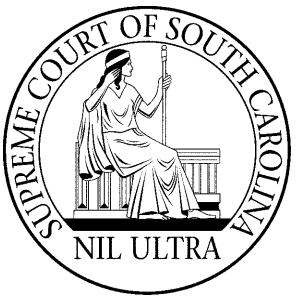

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 5, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Janette Buchanan and Shana Smallwood, Individually and as Co-Personal Representatives of the Estate of James S. Buchanan, Respondents,

v.

The South Carolina Property and Casualty Insurance Guaranty Association, Petitioner.

Appellate Case No. 2016-002156

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27840
Heard June 14, 2018 – Filed September 5, 2018

AFFIRMED AS MODIFIED

Howard A. Van Dine, III, A. Mattison Bogan, and Erik T. Norton, all Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioner.

Daniel W. Luginbill, of Wilson & Luginbill, LLC, of Bamberg; and Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, of Columbia, both for Respondents.

JUSTICE KITTREDGE: We issued writ of certiorari to review the court of appeals decision affirming summary judgment in favor of Respondents Janette Buchanan and Shana Smallwood. *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 417 S.C. 562, 790 S.E.2d 783 (Ct. App. 2016). On certiorari, the South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty) argues the court of appeals erred in construing the provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act)[1] and affirming the trial court's finding that the Guaranty's statutory offset of $376,622 should be deducted from the claimant's total amount of stipulated damages of $800,000 rather than the Association's mandatory statutory claim limit of $300,000. We conclude the Act is ambiguous, and we further find the court of appeals correctly construed the Act to require that settlement amounts be offset from the total amount of an injured party's damages rather than from the $300,000 statutory cap. We therefore affirm the court of appeals' decision as modified.

I.

The underlying dispute arose following a deadly motor vehicle accident in Bamberg County on January 7, 2008. At the time of the accident, decedent James Buchanan was driving a tractor trailer traveling northbound on U.S. Highway 321. Heading southbound on U.S. Highway 321 were three vehicles—a logging truck followed by two tractor trailers, one driven by Willie Pelote and the other by his brother Roger Pelote, both of whom are former parties to this action. As the vehicles converged, a set of tandem tires came loose from the logging truck and struck Mr. Buchanan's vehicle, breaking the front axle. As a result, Mr. Buchanan's truck crossed the center line and struck the second tractor trailer. Mr. Buchanan's tractor trailer caught fire, and he died at the scene.

Thereafter, Respondents, as co-personal representatives of Mr. Buchanan's estate, filed a wrongful death claim against the driver of the logging truck; the owner of the logging truck; Strobel Tire Co., which performed tire maintenance work on the logging truck shortly before the accident; and the Pelotes.[2]

[1] S.C. Code Ann. §§ 38-31-10 to -170 (2015 & Supp. 2017).

[2] The complaint also included a survival cause of action, but that claim was

The logging truck was insured by a policy with a limit of $1,000,000 issued by Aequicap Insurance Co. (Aequicap), which became insolvent during the pendency of the wrongful death action. As a result of Aequicap's insolvency, Respondents asserted their claims against the Guaranty.

Created by the Act, the Guaranty is a nonprofit, unincorporated association, of which all property and casualty insurers conducting business in South Carolina are members. S.C. Code Ann. § 38-31-40 (2015). The Guaranty's "purpose is to provide some protection to insureds whose insurance companies become insolvent." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994).

When an insurer becomes insolvent, the Guaranty steps into the shoes of the insurer "to the extent of its obligation on the covered claims." S.C. Code Ann. § 38-31-60(b); *see Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014) ("When [the] Guaranty steps into the shoes of an insolvent insurer, its liability is derivative of the insolvent insurance company's direct liability to the consumer."). But by virtue of the Act, the Guaranty's obligation to pay is limited to $300,000 per claim.[3] *Id.* § 38-31-60(a)(iv).

Ultimately, the parties settled the wrongful death claim, stipulating the amount of damages to be $800,000. Thus far, Respondents have recovered a total of $376,622 from parties other than the Guaranty—$225,000 from the Pelotes' insurance carrier; $20,000 from Strobel Tire Co.; and $131,622 in workers' compensation death and funeral expenses.

The parties agree $376,622 is the set-off amount. The only disputed issue is what amount, if any, of the remaining $423,378 is within the Guaranty's statutory cap after setoff. Specifically, the question is whether the settlement amount is offset

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dismissed with prejudice in accordance with the parties' settlement agreement and is not at issue in this appeal.

[3] Further, the Guaranty's obligation to pay ceases when $10 million has been paid on behalf of any one insolvent insurer. S.C. Code Ann. § 38-31-60(a)(iv).

from the $800,000 of total damages or from the $300,000 statutory maximum obligation.

Respondents filed a declaratory judgment action seeking an order that the Guaranty is obligated to pay the full $300,000 amount of the statutory cap. The parties filed cross motions for summary judgment. Respondents argued that the $376,622 is offset from the $800,000 total, leaving $423,378 in unpaid damages, of which the Guaranty is responsible for only $300,000—the statutory cap. In contrast, the Guaranty argued the statutory cap is first applied to the overall claim, reducing it from $800,000 to $300,000; then, the $376,622 in settlements are offset, leaving the Guaranty liable for nothing.

Following a hearing, the trial court entered summary judgment in favor of Respondents, and ordered the Guaranty to pay $300,000. The court of appeals affirmed, concluding the Act was unambiguous and that its plain language required any recovery from solvent insurers to be deducted from the total amount of the damages rather than from the Guaranty's $300,000 cap. *Buchanan*, 417 S.C. at 569, 790 S.E.2d at 786. This Court issued a writ of certiorari to review the court of appeals' decision.

II.

