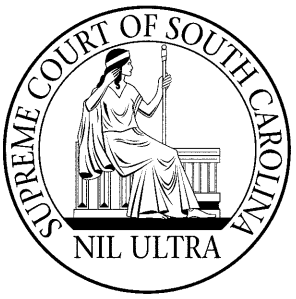

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 27, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Ashley Eugene Moore, Respondent.

Appellate Case No. 2013-002309

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27602
Heard May 19, 2015 – Filed January 27, 2016

REVERSED

Attorney General Alan Wilson, Assistant Attorney General Mary Williams Leddon, and Assistant Attorney General Joshua L. Thomas, all of Columbia, for Petitioner.

Appellate Defender Laura R. Baer and Assistant Public Defender Dayne C. Phillips, both of Columbia, and Carmen V. Ghanjehsani, of Richardson Plowden & Robinson, P.A., of Columbia, for Respondent.

JUSTICE KITTREDGE: Respondent Ashley Eugene Moore was convicted of trafficking in cocaine base and possession of a firearm during the commission of a violent crime. On appeal, Moore argued that the trial court erred in denying his motion to suppress the admission of a large quantity of crack cocaine and a firearm, both of which were seized during a traffic stop. A majority of the court of appeals' panel reversed, finding that officers did not have reasonable suspicion to continue to detain Moore once the initial purpose of the traffic stop was concluded. *State v. Moore*, 404 S.C. 634, 746 S.E.2d 352 (Ct. App. 2013). We granted the State's petition for a writ of certiorari. In light of the standard of review, we reverse the court of appeals and reinstate Moore's convictions and sentence.

I.

On June 30, 2010, Deputy Dale Owens of the Spartanburg County Sheriff's Office was patrolling the I-85 corridor along with his supervisor, Corporal Ken Hancock. At around 1:10 a.m., Deputy Owens observed Moore driving northbound on the interstate and visually estimated that he was travelling in excess of the posted speed limit. Deputy Owens pulled onto the interstate, "paced"[1] Moore's vehicle, and determined that Moore was driving ten miles over the speed limit. Deputy Owens initiated a traffic stop. Moore turned on his left turn signal and appeared to move to the left; however, he then turned on his right turn signal and slowly pulled over.

Deputy Owens approached the passenger side of Moore's vehicle, observed Moore talking on the phone, and requested that Moore end the call. Deputy Owens immediately smelled an odor of alcohol coming from the vehicle, and Moore readily admitted to having a couple of drinks. Deputy Owens then asked Moore for his driver's license and registration. Moore produced his driver's license and a rental agreement for the vehicle. The vehicle had been rented by a third party in Morganton, North Carolina, the previous afternoon.

[1] Pacing is a tool where a law enforcement officer maintains a constant distance behind another vehicle for a certain period of time in order to measure the vehicle's speed.

At the direction of Deputy Owens, Moore exited the vehicle; however, Moore left the door of the vehicle open and had to return to shut it. Moore then lit a cigarette and consented to a pat down, which yielded a "wad" of approximately $600 in cash in Moore's pocket. Moore stated he was unemployed. Moore further informed the officers he was driving from Lawrenceville, Georgia, which is a suburb of Atlanta, on his way to visit his grandmother in Marion, North Carolina.

Deputy Owens then administered a series of three field sobriety tests. Moore passed two of the three tests. Based on these results, Deputy Owens did not arrest Moore for driving while impaired and opted to give him a warning instead. However, Deputy Owens asked Moore for consent to search the vehicle. Moore declined to consent to a search.

At that point, approximately fifteen to sixteen minutes into the traffic stop, Corporal Hancock requested that Deputy Jason Carraway, a drug-detection canine handler, respond to the scene. When Moore learned that a canine unit was en route, he smoked another cigarette. Deputy Carraway arrived approximately sixteen minutes later. The canine alerted to the presence of drugs in Moore's rental vehicle.

Deputy Owens and Corporal Hancock then began a search of the vehicle, which resulted in the seizure of two containers filled with a large quantity of crack cocaine, a loaded semiautomatic handgun, and $4,000.

Moore was arrested and charged with trafficking in cocaine base in excess of 400 grams and possession of a firearm during the commission of a violent crime. Prior to trial, Moore moved to suppress the evidence seized from his vehicle, arguing the officers did not have reasonable suspicion to continue to detain him after the decision was made not to arrest him for driving while impaired.

During the suppression hearing, Deputy Owens testified in detail about his observations during the traffic stop and identified a number of indicators of reasonable suspicion, summarized as follows: (1) Moore initially turned on his left turn signal but then pulled his vehicle over to the right; (2) the time Moore took to pull over was longer than average, indicating the possibility of flight; (3) Deputy Owens noticed an odor of alcohol emanating from the vehicle, which led him to believe that Moore had been drinking in order to calm his nerves; (4) Moore smoked several cigarettes, which was also an indicator that he might be trying to

calm his nerves; (5) Moore continued to talk on the phone during the traffic stop, which was an indicator of criminal activity as phones provide a means of communication between drug traffickers; (6) Moore's hands were shaking when he handed Deputy Owens his driver's license and rental agreement; (7) Moore's pulse appeared to be rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone when he was asked to exit his vehicle, also indicating the possibility of flight; (10) Moore was carrying a large sum of money in his pocket despite being unemployed; (11) Moore was driving a rental car, which was rented by a third party; and (12) Moore was leaving a suburb of Atlanta, which is a known drug trafficking hub.

The trial court denied Moore's motion to suppress, stating:

> I am required to consider the totality of the circumstances, and give due weight to the common sense judgments reached by officers in light of experience and training.
>
> In particular, the problem I have with the . . . facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton [to] Marion is a much shorter trip than that.
>
> So, it appears that he may have been less than truthful about the purpose of his trip. Also, for someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a[n] officer reasonable suspicions. The other factors as noted, I have given those the weight required, and in this case I am going to refuse to suppress.

Moore proceeded to trial and was convicted of both offenses. Moore had a significant criminal record, including convictions for the possession and sale of drugs. The trial court sentenced Moore to an aggregate term of twenty-five years.

Moore appealed, contending the trial court erred in denying his motion to suppress. Specifically, Moore "argue[d] his continued detention was unlawful because the

State did not present sufficient evidence to establish the police officer's reasonable and articulable suspicion of a serious crime." *Moore*, 404 S.C. at 637, 746 S.E.2d at 353. In a split decision, a majority of the court of appeals' panel reversed the trial court, holding that the "facts did not provide Officer Owen[s] with a reasonable suspicion of a serious crime." *Id*. at 644, 746 S.E.2d at 357. Chief Judge Few dissented, finding "evidence in the record to support the trial court's factual findings." *Id*. at 645, 746 S.E.2d at 357 (citation omitted). This Court granted the State's petition for a writ of certiorari.

II.

"'On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.'" *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling. *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013) (citing *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2013)).

III.

