefore, because Mr. McLaughlin admitted authorizing his contractors to remove the pipe and build over the no-build area, the issue of trespass is susceptible to only one inference and should not have been submitted to the jury. *See Hurd*, 353 S.C. at 609, 579 S.E.2d at 142 ("When the evidence yields only one inference, a directed verdict in favor of the moving party is proper."). As such, we find the circuit court erred in refusing to grant a directed verdict on trespass.

IV. New Trial Motions

The Ralphs argue the circuit court erred in denying their motion for a new trial absolute, a new trial on damages, or a new trial *nisi additur* because its judgment and order denying a new trial were characterized by errors of law and the damages award was wholly unsupported by the evidence. As indicated above, the circuit court committed several errors of law, particularly 1) failing to apply Judge Cooper's ruling as the law of the case; 2) granting a directed verdict on punitive damages; and 3) submitting the issues of trespass and abandonment to the jury. As a result of these errors, we agree that the Ralphs are entitled to a new trial.[20]

A new trial is an appropriate remedy when "the verdict is inconsistent and reflects the jury's confusion." *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722. As such,

[20] Because we find the Ralphs are entitled to a new trial based on several errors of law, we decline to address their argument that the evidence in the record does not support the jury's nominal damages award. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

a circuit court must take certain steps to prevent juror confusion. In crafting a jury charge, "[o]nly law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). Similarly, "it [is] the duty of the [circuit court] to eliminate from the proceedings the questions of law[] and to submit to the jury only questions of fact . . . ." *Duren v. Kee*, 41 S.C. 171, 176, 19 S.E. 492, 494 (1894). Accordingly, when a jury charge consists of irrelevant and inapplicable principles that confuse the jury in a manner affecting the outcome of the trial, it constitutes reversible error. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). Likewise, "it is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Dunsil v. E.M. Jones Chevrolet Co., Inc.*, 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977).

When taken together, we find the failure to apply Judge Cooper's order as the law of the case and the failure to grant a directed verdict on trespass likely overburdened and confused the jury, affecting its damages award. The circuit court should have instructed the jury on the law of the case and precluded the McLaughlins from arguing reliance on SIPOA to the jury. Furthermore, because trespass was established as a matter of law, the jury should have only been responsible for determining damages and punitive damages. Instead, the circuit court allowed the McLaughlins to argue reliance to the jury; did not instruct the jury that the McLaughlins could not rely on SIPOA as a matter of law; and submitted the issues of trespass, abandonment, and damages to the jury. *See Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 ("Only law applicable to the case should be charged to the jury."). As such, the jury's role expanded from simply determining damages to ruling on complex questions of law.[21] *See Duren*, 41 S.C. at 175, 19 S.E. at 494 ("[Q]uestions of law do not go to the jury . . . .").

Moreover, by allowing the jury to hear evidence of reliance and rule on the issue of abandonment, the circuit court gave credence to the McLaughlins' theories that 1) the easement could have been abandoned by SIPOA and 2) they justifiably relied on SIPOA's representations that the easement had been abandoned. In turn these theories supported the overall theme of the McLaughlins' case: that they were not responsible for damaging the Ralphs' property because they did not know the easement existed. However, both of these theories are misleading, as SIPOA could

[21] As indicated above, the issues of abandonment and trespass were both questions of law rather than fact. *See supra* Section III.

not have abandoned the easement as a matter of law and any purported reliance on SIPOA was irrelevant in determining damages.[22] Accordingly, we find the combined effect of these errors likely confused and overburdened the jury in a manner prejudicial to the Ralphs. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33 ("A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury[']s confusion affects the outcome of the trial."); *Dunsil*, 268 S.C. at 295, 233 S.E.2d at 103 ("[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial."); *see, e.g.*, *C. I. T. Corp. v. Corley*, 196 S.C. 339, 342–43, 13 S.E.2d 440, 441–42 (1941) (reversing a circuit court's order that conflicted with a previous unappealed order constituting the law of the case).

Second, we find the failure to submit the issue of punitive damages to the jury also constitutes reversible error. *See Zinn*, 415 S.C. at 108–09, 780 S.E.2d at 619 ("The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion [] when there is no evidence to support the ruling or where the ruling is controlled by an error of law." (second alteration in original) (quoting *Law*, 368 S.C. at 434–35, 629 S.E.2d at 648)); *see, e.g.*, *Rhodes v. Lawrence*, 279 S.C. 96, 97–98, 302 S.E.2d 343, 344 (1983) (remanding for a new trial after determining the circuit court erred in granting a directed verdict on punitive damages).

As such, we agree that the Ralphs are entitled to a new trial. However, we find the scope of the new trial can be limited on remand. "The law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability but the damages awarded are inadequate, a new trial *may* be ordered on the issue of damages alone." *Cartin v. Keller Bldg. Prods. of Charleston*, 299 S.C. 152, 153, 382 S.E.2d 922, 923 (1989). In other words, "[a] new trial on damages alone is not warranted unless the evidence presented indicated that a directed verdict on the issue of liability would have been proper." *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993); *see also* S.C. Code Ann. § 15-33-125 (2005) ("Unless the plaintiff is entitled

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[22] Moreover, even though the issue of trespass should not have been submitted to the jury, we note that any purported reliance on SIPOA's representations by the McLaughlins would have also been irrelevant in determining trespass. *See Snow*, 305 S.C. at 553, 409 S.E.2d at 802 ("Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes [trespass].").

to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages.").

As discussed above,[23] we find the Ralphs were entitled to a directed verdict on trespass. Therefore, as the issue of liability has already been established as a matter of law, it is not necessary to remand the case for a new trial absolute. *See* § 15-33-125 ("Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages."). Accordingly, we remand the case for a new trial on compensatory damages and punitive damages only.

CONCLUSION

Based on the foregoing, we find the circuit court erred in failing to apply Judge Cooper's ruling as the law of the case, granting a directed verdict on the issue of punitive damages, and submitting the issues of trespass and abandonment to the jury. Accordingly, we reverse the judgment and remand the case for a new trial on compensatory damages and punitive damages. Furthermore, on remand, Judge Cooper's determination that the McLaughlins could not reasonably rely on SIPOA's representations shall be applied as the law of the case.

REVERSED AND REMANDED.

WILLIAMS and HILL, JJ., concur.

[23] *See supra* Section III.