The Guaranty argues the court of appeals correctly found the Act was unambiguous but erred in construing its provisions, which the Guaranty claims entitle it to deduct the $376,622 offset from its $300,000 statutory maximum claim obligation, thus eliminating the Guaranty's liability altogether. We disagree. Although we find the court of appeals erred in concluding the relevant statutory provisions are unambiguous, we nevertheless affirm the court of appeals' ultimate construction of the Act.

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014) (quotation marks and citation omitted). "Because [the] Guaranty is a creature of statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act." *Id.* at 365–66, 764 S.E.2d at 922.

The Act defines a covered claim as "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies." S.C. Code Ann. § 38-31-20(8) (2015).[4] The Guaranty "is obligated to the extent of claims existing before the determination of insolvency." *Id*. § 38-31-60(a). "This obligation includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars." *Id*. § 38-31-60(a)(iv). Before seeking payment from the Guaranty, a claimant is required to exhaust "all coverage and limits" available through any other applicable policy. *Id*. § 38-31-100(1) (2015).

Regarding setoff, the Act provides in relevant part:

> (1) A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy. *Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery*. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.
>
> (a) A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim must be considered to be a claim arising from the same facts, injury, or loss that gave rise to the covered claim against the association. *Any amount payable on a covered claim under this chapter*

[4] It is undisputed Respondents' claim is a covered claim.

> *must be reduced by the full and combined policy limits of all joint tortfeasers*.
>
> (b) To the extent that the association's obligation is reduced by the application of this section, the liability of the person insured by the insolvent insurer's policy for the claim must be reduced in the same amount.

Id. § 38-31-100(1) (emphasis added).[5]

The key phrase "amount payable on a covered claim" is not defined in the Act. In construing its meaning, "[t]he question of Legislative intent is, of course, the pivotal question with which we are here concerned." *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 485–86, 124 S.E. 761, 763 (1924) (noting "the essential nature and raison d'être of [the subject matter] are properly borne in mind" in approaching the construction of an act).

The Guaranty contends the court of appeals' interpretation of the phrase "amount payable on a covered claim" to be the full amount of the covered claim (i.e. total damages) renders the words "amount payable" meaningless and reads that phrase out of the statute. The Guaranty argues that key phrase is given effect only when the setoff provision in section 38-31-100 is applied to the $300,000 statutory cap rather than the full amount of the claim. In support of its argument, the Guaranty cites *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." (internal marks and citations omitted)).

We acknowledge the argument that the phrase "amount payable" must mean something. Indeed, "[t]he various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency." *Crescent Mfg. Co.*, 129 S.C. at 492, 124 S.E.2d at 765. However,

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[5] Although the Act provides setoff is in the amount of the full policy limits of other available coverage, the parties stipulated in the settlement agreement that the setoff amount in this case would be limited to the amounts actually paid and received.

"[t]he court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id.* In reading the provisions of the Act as a whole and bearing in mind its underlying purpose, we conclude the better-reasoned interpretation is that the "amount payable on a covered claim" refers to the claimant's overall damages—not the Guaranty's obligation on a covered claim. Moreover, we find the unmistakable purpose of the Act to hew more closely with the result we reach today. Of course we acknowledge the purpose of the Guaranty is to provide *some* relief—not necessarily to make an injured claimant whole in every case, hence the limitation on liability. *Brock*, 410 S.C. at 367–68, 764 S.E.2d at 922. Nevertheless, we cannot conclude the General Assembly envisioned the setoff provision of section 38-31-100 to completely eliminate a severely injured claimant's ability to recover anything from the Guaranty simply by virtue of the fact that his injuries, and thus his partial recovery from other tortfeasors, was greater than $300,000. We decline the invitation to construe the Act in a manner that would be "destructive of its obvious intent." *Crescent Mfg. Co.*, 129 S.C. at 492, 124 S.E. at 765 (1924).

We acknowledge there is a split of authority from other jurisdictions with similar statutory provisions.[6] However, our analysis is based upon the language and

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[6] *Compare Arizona Prop. & Cas. Ins. Guar. Fund v. Herder*, 751 P.2d 519, 523 (Ariz. 1988) (noting the phrase "amount payable on a covered claim" was "neither a model of clarity nor an exemplar of the draftsman's craft" and concluding that phrase "means simply that the total amount payable as damages for the claimant's injuries caused by the covered occurrence shall be reduced by the amount the claimant has recovered"), *and Connecticut Ins. Guar. Ass'n v. Union Carbide Corp.*, 585 A.2d 1216, 1224–25 (Conn. 1991) (construing a similar statutory provision and concluding "[t]he evident purpose of providing in [the statutory section] . . . for a reduction of a covered claim 'by the amount of any recovery' from other available insurance was to prevent a person from twice receiving benefits for the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied"), *with Blackwell v. Pennsylvania Ins. Guar. Ass'n*, 567 A.2d 1103, 1105 (Pa. 1989) (finding the phrase "any amount payable on a covered claim under this act" referred to the $299,900 statutory cap, not the total amount of the claimant's damages).

underlying purpose of the South Carolina Act, and we find the lower courts' construction—namely, that any settlement amount is offset from the total claimed damages rather than the $300,000 statutory cap—is most consistent with the language and purpose of the Act.[7]

III.

Based on the foregoing, we find the statutory language is ambiguous. We nevertheless conclude the court of appeals correctly construed the phrase "amount payable on a covered claim" as the total amount of damages suffered under a covered claim, not the Guaranty's statutory maximum claim obligation. We therefore affirm the court of appeals' decision as modified.

BEATTY, C.J., HEARN and JAMES, JJ., concur. FEW, J., concurring in a separate opinion in which KITTREDGE and JAMES, JJ., concur.