In reversing the trial court's finding that Deputy Owens had reasonable suspicion to further detain Moore, the State contends that the court of appeals exceeded the proper scope of review. We agree.

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 132 S. Ct. 945, 949 (2012). However, it is well-established that "[a] police officer may 'stop and briefly detain a person for investigative purposes' if he 'has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.'" *Provet*, 405 S.C. at 108, 747 S.E.2d at 457 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

"Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." *Id*. (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed." *Id*. (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)); *see Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015) (holding that even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). However, "[o]nce the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." *Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848. "'[T]he officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.'" *Id*. (quoting *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998)).

"The concept of reasonable suspicion, like probable cause, is not 'readily or even usefully, reduced to a neat set of legal rules.'" *Sokolow*, 490 U.S. at 7 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *Provet*, 405 S.C. at 108, 747 S.E.2d at 457 (citing *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). "[C]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *State v. Taylor*, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013) (citing *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004)). At bottom, in evaluating whether an officer possesses reasonable suspicion, this Court must "consider 'the totality of the circumstances—the whole picture.'" *Sokolow*, 490 U.S. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Here, while the court of appeals' panel majority properly set forth the standard of review, it failed to follow the standard of review. As correctly noted by Chief Judge Few, the majority of the court of appeals panel reweighed the facts and substituted its de novo judgment. The question before the court of appeals was whether there was any evidence to support the trial court's finding of reasonable suspicion—not the court of appeals' independent view of the facts. *See Provet*, 405 S.C. at 107, 747 S.E.2d at 456 ("We affirm if there is any evidence to support the trial court's ruling." (citing *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666)). While we acknowledge that many of the factors offered by the State seem innocent when viewed in isolation, there is evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the

surrounding circumstances.

In evaluating whether reasonable suspicion existed for Deputy Owens to prolong the traffic stop, the trial court first noted the large sum of money found in Moore's pocket, finding it was unusual and therefore suspicious for an unemployed person to carry such a large amount of cash. We agree with the trial court that, under the circumstances of this case, the presence of a large amount of cash can be a factor supporting reasonable suspicion. *See, e.g.*, *United States v. Chhien*, 266 F.3d 1, 8–9 (1st Cir. 2001) (holding that the discovery of $2,000 in cash during a traffic stop supported a finding of reasonable suspicion).

Additionally, the trial court focused on Moore's unusual itinerary. The rental agreement stated that Moore's vehicle was rented to a third party in Morganton, North Carolina the day before the traffic stop. Yet, when police stopped Moore, he claimed to be traveling from Lawrenceville, Georgia, to visit his grandmother in Marion, North Carolina at approximately 1:10 a.m.—less than twelve hours after the vehicle was rented. The trial court found this circumstance also supported a finding of reasonable suspicion, noting that it would have been very unusual to drive "from Morganton to Lawrenceville and back to Marion to visit a grandmother." This unusual itinerary, coupled with the large sum of cash, and other factors, support the trial court's finding of reasonable suspicion.[2] *See United States v. Digiovanni*, 650 F.3d 498, 513 (4th Cir. 2011) (noting an unusual travel itinerary, "coupled with other compelling suspicious behavior," supports a finding

[2] Notably, the information about Moore's peculiar itinerary was revealed *prior to* Deputy Owens' decision to issue Moore a warning ticket. Conversely, in *State v. Tindall*, the precise details of the defendant's itinerary—specifically, that he was being paid $1,500 to drive a vehicle from Atlanta to Durham—were not elicited until *after* the initial purpose for the traffic stop was complete. 388 S.C. 518, 522, 698 S.E.2d 203, 204 (2010). As these precise details were unknown to the officer at the time the initial purpose for the stop was concluded, they therefore could not have been part of the reasonable suspicion calculus in extending the stop. *See United States v. Hudson*, 405 F.3d 425, 438 (6th Cir. 2005) (noting that reasonable suspicion must rest on specific facts which are available to the officers *before* the contact at issue is initiated) (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972) (explaining the reasonable suspicion determination must be made "in light of the facts known to the officer at the time")).

of reasonable suspicion); *cf. United States v. Brugal*, 209 F.3d 353, 361 (4th Cir. 2000) ("[A] reasonable officer could conclude that few innocent travelers from New York City are traveling northbound on Interstate 95 in South Carolina at 3:30 a.m. in a vehicle rented in Miami fourteen hours earlier.").

Moore exhibited excessive nervousness in the judgment of the officer, which lends support to a finding of reasonable suspicion to prolong the traffic stop. We nevertheless comment on law enforcement's reliance on the seemingly omnipresent factor of nervousness. General nervousness will almost invariably be present in a traffic stop. At the suppression hearing, Deputy Owens gave a lengthy list of factors in support of reasonable suspicion, including many that were merely different manifestations of the element of nervousness. While nervous behavior is a pertinent factor in determining reasonable suspicion,[3] we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion. Here, law enforcement's penchant for turning nervousness into a laundry list of factors was not necessary. The trial court properly focused not on the factor of nervousness, but rather upon the facts noted above which support a finding of reasonable suspicion that Moore was likely engaged in criminal activity.

Finally, the trial court relied on Deputy Owens' extensive experience as a law enforcement officer, especially in the area of drug interdiction. Deputy Owens testified that he has been a law enforcement officer for almost twenty years, spent seventeen years with the South Carolina Highway Patrol, received over one thousand hours of instruction in advanced criminal interdiction, and served as an instructor for the South Carolina Criminal Justice Academy in criminal interdiction and criminal patrol techniques. This extensive training and experience in drug interdiction supports the common sense judgments Deputy Owens made during the traffic stop. *See United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("Reasonable suspicion is a commonsensical proposition. Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what

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[3] *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting nervousness is one of any number of factors that may be taken into account in deciding whether reasonable suspicion exists) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975)).

transpires on the street.").[4]

While each of the factors considered by the trial court would be, standing alone, insufficient to support a finding of reasonable suspicion, we find that the totality of factors in this case is sufficient to support the trial court's finding in light of our deferential standard of review.

IV.

Because there is evidence to support the trial court's finding of reasonable suspicion, we reverse the court of appeals and reinstate Moore's convictions and sentence.

REVERSED.

PLEICONES, C.J., Acting Justices Jean H. Toal and James E. Moore, concur. BEATTY, J., concurring in result only.

[4] In another case involving whether reasonable suspicion existed for Deputy Owens to initiate a different traffic stop, the court of appeals concluded the trial court "did not abuse its discretion in concluding reasonable suspicion existed based on the totality of the circumstances, *particularly considering* [Deputy] Owens' four years of experience as a member of the South Carolina Highway Patrol's Aggressive Criminal Enforcement Unit." *Provet*, 391 S.C. at 506, 706 S.E.2d at 519 (emphasis added) (citations omitted).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and

Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998, Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miler and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith

and Margaret H. Smith, Jason A. Underwood, Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, Petitioners,

v.

Shipyard Village Council of Co-Owners, Inc., Respondent.

Shipyard Village Council of Co-Owners, Inc., Third-Party Plaintiff,

v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, Third-Party Defendants.

Appellate Case No. 2014-002394

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27603
Heard November 3, 2015 – Filed January 27, 2016

AFFIRMED AS MODIFIED

Howell V. Bellamy, Jr., and Howell V. Bellamy, III, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, PA, of Myrtle Beach, for Petitioners.

Carlyle Richardson Cromer and R. Wayne Byrd, both of Turner Padget Graham & Laney, PA, of Myrtle Beach, for Respondents.

Acting Justice Toal: The underlying dispute in this case involves the repair of faulty windows and sliding glass doors in a condominium development, Shipyard Village Horizontal Property Regime (Shipyard Village), in Pawleys Island, South Carolina. Fifty co-owners of units in Buildings C & D of the development (Petitioners) appeal the court of appeals' decision reversing the trial court's finding that the business judgment rule does not apply to the conduct of the Board of Directors (the Board) of the Shipyard Village Council of Co-Owners, Inc. (the Council), and the trial court's decision granting Petitioners partial summary judgment on the issue of breach of the Board's duty to investigate. *See Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014). We affirm the court of appeals' decision as modified.

FACTS/PROCEDURAL BACKGROUND

Shipyard Village was established in 1982 pursuant to the recording of its Master Deed. Bylaws were promulgated to govern the Board's administration of the Council. Phase I of Shipyard Village was completed in 1982, and consists of Buildings A and B, each of which contains forty units. Phase II was completed in 1998, and consists of Buildings C and D, each of which contains thirty units.

Evidence in the record indicates that water leaks around the windows and sliding glass doors in various units in Buildings A and B date back to 1983. Moreover—although there is conflicting evidence as to the cause—the evidence indicates that the Board knew about the leaks for years, and that the co-owners of

units with leaks failed to maintain and repair their units as required by the Master Deed and Bylaws.

Section 3.6(c) of the Master Deed provides that a unit's balcony doors, including the doors' "frames, casings, hinges, handles, and other fixtures" are part of each unit. Under Section 3.7(a) of the Master Deed, the roofs and stucco exteriors of the units are common elements.

Sections 6.1 and 6.2 of the Bylaws provide that the property manager of Shipyard Village or the Board is responsible for the maintenance, repair, and replacement of the "common elements," and co-owners are responsible for the maintenance and repair of their own units. However, section 6.3 of the Bylaws provides:

> [I]f a co-owner fails to perform the maintenance required of him by [the Bylaws], and such failure creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the rights of another [c]o-owner, or which substantially detracts from the value or appearance of the Regime Property, the Board [] shall, after giving such [c]o-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed and charge all reasonable expense of so doing to such [c]o-owner by an Individual Assessment.

Section 6.4 of the Bylaws further states:

> The expenses of all maintenance, repair, and replacement provided by the Manager or the Board . . . shall be Common Expenses, except that when such expenses are not fully reimbursed by insurance proceeds and when they are necessitated by (1) the failure of a [c]o-owner to perform the maintenance required by these Bylaws or by any lawful Regulation or (2) the willful act, neglect, or abuse of a [c]o-owner, they shall be charged to such [c]o-owner as an Individual Assessment.

Similar to the Bylaws, Section 5.6 of the Master Deed provides that maintenance, repair, and replacement of the common elements are the Board's responsibility, and that the expenses incurred for such purposes shall be assessed as common expenses except in the case of the negligence of a co-owner.

At a board meeting on June 15, 1999, the Board discussed the responsibility for waterproofing the units' balcony thresholds (the area underneath the sliding glass doors) and window frames pursuant to the Master Deed. The Board moved to notify all co-owners that they were responsible for waterproofing their balcony thresholds and window frames, and subsequently mailed such notice to the co-owners on August 11, 1999.

A management report dated August 23, 2002, referenced the "many calls" the Board was receiving about leaking windows in Buildings A and B. The report noted that "[t]his is the owners['] responsibility and [is] very difficult for some to try to deal with getting the work done," and further stated that "[w]e are in the process of inspecting the windows and formulating a plan/price."

At some point in 2002, the Board hired McGee Consulting Association (MCA) to investigate and perform testing on the windows of Buildings A and B. The minutes from the September 27, 2002, special meeting of the Board indicate that MCA conducted water testing on some of the windows. The water testing confirmed positive water intrusion, which had caused some of the wood framing to deteriorate. In response to this information, the Council's attorney informed the Board that "there were safety issues with respect to the durability of the windows," and recommended the Board pursue legal action against the responsible parties.[1]

In response to co-owners' complaints, the Board repeatedly informed co-owners that under the Master Deed, the leaks in windows and sliding doors were their responsibility. For example, a letter dated March 28, 2003—written on behalf of the Board by Kelli Diehl, the property manager of Shipyard Village, to a co-owner in Building A—stated, in pertinent part: "It has been determined that during a hard rain, water flows under the threshold of your sliding glass door and leaks onto the unit below. The sliding doors are the owners' responsibility to maintain and thus, we are requesting that you take action to correct this problem." Furthermore, Dr. Leon Jennings—the president of the Board at that time—sent a letter informing co-owners that for various reasons, the Board did not endorse a lawsuit on behalf of the Board regarding the faulty windows. Instead, the Board

[1] At a special meeting of the Board that occurred on February 21, 2002, an engineer's report "stressed that problems from water intrusion are time related and tend to compound."

"advise[d] all owners to have their windows inspected and repaired if needed."

In 2003, the Board hired Keystone Construction (Keystone) to study leaks that were manifesting themselves at some of the windows. Keystone concluded that the water was leaking through the stucco—not the windows. Keystone also found that non-existent window flashing[2] was part of the problem.

In 2004, after reporting water intrusion problems, Ben and Katie Morrow, co-owners of a unit in Building B, replaced their windows. However, even after replacing their windows, they continued to experience water intrusion problems and engaged an engineer, Donald Manning, who identified stucco cracks as the source of the water intrusion.[3] Ultimately, Manning confirmed that Building B was "sick and about to become cancerous," that the inside intrusion of moisture was "severe," and that some co-owners were in "denial of this ever-increasing problem."

At the Board meeting on February 17, 2006, Jennings discussed the stucco problems. Jennings explained that repairing individual windows would not solve leak issues, but rather, the leakage occurred at the window/stucco interface—a problem which required vertical stacks of windows be removed, flashed, and replaced at the same time. According to Jennings, stucco problems around a window were the Board's responsibility to repair, but if stucco was damaged during the installation of a window, the co-owner was responsible for repairing the stucco. In essence, Jennings acknowledged that it was "difficult and impractical" for owners to try to replace the windows.