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[7] Our holding today is also consistent with our appellate courts' interpretation of the Tort Claims Act which, unlike the Guaranty Act, includes an express statement of legislative intent to limit/reduce the government's liability. *See* S.C. Code Ann. § 15-78-200 (directing that the provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the governmental entity"); *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 222, 528 S.E.2d 682, 689 (Ct. App. 2000) ("[W]e find the jury verdict should be reduced by the amount of the settlement allocated to each cause of action and then further reduced by the comparative negligence of [the decedent]. Finally, the $250,000 cap under the Tort Claims Act in effect at the time of this action provides the final reduction.").

JUSTICE FEW: I concur fully in Justice Kittredge's majority opinion. I write separately to address a principle of law erroneously employed by the court of appeals as a principle of statutory interpretation.

In *Antley v. New York Life Insurance Co.*, 139 S.C. 23, 137 S.E. 199 (1927), this Court faced the question of whether an insured may assign the proceeds of a life insurance policy without the consent of the beneficiary. 139 S.C. at 27, 137 S.E. at 200-01. The Court acknowledged that in prior decisions it had given conflicting answers to the question of whether a beneficiary's interest is vested. 139 S.C. at 28-29, 137 S.E. at 201; *compare, e.g.*, *Taff v. Smith*, 114 S.C. 306, 311, 103 S.E. 551, 553 (1920) (holding the beneficiary holds a vested interest in a life insurance policy); *with Bost v. Volunteer State Life Ins. Co.*, 114 S.C. 405, 409, 103 S.E. 771, 772 (1920) (holding "the beneficiary does not take a vested interest" in a life insurance policy). Explaining the authority of the Court to resolve the conflict between our prior decisions, we stated,

> In this state of conflict between the decisions, it is up to the court to "choose ye this day whom he will serve"; and, in the duty of this decision, this court has the right to determine which doctrine best appeals to its sense of law, justice, and right.

Antley, 139 S.C. at 30, 137 S.E. at 201 (quoting *Joshua* 24:15 (King James)).

In choosing between its own conflicting decisions, it is—of course—appropriate for this Court to turn to "its sense of . . . justice[] and right." We have applied this principle of law—also appropriately—in other contexts. In *Huggins v. Commercial & Savings Bank*, 141 S.C. 480, 140 S.E. 177 (1927), for example, we addressed a novel question of law not controlled by statute nor governed by any of our prior decisions. We stated,

> In the absence of legislative enactment to direct us, with no precedent to bind us, and without decision to guide us, it seems necessary for this court to decide at this time, if it will adopt the rule . . . . In making this

> decision, the striking language of Mr. Justice Cothran in a recent case, where the situation was somewhat like the present, seems appropriate:
>
> > In this state of conflict between the decisions, it is up to the court to "choose ye this day whom ye will serve"; and, in the duty of this decision, this court has the right to determine which doctrine best appeals to its sense of law, justice, and right.

141 S.C. at 495, 140 S.E. at 182 (quoting *Antley*, 139 S.C. at 30, 137 S.E. at 201).

We have also used this principle of law appropriately on numerous occasions when deciding certified questions from other courts involving novel questions of law not controlled by statute or prior decision. In *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), for example, we answered certified questions concerning our comparative negligence laws and public policy, neither of which was controlled by statute or prior decision. We stated,

> When a certified question raises a novel question of law, this Court is free to answer the question "based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right."

420 S.C. at 11, 800 S.E.2d at 480 (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)).

Unfortunately, however, this Court has inappropriately recited this principle of law in cases that did involve statutory interpretation. *See, e.g.*, *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 5, 8, 760 S.E.2d 785, 787, 788 (2014) (interpreting "in a matter of first impression" section 30-4-80 of the South

Carolina Code (Supp. 2017)); *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466-67, 636 S.E.2d 598, 605-06 (2006) (interpreting as "a novel question of law" subsection 40-45-110(A)(1) of the South Carolina Code (2011)), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016); *Miller v. Aiken*, 364 S.C. 303, 306, 613 S.E.2d 364, 365 (2005) (interpreting as "a novel question of law" section 38-77-160 of the South Carolina Code (2015)).

If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. Courts do not have that power. Rather, as Justice Kittredge explained in the majority opinion, courts must employ recognized principles of statutory interpretation with the purpose of discerning legislative intent. There is no principle of statutory interpretation that allows a court to simply do what it thinks is just and right. While I agree with the majority that the court of appeals reached the correct result, the court of appeals erred by stating an "appellate court is free to decide" a question of statutory interpretation "based on its assessment of which interpretation and reasoning would best comport with . . . the Court's sense of law, justice, and right." *Buchanan v. The S.C. Prop. & Cas. Ins. Guar. Ass'n*, 417 S.C. 562, 567, 790 S.E.2d 783, 785 (Ct. App. 2016). This principle of law first articulated in *Antley* is applicable only when our prior decisions are in conflict or when the Court is faced with novel questions of law not governed by statute or controlled by prior decision. The principle is not applicable to the issue in this case.

KITTREDGE and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC,on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27841
Heard May 24, 2018 – Filed September 5, 2018

REVERSED AND REMANDED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, PA, of West Columbia, for Petitioners.

William W. Wilkins and Burl F. Williams, both of Nexsen Pruet, LLC, of Greenville, James Lynn Werner and Lawrence M. Hershon, both of Parker Poe Adams & Bernstein, LLP, and Poe D. Johnson, of Johnson & Barnett LLP, all of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves the South Carolina Home Builders Self Insurers Fund (Fund), which was created by the Home Builders Association of South Carolina, Inc. "for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act." The Fund at issue here was established in September 1995 by an "Agreement and Declaration of Trust" (Agreement) between the Home Builders Association of South Carolina, Inc. (Association) and the Fund's Board of Trustees (Board). The underlying dispute arose after the Board announced plans to wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company. Petitioners, who were members of the Fund, disagreed with that decision and challenged the Board's authority to use the Fund's assets in such a way. The trial court twice dismissed Petitioners' suit, first on the basis that it involved the internal affairs of a trust and therefore should have been filed in probate court, then in a subsequent proceeding, on the basis that the lawsuit was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1), SCRCP.

On appeal, the court of appeals affirmed the dismissal of Petitioners' complaint, finding the trial court properly concluded (1) the Fund was not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). We issued a writ of certiorari to review the court of appeals' decision. We reverse and remand, for Petitioners have satisfied the pleading requirements of Rule 23(b)(1), irrespective of whether the Fund is properly characterized as a trust.

I.

All employers conducting business in South Carolina must secure the payment of compensation to their injured employees. S.C. Code Ann. § 42-5-10 (2015). This may be accomplished either by purchasing workers' compensation liability insurance or by qualifying as a "self-insured" employer. To become self-insured, an employer must demonstrate to the Workers' Compensation Commission (Commission) that it has the "financial ability to pay directly the compensation in the amount and manner and when due as provided" by the Act. S.C. Code Ann. § 42-5-20 (2015).

The Act also allows employers to create a self-insured workers' compensation liability fund or "pool." *Id*. § 42-5-20 ("The [C]omission may, under such rules and regulations as it may prescribe, permit two or more employers in businesses of a similar nature to enter into agreements to pool their liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers."). For a self-insurance fund to be approved, an officer of the proposed organization must submit to the Commission various documents, financial statements, and notably, "[a]n indemnity agreement which jointly and severally binds each member of the fund, signed by each proposed member." S.C. Code Ann. Regs. 67-1501(E)(1)–(8) (2012).[1] A self-insured fund must be approved by the Commission before it may begin operation. *Id*. § 67-1502 (2012).

The Agreement identified its purpose as:

> meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; *to form an overall self-insurers fund* pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation

[1] This requirement of joint and several liability for fund membership is not unique to South Carolina. *See infra* note 8.

> coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

(emphasis added).

In addition to establishing the authority of Board members and extensive guidelines for the administration of the Fund, the Agreement further provided that amendments to the Agreement may be made by a majority of the Board, "However, this Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion or application of any of the funds of the* [*Fund*] *for any purpose other than those specified herein*." (emphasis added). The Agreement also provided that "In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members."

In the fall of 2003, the Board began discussing the idea of winding down the Fund and using the remaining monies on hand to capitalize a mutual insurance company, presumably to be comprised of the members of the Fund. Over the next several years, the Board continued to explore this "conversion" with the Association, the Commission, and the Department of Insurance (DOI); the two biggest challenges were identified as accumulating the $5 million necessary for the mutual insurance company's starting capital reserve and upgrading the Fund's existing computer systems to enable compliance with DOI's regulatory requirements.

In furtherance of the plan to create a mutual insurance company, the Board authorized expenditures from the Fund to purchase a custom computer software program; purchase office space costing $1.6 million; include "operations of the insurance company" in the scope of its directors and officers insurance coverage; and to subscribe to a national workers' compensation insurance-rating and data-collection bureau.

In May 2011, the Board notified the Commission it planned to cease accepting new members into the Fund effective July 1, 2011, and planned to withdraw the Fund from the self-insured program effective January 1, 2012. The Board also sought and received "approval" from the Commission to use $5 million in Fund assets to

capitalize the reserve fund for the mutual insurance company; however, this "approval" included no evaluation of whether this use of Fund monies complied with the terms of the Agreement. Indeed, the director of the self-insurance division of the Commission wrote to the Fund's administrator:

> In response to your request[,] we have approved the release of $5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured [F]und. It is understood that the [F]und will cease accepting new members effective July 1, 2011[,] and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. *The outstanding liabilities of the* [*F*]*und at the time of closure, January 1, 2012, will remain the responsibility of the self-insured* [*F*]*und and its membership under joint and several liability*. The [F]und is required to provide a final audited financial statement following closure and will continue to provide the Commission[']s Form 11, Fund Quarterly Financial Report, until further notice. The [F]und will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the [F]und[']s closure.

(emphasis added).

Petitioners are members of the Fund who, in February 2012, filed suit against the Fund, the Board, and the individual members of the Board (collectively "Respondents"). Petitioners alleged breach of fiduciary duty; breach of trust; breach of contract; and breach of contract accompanied by a fraudulent act. Petitioners alleged that the Board committed *ultra vires* acts in breach of its fiduciary duties by removing more than $5 million from the Fund to establish the mutual insurance company—monies which should have been returned to the Fund's members under the terms of the Agreement. Petitioners also alleged that in addition to not receiving their share of the $5 million paid-in surplus, they have suffered or will individually suffer additional tax consequences and additional liability exposure to cover the Fund's obligations. Petitioners alleged that all improper expenditures should be reimbursed to the Fund to reduce the amounts for which Fund members might ultimately be jointly and severally liable.

Additionally, Petitioners sought an accounting and a declaration that Fund assets could not be used for the purpose of establishing a mutual insurance company.

Respondents moved to dismiss the complaint, asserting eight separate bases for dismissal, including (1) the circuit court's lack of subject matter jurisdiction because the complaint involved the internal affairs of a trust, which fell within the exclusive jurisdiction of the probate court;[2] and (2) that the action was derivative in nature and did not meet the pleading requirements of Rule 23(b)(1), SCRCP.[3] The Respondents' motions sought protection from responding to Petitioners' discovery requests during the pendency of the motions; incorporated by reference an affidavit of the Fund's administrator, to which twelve separate exhibits were attached; and stated "the Court will be asked, pursuant to Rule 12(b)(6), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment."