A proposal from Pro-Tec Finishes, Inc., estimated a cost of approximately $2,400,000 to replace the windows in Buildings A and B. At the annual members' meeting on April 15, 2006, the Board attempted to amend the Bylaws to designate the windows and sliding glass doors as common elements (via the "window amendment")—and therefore, the responsibility of the Board. However, the

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[2] Window flashing is not the responsibility of co-owners under section 3.6(c) of the Master Deed.

[3] Similarly, Shipyard Village's new site maintenance supervisor, Richard Bennett, determined that sealant joint failures at the window-stucco interface, as well as cracked stucco, could be causing the problem.

amendment failed to receive the required two-thirds affirmative vote needed to pass. A motion was made, and carried unanimously, to leave the vote open for thirty days to allow those co-owners who did not vote at the meeting, to vote. However, upon subsequent discussions with its attorney, the Board decided not to leave the vote open.

Instead, on April 24, 2006, the Board sent a letter to co-owners stating that because the first vote on the window amendment did not pass, the Board "decided to start the amendment process over." Therefore, along with that letter, the Board mailed out a new proxy card to all co-owners, seeking the co-owners' approval of the window amendment, and instructing the co-owners to return the proxy card by mail or fax.[4]

On July 6, 2006, the Board sent a letter to co-owners, stating that the window amendment had passed. The letter did not address the voting procedure used to adopt the window amendment. In fact, the recorded amendment itself misrepresents the procedure, providing that "a Special Meeting was held on April 15, 2006 for the purpose of voting on this Amendment to the Master Deed."[5] Further, the window amendment did not explicitly make the sliding glass doors a common element.

In 2007, the Board hired Kenneth G. Schneider, Jr., who identified an "open joint" directly under the sliding glass doors' threshold between adjoining hollow core slabs of the balcony and unit, which allowed water to leak into the unit below. On September 18, 2007, Diehl e-mailed the Board regarding window leaks in Buildings A and B. The e-mail states, in pertinent part:

Please understand that many, many of these units were leaking

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[4] Section 1.3 of the Bylaws, which declares that votes may only be cast at meetings, and Section 1.5 of the Bylaws, which states that "[a]ny action which may be taken by a vote of the unit owners may also be taken by written consent to such action signed by *all* [co-]owners entitled to vote," are the only two voting procedures permitted under the governing documents for amending the Master Deed and Bylaws. (Emphasis added).

[5] The amendment was actually passed as a result of the proxy vote by mail, about which no meeting was held.

> previously and because windows were the owners' responsibility, the issue was thrown back at the owners who most ended up doing nothing, and now that this is the [Board's] responsibility, owners are impatient . . . . Most of you were not on the board to remember but I tried to bring this up after I was here for a while and I got my hand slapped big time by Bobby Warner [the maintenance supervisor] and some board members because this was an owner responsibility. Bobby Warner only did cosmetic stucco repairs to these [buildings] for 20+ years and kept pushing back to the owners—who clearly could not handle and needed help.

On April 19, 2008, the Board reported at the annual members meeting that Buildings A and B required extensive repairs, and that all co-owners' windows and sliding glass doors needed to be removed and replaced—work which would cost $12,000,000 to $13,000,000. At the meeting, the Board provided that all co-owners would be responsible for a proposed special assessment to fund the work, if it passed.

Around this time, one of the Board's consultants, HICAPS, gave a presentation to the Board identifying the problems in Buildings A and B. HICAPS identified two primary problems: (1) failures in the structural concrete, including corrosion of the reinforcing steel; and (2) the building envelope was not "weather tight." Another structural inspection revealed numerous failures in Buildings A and B: roof failure, façade failure, edge beam failure, soffit failure, concrete failure, expansion joint failure, horizontal surface failure, HVAC anchorage failure, and poor to non-existent flashing in the windows and doors.

In May 2008, co-owners who owned units in Buildings C and D hired attorney Jeff King, who sent a letter to the Board asserting that the proposed special assessment was invalid because the window amendment was not properly adopted under the Bylaws, and therefore, the total cost of repair and replacement remained the sole responsibility of the co-owners of Buildings A and B. In January 2009, a majority of co-owners of Buildings C and D brought a lawsuit challenging the validity of the window amendment.

As a result of the lawsuit, the Board called for a re-vote on the window

amendment, and a vote on an additional "sliding glass door amendment"[6] at a special members meeting held on March 21, 2009. Both votes failed to obtain the required two-thirds affirmative vote to pass.

On July 8, 2009, the Board notified co-owners that the windows and sliding glass doors would be replaced in Buildings A and B, and that the "most efficient way to finance the necessary repairs is through a Special Assessment" and the "more cumbersome alternative called for in the Bylaws would make it necessary for the cost of the repairs to be added to the 2010 and 2011 Operating Fund[, and to] bill all homeowners monthly just like other homeowners[']s expenses." The proposed assessment was $88,398 per unit for Buildings A and B; $64,868 per unit for three-bedroom units in Buildings C and D; and $68,471 for four-bedroom units in buildings C and D.

The co-owners voted against the special assessment. Consequently, the Board incorporated the repair costs into the 2010 and 2011 annual operating budgets. Minutes from the November 13, 2009, special meeting of the Board provide that the 2010 operational budget was increased to fund approximately half of the repairs and reconstruction of Buildings A and B. However, the Board never submitted the 2010 operational budget to the co-owners for their review and amendment, as required by the Bylaws.[7] The balance of the repairs and reconstruction were to be funded in the 2011 operational budget.

On October 7, 2009, Petitioners filed a new lawsuit, alleging negligence and gross negligence, negligent/gross negligent misrepresentation, breach of fiduciary duty, and breach of the Master Deed and Bylaws. This suit was consolidated with the prior lawsuit brought by co-owners of Buildings C and D.

In May 2012, Petitioners moved for summary judgment on their negligence

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[6] Similar to the window amendment, this amendment would have made each unit's sliding glass door a common element.

[7] Section 5.2 of the Bylaws provides that the Board shall "prepare, adopt and present, or cause to be prepared and presented, to the [c]o-owners at their annual meeting an annual budget" for the next fiscal year. Further, Section 5.3 of the Bylaws states that the budget, as adopted by the Board, may be amended upon the motion and affirmative vote of co-owners holding two-thirds of the percentage interest in the common elements.

and breach of fiduciary duty causes of action. Following a hearing, the trial court granted Petitioners' motion for summary judgment in part for the negligence claim on the issues of duty and breach. The trial court found that the Bylaws and Master Deed imposed affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed and the Bylaws, and to investigate when presented with evidence showing that an individual co-owner's neglect in maintaining his or her unit resulted in damage to the common elements. The trial court found that the Board breached its duty to investigate the substantial evidence in the record that reasonably showed that co-owners neglected the maintenance of their leaking windows and sliding glass doors.