On September 4, 2012, a hearing was held on Respondents' motions to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction of the internal affairs of trusts and requested proposed orders. On January 30, 2013, after the hearing but before

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[2] *See* S.C. Code Ann. § 62-7-201(a) (Supp. 2017) (providing "the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts").

[3] Rule 23(b)(1) provides:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains . . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort.

the circuit court issued its written order, Petitioners sent a written demand letter to Respondents' counsel itemizing specific requests:

> In particular, our clients believe the following actions are necessary and should be taken on behalf of the [F]und:
>
> 1. The $5,000,000 which was taken out of the [F]und as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Builders Self Insurers Fund.
>
> 2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
>
> 3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of the Trustees.
>
> 4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
>
> 5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The letter also stated:

> [We] believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. [We]

> believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.
>
> If your clients' position is any different, please let [us] know so we can discuss this matter. If [we] do not hear from you regarding this, [we] will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Respondents did not immediately respond.

On March 5, 2013, the circuit court issued a written order of dismissal finding "[i]t is clear from the documents submitted to the Court that this dispute concerns a trust" and concluding the circuit court therefore lacked subject matter jurisdiction.

Nevertheless, the dismissal was without prejudice, allowing Plaintiffs to refile their complaint in Probate Court and subsequently remove the re-filed matter back to circuit court.[4]

Still having received no response to their January 30, 2013 letter, Petitioners refiled their lawsuit in probate court on April 9, 2013, alleging the same causes of action and including a new paragraph, which stated:

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:

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[4] *See* S.C. Code Ann. § 62-1-302(d)(4) ("Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) matters involving the internal or external affairs of trusts . . . .").

a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

The re-filed suit was removed to circuit court.

Respondents moved to dismiss this second complaint, alleging, among other things, that the lawsuit *did not involve a trust* but rather was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1) and therefore should be dismissed; Respondents submitted an affidavit in support of their motion.[5]

Ultimately, the circuit court dismissed Petitioners' complaint, finding the Fund was an unincorporated association, not a trust, and that the complaint was therefore subject to Rule 23(b)(1). The circuit court held that the complaint failed to comply with Rule 23(b)(1). Petitioners then filed a Rule 59(e) motion arguing the pre-suit demand was properly made and that the trial court's order elevated form over substance. In their motion, Petitioners also sought to supplement or amend their pleadings if more detailed pleadings were required. The circuit court denied this motion.

On appeal, the court of appeals affirmed, finding the circuit court properly concluded (1) the Fund was an unincorporated association and not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint

[5] Respondents also alleged Petitioners lacked standing; that the contract claims fail because Petitioners were not parties to the Agreement; and that the complaint failed to meet the heightened pleading standard of Rule 9(b), SCRCP, as to the breach of contract accompanied by a fraudulent act claim.

was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). This Court issued a writ of certiorari to review the court of appeals' decision.

II.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id*. (citation omitted). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id*. at 395, 645 S.E.2d at 247–48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id*. at 395, 645 S.E.2d at 248 (citation omitted).

In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also, e.g.*, *Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (citations omitted) (finding that the trial court's consideration of matters beyond the pleadings converted the motion to dismiss into a motion for summary judgment). Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

"[I]f 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[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be

viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

A. Unincorporated Association or Trust

The court of appeals found that although the Agreement, by its terms, purported to create a trust, the Fund possessed many characteristics typically associated with business corporations, and thus, the Fund was properly considered an unincorporated association for the purposes of the pre-suit demand and pleading requirements of Rule 23. Petitioners argue the court of appeals erred in categorizing the Fund as anything other than precisely what it purports to be—a trust—and therefore, Petitioners argue the pre-suit demand and pleading requirements of Rule 23(b)(1) are inapplicable. Petitioners alternatively assert that in any event they satisfied the pleading requirements of Rule 23(b)(1). On this latter point, we agree with Petitioners. Nevertheless, we address the dispute over the proper characterization of the Agreement and its impact on the applicability of Rule 23(b)(1).

In construing a trust agreement, "a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument." *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985) (citing *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978)). "If the intention of the settlor appears on the face of the agreement, then the court will effectuate it, unless it is in conflict with principles of law." *Id*. (citing *Citizens & S. Nat'l Bank of S.C. v. Auman*, 259 S.C. 263, 191 S.E.2d 511 (1972)).

Despite this black-letter law, we acknowledge the truth in the court of appeals' observation that the Fund is, in many ways, dissimilar to a garden-variety trust. *Patterson*, 418 S.C. at 78–80, 791 S.E.2d at 301–02. Nevertheless, that dissimilarity is not dispositive. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–66 (1980) (rejecting an argument that a business trust should be treated as an

unincorporated association simply because it resembled a business association in several aspects, finding instead that the entity was an express trust, just as it purported to be, and that there was no basis for disregarding the trust's legal form). But many states permit (indeed, one state even requires[6]) workers' compensation self-insured funds to be organized as trusts.[7] Also, it is common in many other

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[6] *See* 77 Pa. Cons. Stat. § 1036.2(b)(8) (allowing a group of employers to create a workers' compensation self-insured fund if the group "[e]xecutes a trust agreement under which each member agrees to jointly and severally assume and discharge the liabilities arising under this act").

[7] *See, e.g.*, Ala. Admin. Code r. 480-5-3-.08(9) (2018) ("Each Fund shall have a set of Bylaws or shall enter into a trust agreement which shall govern the operation of the Fund."); Ariz. Rev. Stat. Ann. § 23-961.01(A) (2018) ("Two or more employers, each of whom are engaged in similar industries, may enter into contracts to establish a workers' compensation pool to provide for the payment and administration of workers' compensation claims . . . [b]y the execution of a trust agreement . . . ."); 099-00-1 Ark. Code R. § 099.05(III)(A) (requiring a workers compensation self-insured group "to be administered under the direction of an elected board of trustees"); Ill. Admin. Code tit. 50, § 575.110 (2018) (defining the governing body of a workers' compensation self-insured fund as "any member of the pool's Board of Trustees, if the pool is a trust, or any member of the pool's Board of Directors, if the pool is any other type of entity"); 211 Mass. Code Regs. 67.06(2)(b)(2) (2018) (requiring self-insured group applicants to submit " a copy of the articles of association, trust agreement, or articles of organization"); Mich. Admin. Code r. 408.43d (2018) (requiring workers' compensation self-insured funds "to be administered under the direction of an elected board of trustees and to provide workers' compensation coverage for a group of private employers in the same industry or for public employers of the same type of unit"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(1)(A)(13) (2018) (defining a workers compensation self-insured trust as "[a] combination of persons, businesses, firms, or corporations bound together to secure, jointly and severally, workers' compensation liability by holding the individual interests of each subservient to a common authority for the common interests of all. This shall also include the written instrument that creates the trust."); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(a)(1) (2018) (requiring workers' compensation self-insured fund applicants to submit "[t]he articles of

states for fund participants to be subject to joint and several liability.[8] The

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incorporation, trust agreement, or any other similar document from which the pool is formed").

[8] *See* Ala. Admin. Code r. 480-5-3-.08(6) (2018) ("All participants shall sign Participation Agreements providing for joint and several liability for claims against the Fund during the coverage periods of their participation."); 099-00-1 Ark. Code R. § 099.05(III)(A)(1)(a) (2018) (requiring all fund participants to execute "[a]n indemnity agreement jointly and severally binding the group and each member thereof to comply with the provisions of the Arkansas Workers' Compensation laws and Rules and Regulations of the Commission"); Cal. Code Regs. tit. 8, § 15479(a)–(b)(1) (2018) (requiring each member of a group self-insurer to execute an "agreement under which each member of a group self-insurer agrees to assume and discharge, jointly and severally, any compensation liability under Labor Code Section 3700-3705 of any and all other employers that are parties to the group self-insurer indemnity agreement"); 3 Colo. Code Regs. § 702-2:2-2-2(7) (2018) (requiring pool agreements to "jointly and severally bind each member to pay claims and comply with all provisions of the workers' compensation laws of the State of Colorado"); Fla. Admin. Code Ann. r. 69O-190.068(1) (2018) ("Each self-insurers fund member shall enter into an indemnity agreement jointly and severally binding the self-insurers fund and each member thereof to comply with the provisions of the Florida Workers' Compensation Law"); Ga. Code Ann. § 34-9-151(9) (2018) (requiring workers' compensation self-insured fund agreements to include a provision "through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund"); 37 La. Admin. Code tit. 37, § 1111(A) (2018) ("Each self-insurance fund member shall enter into an indemnity agreement jointly and severally binding the self-insurance fund and each member thereof to comply with the provisions of the applicable Louisiana Revised Statutes and rules, regulations, and directives of the Department of Insurance."); 02-031-250 Me. Code R. § III(B)(2)(d) (2018) (requiring members of workers' compensation group self-insured plans to submit an executed indemnity agreement); Md. Code Regs. 31.08.09.08(C)(13) (2018) (requiring a workers compensation self-insured fund to submit "[c]opies of executed agreements with each member assuming joint and several liability for obligations of the group in the event of insolvency of the Self-Insurers' Guaranty Fund"); 211 Mass. Code Regs. 67.06(2)(b)(17) (2018)

(requiring that all members of a workers' compensation self-insured group are jointly and severally liable for all workers' compensation obligations); Mich. Admin. Code r. 408.43g(5)(j) (2018) (requiring workers' compensation group self-insured fund records to include "Individual membership applications containing signed indemnity agreements"); Minn. r. 2780.2800(3) (2018) (providing a workers' compensation self-insured group "shall not accept any liability for a new member until a signed indemnity agreement in the form set forth in part 2780.9920 has been completed by that new member and filed with the commissioner"); Code Miss. R. 20-2-1:1.7(B)(2)(b)(9) (conditioning approval of a workers compensation self-insured fund upon the workers compensation commission's receipt of "[a]n indemnity agreement jointly and severally binding the group self-insurer and each member thereof to meet the workers' compensation obligations of each member"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(5)(A)(1) (2018) (requiring that workers' compensation self-insured trusts include in the trust agreement "an indemnity clause which jointly and severally binds the group and each member thereof for payment of benefits to employees of members of the group and all other liability pursuant to Chapter 287, RSMo"); Mont. Admin. R. 24.29.621(1)(c)(i) (2018) (requiring members of a workers compensation self-insured group to execute an "agreement to accept joint and several liability for all workers' compensation benefits and occupational disease obligations incurred by the employer group"); N.J. Admin. Code § 11:15-1.3(b)(5) (2018) (requiring workers' compensation self-insured groups to obtain "[a]n indemnity and trust agreement, in a form satisfactory to the Commissioner, jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member, and establishing a trust for the benefit of persons qualifying to receive workers' compensation awards or payments from employers participating in the group"); N.Y. Comp. Codes R. & Regs. tit. 12, § 317.9(b)(7) (2018) (allowing a group self-insurer "to immediately levy an assessment upon the group members or take such other action as may be appropriate in order to make up the deficiency"); Okla. Admin. Code 810:25-11-15(a)(1) (2018) (requiring "[e]very member of a group self-insurance association shall execute an indemnity agreement . . . under which each member agrees to assume and discharge, jointly and severally, liability under the AWCA of any and all employers party to such agreement"); Or. Admin. R. 436-050-0270(1)(g) (2018) (requiring employers applying for certification as a self-insured employer group to submit a "'Group Self-Insured Indemnity Agreement' or another form authorized by the director, that jointly and severally

presence of joint and several liability among Fund members does not necessarily undermine a trust's identity as such; rather it is a function of the overriding policy concern of ensuring injured workers' claims are paid.