Ultimately, the trial court found that the Board was precluded from asserting protection under the business judgment rule for two reasons. First, the trial court found that "the standards of [the Board] are controlled by three specific documents"—Shipyard Village's Master Deed, its Bylaws, and the South Carolina Horizontal Property Act[8] (the Act)—"and not the general corporate standard of the business judgment rule." Second, the trial court found that the Board was precluded from asserting the business judgment rule based on its *ultra vires* conduct, as well as its lack of good faith and failure to exercise due care or reasonable care in discharging its duties under the Bylaws. Specifically, the trial court cited the Board's "lack of good faith in continuing to enforce the 2006 window amendment . . . when it admittedly knew the amendment was invalid and [un]enforceable in June 2008." Further, the trial court found that the Board's failure to place its adopted annual budgets on the agenda for presentation to the co-owners at the 2009 and 2010 annual members' meetings, as well as the Board's "invalid assessment" of costs, were *ultra vires* acts.

The court of appeals affirmed the trial court's grant of summary judgment on the existence of a duty to investigate.[9] *Fisher*, 409 S.C. at 182, 760 S.E.2d at 131. However, the court of appeals reversed the trial court's finding on the business judgment rule and its decision to grant summary judgment on the issue of breach, and remanded the case for trial. *Id.*

This Court granted Petitioner's petition for writ of certiorari to review the

[8] S.C. Code Ann. §§ 27-31-10 to -440 (2007 & Supp. 2014).

[9] Neither party appeals the court of appeals' decision on this issue.

court of appeals' opinion.

ISSUES PRESENTED

I. Whether the court of appeals erred in reversing the trial court's finding that the business judgment rule does not apply to the Board's conduct?

II. Whether the court of appeals erred in reversing the trial court's decision granting Petitioners summary judgment on the issue of whether the Board breached its duty to investigate?

STANDARD OF REVIEW

On review of an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Turner*, 392 S.C. at 766, 708 S.E.2d at 769. In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment. *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citation omitted). In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002).

LAW/ANALYSIS

I. Business Judgment Rule

Petitioners argue the court of appeals erred in reversing the trial court's decision that Respondent is precluded from asserting the protection of the business judgment rule. We disagree.

In South Carolina, courts apply the business judgment rule to protect corporate directors. "'Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.'" *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) (quoting *Dockside Ass'n, v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987)); *see also Dockside Ass'n, v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("We now uphold the [c]ourt of [a]ppeals' determination that the business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct."). The business judgment rule applies to disputes between directors of a homeowners' association and aggrieved homeowners, and as the court of appeals has stated, "the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)).

A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) (citing *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987)). A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts. *See id.* The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. *Id.* In other words, while the business judgment rule protects a corporation's exercise of its best judgment when deciding between viable options in a given business-related situation, the business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws.

Here, the court of appeals held that the trial court erred in finding the business judgment rule did not apply because the Master Deed, Bylaws, and the Act "applied instead." *Fisher*, 409 S.C. at 180, 760 S.E.2d at 130. Similarly, Respondent contends that the "trial court concluded that because the [] Act, the Master Deed, and the Bylaws all governed [the Board's] conduct, the business judgment rule offers . . . no protection." To the extent that the trial court found that

Shipyard Village's governing documents and the business judgment rule are mutually exclusive, we agree that the trial court erred. While any *ultra vires* action of the Board, as well as any failure of the Board to comply with its affirmative duties under the governing documents, are not subject to the business judgment rule, the mere existence of the Master Deed, Bylaws, and the Act does not preclude the application of the business judgment rule.

The court of appeals also found that the trial court "erred in finding that because the [Board] committed two acts it found to be *ultra vires*, the business [judgment] rule did not apply to any of its actions." *Id.* at 180–81, 760 S.E.2d at 130. We agree with the court of appeals. Even if the Board did commit *ultra vires* acts, those acts would not preclude the Board from asserting the protection of the business judgment rule for *intra vires* acts, made in good faith. On that note, we emphasize that because the business judgment rule only applies where a corporation acts within its authority, without corrupt motives, and in good faith, *see Kuznik*, 342 S.C. at 599, 538 S.E.2d at 25, the court of appeals incorrectly stated that "any investigation" conducted by the Board pursuant to its duty to investigate "would be looked at under the business judgment rule to determine if the [Board] met its duty." *See Fisher*, 409 S.C. at 181, 760 S.E.2d at 130.

Therefore, we affirm as modified the court of appeals' reversal of the trial court's ruling on the business judgment rule. The trial court should permit Respondent to assert the business judgment rule as a defense at trial. Nevertheless, the Board will not be entitled to the protection of the business judgment rule if the jury finds that the Board acted beyond the scope of its authority, or acted with corrupt motives or in bad faith. Therefore, ultimately, the jury must decide whether the Board violated the requirements of the Master Deed and Bylaws, which of the Board's actions were *intra vires* and which were *ultra vires*, and the impact of that breakdown on Petitioners' negligence claim.

II. Summary Judgment on Breach of Duty

Petitioners argue the court of appeals erred in reversing the trial court's decision to grant them summary judgment on the issue of breach of the duty to investigate. Respondent, on the other hand, contends that the record contains at least a mere scintilla of evidence that Respondent did not breach its duty to investigate, and thus, the Court should uphold the court of appeals' decision. We agree with Respondent.

The issue of negligence is a mixed question of law and fact. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011) (citing *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007)). A court must first determine, as a matter of law, whether the law recognizes a particular duty. *Id.* (citing *Moore*, 373 S.C. at 221, 644 S.E.2d at 746). If a duty exists, the jury then determines whether the defendant breached the duty, resulting in damages. *Moore*, 373 S.C. at 221, 644 S.E.2d at 746.

Here, the trial court ruled:

> [The Board] had a duty to investigate[,] when presented with evidence which would show or reasonably show that an individual [co-owner's] neglect in maintaining his or her [u]nit has resulted in damage to the common elements[,] that an investigation is required by the Bylaws. That is the [Council] through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting [co-owner] for the damage . . . .

The trial court then found as a matter of law that the Board breached its duty when it failed to determine: (1) whether the water intrusion damage to the common elements of Buildings A and B was the fault of a particular co-owner, or group of co-owners; and (2) whether other non-defaulting co-owners were entitled to a rebate by individual assessment from the A and B co-owners who caused the damage.

We find evidence in the record that could support the conclusion that the Board indeed breached its duty to investigate. For example, there is evidence that the Board had actual notice of the leaks occurring in Buildings A and B since 1983, that the co-owners in those buildings were neglecting the problems, and that the co-owners' neglect to repair their own windows and doors caused damage to the common elements. Further, as Petitioners point out, Respondent acknowledged on the record that it never asked any qualified expert to allocate the damages to the common elements attributable to the leaking windows and sliding glass doors and the alleged failure of the co-owners to maintain those windows and sliding glass doors.

However, when viewed in the light most favorable to Respondent, there is at least a scintilla of evidence in the record to indicate an issue of material fact as to whether the Board breached its duty to investigate, as set forth by the trial court. *See Bass*, 395 S.C. at 134, 716 S.E.2d at 912; *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860. In the years preceding the initiation of this lawsuit, the Board hired numerous engineers and consultants to determine the cause of the water intrusion. In addition to citing leaks around the windows and doors, these engineers and consultants' reports attributed the water intrusion problems to the common elements—including the stucco and various components of the building envelope system. For instance, Keystone concluded that the water was leaking through the stucco, and that non-existent window flashing was part of the problem. Moreover, Schneider determined that the water was leaking at the "stacks" of the units, while HICAPS informed the Board that the building envelopes were not water tight and allowed water to enter the structures. In sum, there is evidence in the record to support a conclusion that the water leaks occurred due to water intrusion through the common elements, and thus, the Board could have made an informed decision not to apportion the costs of the damage to the co-owners. As a result, the trial court should not have decided the question of whether the Board breached its duty to investigate as a matter of law.

Therefore, we hold that the trial court erred in granting Petitioners' motion for summary judgment, as the jury should have decided whether the Board breached its duty to investigate. Accordingly, we affirm the court of appeals' decision on this issue.

CONCLUSION

Based on the foregoing, we affirm as modified the court of appeals' decision and remand the case for trial.

AFFIRMED AS MODIFIED.

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

The Supreme Court of South Carolina

Re: Amendments to Rule 601, South Carolina Appellate Court Rules

Appellate Case No. 2015-001725

ORDER

The Family Court Subcommittee of the Docket Management Task Force recommends Rule 601(a), SCACR, be amended to provide that Family Court merits hearings involving child abuse, child neglect, and termination of parental rights, as well as juvenile criminal hearings when the juvenile is in detention or otherwise in state custody, have priority over General Sessions matters in the event of conflicts in hearing dates.

We grant the Family Court Subcommittee's request to amend Rule 601(a), SCACR, as set forth in the attachment to this Order. The amendments are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 20, 2016

Rule 601(a), South Carolina Appellate Court Rules, is amended to provide:

(a) Order of Priority as Between Tribunals. In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of his obligations to those tribunals:

(1) The Supreme Court.

(2) The Court of Appeals.

(3) The Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Committee on Character and Fitness.

(4) The Family Court - merits hearings involving child abuse, child neglect, and termination of parental rights; juvenile criminal hearings where the juvenile is in detention or otherwise in state custody.

(5) The Circuit Court - General Sessions.

(6) The Circuit Court - Common Pleas, Jury Term.

(7) The Family Court - all cases not referenced in (4) above.

(8) The Circuit Court - Common Pleas, Non-Jury Term.

(9) The Administrative Law Court.

(10) Alternative Dispute Resolution Conferences conducted pursuant to the SC Court-Annexed ADR Rules.

(11) The Probate Court.

(12) Magistrates and Municipal Courts.

(13) Other Administrative Bodies or Officials.

When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose.

The Supreme Court of South Carolina

Adoption of the Uniform Bar Examination

ORDER

Pursuant to the Court's authority under Article V, § 4 of the South Carolina Constitution, and after consultation with the Board of Law Examiners and representatives of the South Carolina Bar, the Charleston School of Law, the University of South Carolina School of Law, and the National Conference of Bar Examiners, the Court will replace the current format of the South Carolina Bar Examination with the Uniform Bar Examination (UBE).[1] The first administration of the UBE in South Carolina will occur during the February 2017 South Carolina Bar Examination.

Details about the UBE and its effect on the Court's admission requirements will be contained in amendments that will be promulgated to Rule 402 of the South Carolina Appellate Court Rules.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 21, 2016

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[1] The UBE is a series of tests consisting of the Multistate Essay Examination, the Multistate Performance Test, and the Multistate Bar Examination given on the last Tuesday and Wednesday in February and July. Specific information about the UBE, including a description of the testing formats and the subject matters covered by the examination, may be found at www.ncbex.org.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Electronic Filing Policies and Guidelines; Pilot Version-Common Pleas

Appellate Case No. 2015-002219

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, we adopt the attached amendments to the South Carolina Electronic Filing Policies and Guidelines.

These amendments are intended to clarify that: (1) documents signed solely by attorneys who are Authorized E-Filers should be signed using an Electronic Signature and converted to PDF for E-Filing; (2) only attorneys who are Authorized E-Filers may utilize an Electronic Signature on E-Filed documents, and support staff, such as paralegals, legal assistants, or notaries are not permitted to use an Electronic Signature; and (3) court officials authorized to sign orders may do so using an original, Traditional Signature, rather than an electronic signature page, if the order is signed during a hearing or as required by the circumstances.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 25, 2016

Section 1(e) of the South Carolina Electronic Filing Policies and Guidelines is amended to provide:

> **(e) "Electronic Signature"** is the Authorized E-Filer's s/[typed name] in electronically filed documents, combined with the use of the Authorized E-Filer's login and password to access the E-Filing System, and other pertinent identifying information set forth in Section 5 below. Only an Authorized E-Filer may utilize an Electronic Signature on an E-Filed document.

Section 1 of the South Carolina Electronic Filing Policies and Guidelines is further amended to add paragraph (p), which provides:

> **(p) "Traditional Signature"** is the original, handwritten signature of any person. All persons who are not Authorized E-Filers, including, but not limited to, paralegals, legal assistants, and notaries, are required to use a Traditional Signature on all E-Filed documents.

Section 5(a) the South Carolina Electronic Filing Policies and Guidelines is amended to provide:

> **(a) Electronic Signatures.**
>
> > **(1)** Pleadings, motions, and all other documents signed solely by attorneys who are Authorized E-Filers must be signed using an Electronic Signature and converted from a word processing format to PDF for E-Filing. A pleading, motion, or other document signed solely by an attorney who is an Authorized E-Filer may not be signed with the Authorized E-Filer's Traditional Signature and scanned to PDF.
> >
> > **(2)** The use of the Authorized E-Filer's login and password, combined with the use of the s/[typed name] in the signature line of an E-Filed document shall constitute the Authorized E-Filer's Electronic Signature on all E-Filed documents in accordance with Rule 11, SCRCP. The Authorized E-Filer shall also provide other identifying information, including the name,

physical address, telephone number, and email address of the E-Filer, along with the E-Filer's South Carolina Bar Number. For example:

s/John Doe
S.C. Bar No. 12345
Attorney for the Plaintiff
1234 Any Street
Columbia, SC 29201
803-555-0111
name@email.com

Section 5(c) of the South Electronic Filing Policies and Guidelines is amended to provide:

(c) Signatures of Persons Other than Authorized E-Filers. Only an attorney who is an Authorized E-Filer may utilize an Electronic Signature on an E-Filed document. Documents containing the signature of persons other than Authorized E-Filers, including affidavits, other notarized or signed documents, certificates of service signed by paralegals or legal assistants, or proposed consent orders, cannot be E-Filed with an Electronic Signature. Any document that requires a signature of a person who is not an Authorized E-Filer must be signed with a Traditional Signature and E-Filed as a scanned PDF image.