The Agreement resembles a trust in some respects, and it does not resemble a trust in other respects. However, the question of whether the Fund is a trust need not be resolved, for we elect to follow the precedent from other jurisdictions applying Rule 23(b)(1) to all actions which are derivative in nature, even if the entity in

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binds each member for the payment of any compensation and moneys due to the director by the group or any member of the group"); 34 Pa. Code § 125.133(c)(8)(i) (2018) (requiring workers' compensation group self-insured applicants to submit to the workers compensation bureau the group's "proposed trust agreement and bylaws, which shall include: (i) A pledge that each member will be jointly and severally liable for the expenses and other obligations of the fund and for each other member's workers' compensation liability which is incurred while it is a member, including liability for assessments on claims incurred during a member's membership but not issued until after it has terminated membership"); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(e)(2) (2018) (requiring workers' compensation self-insured pool applicants to submit for approval "[i]ndemnity agreements between the pool and each member establishing each member's joint and several liability to the pool for all expenses, liabilities, and claims asserted against the pool by any person or entity"); Tex. Lab. Code Ann. § 407A.056(a) (requiring applicants for a certificate of approval to operate a workers' compensation self-insured fund to submit an indemnity agreement that "jointly and severally bind[s] the group and each employer who is a member of the group to meet the workers' compensation obligations of each member"); 14 Va. Admin. Code § 5-370-40(A)(1) (2018) (providing "[a]n application submitted by a group self-insurance association shall be accompanied by the following items . . . 1. A copy of the members' indemnity agreement and power of attorney required by 14 VAC 5-370-120 binding the association and each member of the association, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association"); Wash. Admin. Code § 296-15-024(3)(a)(v) (2018) (requiring members of a workers' compensation group self-insurance fund to submit "[a]n indemnity agreement jointly and severally binding the group and each member to comply with the provisions of Title 51 RCW").

question is a trust. *See, e.g.*, *Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 255 (App. Div. 2017) (finding the "analysis applicable to derivative actions against corporations has been held to apply to trusts" and finding that the joint and several liability of workers' compensation group self-insured trust members "does not require us to set aside the legal distinction [] between derivative and direct claims"); *see also In re Mortg. & Realty Tr. Sec. Litig.*, 787 F. Supp. 84, 86 (E.D. Pa. 1991) (applying the Rule 23 demand requirement to a derivative action against the board of trustees of a real estate investment trust). The key inquiry is whether the underlying challenge is properly characterized as derivative in nature. Accordingly, the applicability of the pre-suit demand and pleading requirements of Rule 23(b)(1) are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative. We turn now to that issue.

B. Direct or Derivative

Petitioners argue that the court of appeals erred in finding all of their claims were derivative in nature. Specifically, Petitioners allege that based on the joint and several liability the Act imposes upon members of the Fund, "the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets." Based on this individual liability exposure, Petitioners argue their actions are direct rather than derivative. We agree in part and disagree in part, and we find Petitioners' complaint includes both direct and derivative claims.

"An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (citation omitted). An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. *Id*. (citation omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id*. (citation omitted).

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder." *Id.* (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703–04 (Ct. App. 1988)). "Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id*. at 49, 557 S.E2d at 684–85 (quoting *Ward*, 295 S.C at 221, 367 S.E.2d at 703–04). "It becomes material,

therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." *Id*. at 49, 557 S.E.2d at 685 (quoting *Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929)).

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923. Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922. "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id*. (citing *Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618 (Del. Ch. 2013)); *see also Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 74 (Mass. App. Ct. 1985) (observing a shareholder may pursue both direct and derivative claims in a single action).

In evaluating Petitioners' claims in the underlying complaint, the court of appeals found:

> In the instant case, [Petitioners] allege the Board's decision to remove $5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held [Petitioners'] claims were derivative and subject to the pleading requirements of Rule 23(b)(1).

Patterson, 418 S.C. at 81, 791 S.E.2d at 302 (citations omitted).

While we agree with the court of appeals that Petitioners' claim that the removal of the $5 million impacted the Fund's ability to cover its risk is derivative in nature, this claim is by no means the *only* claim asserted in the complaint. Indeed, the court of appeals overlooked various other causes of action and forms of relief requested in the complaint.

Though discovery has not been conducted, one or more of Petitioners' additional claims may be direct in nature. We thus find the court of appeals erred in concluding that the complaint alleged *only* derivative claims. *See Accredited Aides Plus*, 46 N.Y.S.3d at 255 (finding certain claims by members of a workers' compensation group self-insured trust were direct, not derivative, in nature and observing that "just as the trust's deficits are eventually passed through to employer members as assessments by the Board, any recovery by the Board upon its claims on behalf of the trust will benefit the employer members by reducing the trust's deficit and the employer members' corresponding liabilities"). To the extent the court of appeals affirmed the dismissal of Petitioners' direct claims based on Rule 23, this was error.

Although we believe Petitioners' complaint may involve some direct claims, we nevertheless believe the court of appeals correctly found that certain claims were derivative in nature. Accordingly we turn now to what we view as the critical question before the Court—whether Petitioners' complaint met the pleading requirements of Rule 23 (b)(1).

C. Compliance with Rule 23(b)(1)

Lastly, Petitioners argue that even assuming Rule 23(b)(1) applies to their claims, the court of appeals erred in finding the requirements of that rule were not satisfied. We agree, for even if all claims are derivative and Rule 23(b)(1) applies, the demand and pleading requirements of Rule 23(b)(1) have been met.