Section 6(a) of the South Carolina Electronic Filing Policies and Guidelines is amended to provide:

(a) Signing of Orders. Orders shall be electronically filed by the court or court personnel. Judges or court personnel authorized to sign orders should utilize an electronic signature page for the electronic signing of all orders, including any form orders. Where electronically signed by a judge, the signature on the electronic signature page shall include the individual judge's code assigned by Court Administration and the s/typed name of the judge as an electronic signature. Electronically signed and filed court orders and judgments shall have the same force and effect as if the judge had affixed a written

signature to a paper copy of the order. Orders may also be signed by judges using a Traditional Signature, rather than an electronic signature, if signed during a hearing or as required by the circumstances.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Cleophus N. Edwards, Jr., Appellant.

Appellate Case No. 2012-213596

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

Opinion No. 5377
Heard September 8, 2015 – Filed January 27, 2016

AFFIRMED

Arthur Kerr Aiken, of Aiken & Hightower, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Caroline M. Scrantom, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

MCDONALD, J.: Cleophus N. Edwards, Jr. appeals his convictions for murder, first-degree burglary, and possession of a weapon during the commission of a violent crime, arguing the circuit court erred in admitting into evidence (1) a laptop computer, (2) clothing and shoes from a suitcase, and (3) the results of DNA analysis and shoe imprint comparisons. We affirm.

FACTS/PROCEDURAL HISTORY

On February 3, 2011, Carolyn Hanton (the victim) was stabbed to death inside her house. Aaron Hanton, the victim's husband, reported a red Acer laptop was missing from the house. On February 16, 2011, when police went to Appellant Edwards's house to execute an arrest warrant for a probation violation, an officer observed Edwards using a red Acer laptop and matched its serial number to the serial number from the victim's computer box. Police questioned Edwards about the laptop following his arrest, and he confessed to stabbing and robbing the victim. A grand jury subsequently indicted him for murder, first-degree burglary, and possession of a weapon during the commission of a violent crime.

Before trial, Edwards moved to suppress evidence of the laptop, arguing police searched and seized it in violation of his Fourth Amendment rights. The State proffered the testimony of Officer Ryan Harter, who responded to the victim's house on February 3, 2011. Officer Harter testified that when the victim's family members informed him that a red Acer laptop was missing, he entered the serial number from the laptop's box into a police database and reported it as stolen.

Unrelated to the victim's murder, Officer Harter accompanied a team to Edwards's house on February 16, 2011, to execute an arrest warrant for a probation violation. There, Officer Harter observed Edwards sitting with a red Acer laptop on his lap. Officer Harter testified that he was familiar with computers, and the model he viewed on Edwards's lap was "extremely consistent" with the missing laptop from the victim's house. Officer Harter stated, "Acer is not a real popular brand. And the fact that it is a red laptop really kind of sets it apart. We knew it was a widescreen laptop, and so it met a lot of criteria just from [being] able to view it." Officer Harter testified that he turned the computer over to view the serial number and discovered it matched the serial number of the missing computer. On cross-examination, Officer Harter reiterated that the brand, color, and screen width of the computer caught his attention. Officer Harter stated, "I believe[d] it had a high

probability of being the computer we were seeking." Officer Harter acknowledged Edwards did not give him permission to move the computer to view the serial number and that police did not have any prior knowledge or tips that the computer would be located at Edwards's house.

Edwards argued that even though he was on probation, he had the right to be free from unreasonable searches in his home, and Officer Harter needed reasonable suspicion to search the computer. According to Edwards, the computer was "really an innocent object," and simply observing a computer of the same brand and color as the missing computer was insufficient to give Officer Harter reasonable suspicion.

Edwards also moved to suppress articles of clothing and shoes seized from a suitcase outside his house. The State explained that after his confession, police secured a warrant to search Edwards's house for weapons, clothing, and shoes. While police were executing the search warrant, Melvin Simmons and Britney Davis—Edwards's former roommate and his roommate's girlfriend—independently brought a suitcase purportedly belonging to Edwards to drop off at the house. According to the State, Officer Gerald Carter saw Edwards's name on the luggage tag, opened the suitcase at the scene, viewed a pair of tennis shoes, closed the suitcase, and took it into custody. The State explained that Officer William Ketcherside got a search warrant for the suitcase the next day, documented its contents, and transported the contents to the South Carolina Law Enforcement Division (SLED) for testing. Edwards argued the suitcase evidence should be suppressed because it was not covered under the search warrant for the house and because exigent circumstances did not support the warrantless search of the suitcase. Edwards also asserted police lacked the necessary reasonable suspicion to search the suitcase because it was "an innocent object" that police had no reason to believe contained evidence of the crime.

The circuit court denied the motions to suppress the computer and suitcase evidence, determining that police needed only reasonable suspicion for the searches based on the probation statute[1] and Edwards's signing of a waiver

[1]*See* S.C. Code Ann. § 24-21-430 (Supp. 2015) ("[Probation] conditions imposed [by a court] must include the requirement that the probationer must permit the search or seizure, without a search warrant, based on reasonable suspicions, of the

acknowledging that as a condition of his probation, he was subject to warrantless searches based upon an officer's reasonable suspicions. The circuit court ruled that Officer Harter had reasonable suspicion to examine the computer, noting his experience and firsthand knowledge of the missing red Acer from his investigation of the victim's house thirteen days earlier. Additionally, the circuit court found that Officer Carter had reasonable suspicion to search the suitcase based on the discovery of the laptop at Edwards's house and his confession.

At trial, the circuit court admitted the laptop, suitcase clothing, and tennis shoes into evidence over Edwards's objection. SLED Agent Karl Kenley, qualified as an expert in footwear identification and comparison, opined that the tennis shoe from the suitcase had the same outsole designs as shoeprints found at the victim's house. SLED Agent Catherine Leisy, qualified as an expert in DNA analysis, opined that samples collected from the outside of the tennis shoe and from the bloodstained jeans from the suitcase matched the victim's DNA profile.

The jury convicted Edwards of murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. The circuit court sentenced him to concurrent sentences of life imprisonment for murder and first-degree burglary.

STANDARD OF REVIEW

"A [circuit] court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error." *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013).

LAW/ANALYSIS

I. Admissibility of the Red Laptop

Edwards argues the circuit court erred in admitting the laptop into evidence because police searched it without probable cause in violation of his Fourth Amendment rights. We disagree.

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probationer's person, any vehicle the probationer owns or is driving, and any of the probationer's possessions by . . . [a] law enforcement officer.").

In *Arizona v. Hicks*, the United States Supreme Court held an officer's movement of stereo equipment to view its serial number constituted a search under the Fourth Amendment. 480 U.S. 321, 324–25 (1987). The Supreme Court explained that this action, which was unrelated to the objective of an authorized intrusion into the house, exposed concealed parts of the apartment to view and produced a new invasion of privacy that constituted a search. *Id.* at 325. Analyzing the reasonableness of the search, the Supreme Court held that probable cause is generally required to conduct a search of an object in plain view, and the officer's reasonable suspicion that the equipment was stolen was not enough to support the movement and examination of the stereo equipment. *Id.* at 325–29.

Here, we agree that Officer Harter's movement of the laptop to view its serial number constituted a search under the Fourth Amendment. *See id.* at 324–25 (holding an officer's movement of stereo equipment to view a serial number constituted a search under the Fourth Amendment). Because Officer Harter's action exceeded the scope of his lawful purpose of being at the apartment to execute an arrest warrant and exposed new information to view, we believe his examination of the laptop constituted a search. *See id.* Next, we must analyze the reasonableness of the search.

Pursuant to the probation statute, a court may impose certain conditions upon probationers. S.C. Code Ann. § 24-21-430 (Supp. 2015). "[T]he conditions imposed must include the requirement that the probationer must permit the search or seizure, without a search warrant, based on reasonable suspicions, of the probationer's person, any vehicle the probationer owns or is driving, and any of the probationer's possessions by . . . [a] law enforcement officer." *Id.*

In *United States v. Knights*, the United States Supreme Court held that a warrantless search of a probationer's house based on reasonable suspicion did not violate his Fourth Amendment rights. 534 U.S. 112 (2001). The defendant signed a probation order containing a condition that he would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* at 114 (alteration in original). While the defendant was on probation, a police officer searched his residence without a warrant based on suspicions that he was involved with an arson. *Id.* at 114–15. The Supreme Court analyzed the reasonableness of the search, balancing the

defendant's expectation of privacy with the promotion of legitimate government interests. *Id.* at 118–21. The Supreme Court found, "[T]he search of [the defendant] was reasonable under [the] general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance." *Id.* at 118 (internal citation omitted) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). Given the defendant's reduced expectation of privacy due to agreeing to the probation condition, the police officer's search, which was supported by reasonable suspicion, was permissible. *Id.* at 119–21. The Court explained that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Id.* at 121.

"The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "In determining whether reasonable suspicion exists, the whole picture must be considered." *Id.* "Generally stated, reasonable suspicion is a standard that requires more than a 'hunch' but less than probable cause." *State v. Provet*, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011). "[C]ourts must 'consider the totality of the circumstances' and 'give due weight to common sense judgments reached by officers in light of their experience and training.'" *Id.* at 500–01, 706 S.E.2d at 516 (quoting *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004)). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." *Id.* at 501, 706 S.E.2d at 516 (quoting *State v. Tindall*, 388 S.C. 518, 527, 698 S.E.2d 203, 208 (2010)).

Although Edwards argues police lacked probable cause for the search under *Hicks*, we find Officer Harter needed only reasonable suspicion to support the search of the red laptop. This situation is distinguishable from that in *Hicks* because of Edwards's agreement to submit to searches of his possessions based on reasonable suspicion as a condition of his probation. Because of Edwards's reduced expectation of privacy as a probationer, reasonable suspicion was enough to support a search under the Fourth Amendment in these circumstances. *See Knights*, 534 U.S. at 121 ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the

probationer's significantly diminished privacy interests is reasonable."). Therefore, the analysis hinges on whether Officer Harter had reasonable suspicion to search the laptop.

We find that evidence supports the circuit court's ruling that Officer Harter had reasonable suspicion under the totality of the circumstances. *See Taylor*, 401 S.C. at 108, 736 S.E.2d at 665 ("A [circuit] court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error."); *Provet*, 391 S.C. at 500, 706 S.E.2d at 516 ("In determining whether reasonable suspicion exists, the [circuit] court must consider the totality of the circumstances."). Officer Harter was aware of a stolen red widescreen Acer laptop because he documented the serial number from the computer box at the victim's house. Additionally, when entering Edwards's house, Officer Harter was aware that Edwards was on probation because police were executing an arrest warrant for a probation violation. When Officer Harter saw the laptop on Edwards's lap, he had reasonable suspicion to believe it was the victim's stolen laptop because of the distinctive nature of a red Acer widescreen laptop, his knowledge of computers, the short elapsed time of thirteen days since the murder, and the four-block proximity between Edwards's house and the victim's house. Accordingly, we hold the evidence supports the circuit court's ruling that police did not violate Edwards's Fourth Amendment rights because Edwards had a diminished expectation of privacy as a probationer and Officer Harter had reasonable suspicion to search the laptop under the totality of circumstances. Thus, the circuit court did not err in admitting the laptop into evidence. *See Taylor*, 401 S.C. at 108, 736 S.E.2d at 665 ("A [circuit] court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error.").

II. Admissibility of the Suitcase Evidence

Edwards next argues the circuit court erred in admitting into evidence the clothing and shoes because police lacked reasonable suspicion to search his suitcase. Edwards further asserts the circuit court erred in admitting into evidence the results of DNA analysis and shoe imprint comparisons because this evidence should have been excluded under the "fruit of the poisonous tree" doctrine as it stemmed from the illegal search of the suitcase. We disagree.

First, we find the circuit court did not err in admitting the items from the suitcase into evidence. As explained above, because of Edwards's probation condition, officers needed only reasonable suspicion to search his possessions. *See* S.C. Code Ann. § 24-21-430 (Supp. 2015); *Knights*, 534 U.S. at 121. Because Davis informed Officer Carter that the suitcase belonged to Edwards and the suitcase had a luggage tag with Edwards's name, we believe Officer Carter reasonably believed it belonged to Edwards. Further, when Officer Carter opened the suitcase, Edwards had already confessed to stabbing and robbing the victim, and police were searching for the shoes Edwards wore during the incident to compare with shoe prints at the scene. Police had a warrant to search Edwards's house for the shoes, clothing, weapons, or other evidence from the incident. Although Officer Carter did not have a particular lead that evidence would be contained in the suitcase, he had a particularized and objective basis for searching the suitcase because Edwards had confessed and police were looking for the shoes and clothing worn during the incident. Therefore, we find Officer Carter had, under the totality of the circumstances, reasonable suspicion that evidence of the crimes Edwards had already confessed to would be located in his suitcase, a logical place to store shoes and clothing or potentially to hide evidence. *See Provet*, 391 S.C. at 500, 706 S.E.2d at 516 ("In determining whether reasonable suspicion exists, the [circuit] court must consider the totality of the circumstances.").

Second, because the search of the suitcase was valid under the Fourth Amendment, the DNA analysis of the suitcase evidence and the shoe imprint comparison testimony did not derive from an illegal search. Therefore, we find the circuit court properly declined to exclude it as "fruit of the poisonous tree." *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (providing evidence generally must be excluded as "fruit of the poisonous tree" if it would not have come to light but for illegal police action).

CONCLUSION

We conclude the circuit court properly denied the motions to suppress and properly admitted the challenged evidence. Accordingly, the circuit court's decision is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.