Both the trial court and the court of appeals found evaluation of whether Petitioners' complaint complied with Rule 23(b)(1) was governed by the court of appeals decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In *Whittle*, three shareholders of Carolina First Corporation brought a derivative action seeking to recover disproportionate stock bonuses paid to three executives. *Id*. at 180, 539 S.E.2d at 405. The complaint included general allegations that the plaintiffs made pre-suit demands upon the Board of Directors; however, the complaint stated "merely that the plaintiffs demanded 'certain information' and 'certain actions.'" *Id*. at 189, 539 S.E.2d at 409. The court of appeals concluded these allegations were not sufficiently particularized to satisfy the requirements of Rule 23(b)(1), holding "[a]t a minimum, a demand must

identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id*. (citation omitted). The court of appeals noted that although the plaintiffs submitted copies of letters purporting to meet the pre-suit demand requirement, the letters could not be considered because they were not attached to the complaint; and in any event, the letters did not satisfy the pleading requirements of Rule 23(b)(1). Therefore, the court of appeals concluded the trial court did not err in refusing to consider them. *Id*. at 190, 539 S.E.2d at 410.

The facts of this case are distinguishable from those in *Whittle*. Here, although the January 30, 2013 pre-suit demand letter was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the January 30, 2013 letter *does* constitute an adequate demand in this case. Another issue here is Petitioners' failure to include the magic phrase "which is incorporated herein by reference" in their discussion of the letter in paragraph 8 of their complaint. Indeed, the allegations concerning the pre-suit demand in Petitioners' complaint are appreciably more detailed than those in *Whittle*. And certainly, when the January 30, 2013 letter is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied. The trial court simply found it was precluded from looking at the January 30, 2013 letter, which was error.

Moreover, in light of the parties' submission and the trial court's willingness to consider multiple affidavits and documents outside the four corners of the complaint, we reject an approach that approves of a trial court's consideration of everything *except* the pre-suit demand letter that was actually sent and received. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint" (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (explaining that "when a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record"). Accordingly, we reverse the dismissal of Petitioners' complaint on the basis that it failed to comply with Rule 23(b)(1), SCRCP.

III.

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case for further proceedings.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Grantham and Evelyn Grantham, Respondents,

v.

James F. Weatherford, Appellant.

In the interest of minors under the age of eighteen.

Appellate Case No. 2016-000459

Appeal From Darlington County
Michael S. Holt, Family Court Judge

Opinion No. 5594
Submitted June 1, 2018 – Filed September 5, 2018

AFFIRMED

William W. Wheeler, III, of Jennings & Jennings, PA, of Bishopville, for Appellant.

James H. Lucas and Cody Tarlton Mitchell, both of Lucas Warr & White, of Hartsville, for Respondents.

WILLIAMS, J.: In this domestic relations matter, James Weatherford (Father) appeals the family court's order awarding maternal grandparents Evelyn Grantham (Grandmother) and David Grantham (collectively, Grandparents) limited visitation with their grandchildren. Father argues the family court erred in unconstitutionally

applying section 63-3-530(A)(33) of the South Carolina Code (Supp. 2011) by requiring a fit parent to proceed with grandparent visitation. We affirm.[1]

FACTS/PROCEDURAL HISTORY

Kasey Weatherford (Mother) married Father on August 25, 2001. Mother and Father had two minor children during the marriage. Shortly after the second child's birth, Mother began to suffer from severe depression and substance abuse, and required frequent help caring for the children. Because Father often worked long shifts and traveled out of town, Grandparents, Father's parents, and Father's aunts helped Mother take care of the children. Grandparents were involved in the children's lives since birth, often taking care of the children multiple times each week. Grandparents maintained a relationship with the children much like parents: taking and picking up the children from school, cooking for the children, bathing the children, buying clothes for the children, and taking the children to doctor's appointments. The children had a positive relationship with Grandparents' adopted children, who were very close in age.

In February 2013, Mother and Father separated. In June 2013, Mother and Father signed a custody agreement, granting custody of the children to Father and reasonable visitation to Mother. The parties agreed Mother's visitation would occur at Grandparents' house under Grandmother's supervision. That same month, Father became romantically involved with Rebecca, who quickly became another caretaker for the children. Mother's supervised visitation continued until November 9, 2013, when Mother tragically committed suicide. At Mother's funeral, the minister—whom Grandparents selected to deliver the eulogy—made harsh statements referencing Mother's "abusive marriage" and implying Father bore responsibility for Mother's death. Grandparents apologized to Father and Rebecca after the funeral and denied giving the minister the information behind the statements. However, the parties' relationship quickly began to deteriorate.

After the funeral, Father immediately limited how often Grandparents saw the children. The parties' relationship worsened after a public altercation between Grandparents and Rebecca in front of the children, an argument between Grandparents and Father in which Grandparents blamed Father for Mother's death,

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

and another confrontation between Rebecca and Grandparents around Christmas 2013 when Grandparents expressed their frustration over the small amount of time they spent with the children during the holidays. Due to the parties' strained relationship, Grandparents only visited with the children twice since the funeral, notwithstanding some incidental contact, before Father stopped Grandparents from seeing the children altogether. In January 2014, Grandparents filed this action seeking visitation with the children. The family court appointed a guardian ad litem (GAL) and held a final merits hearing. Subsequently, the family court issued an order awarding Grandparents limited visitation.

Relying on *Marquez v. Caudill*,[2] the family court awarded Grandparents one weekend of visitation per month from 5:00 P.M. on Thursday until 5:00 P.M. on Sunday, one week of summer visitation, and visitation any other time the parties agreed. The family court also ordered the parties to attend reunification counseling, forbid Grandparents from associating Father with Mother's death, and charged the GAL with providing recommendations for implementing the court-ordered visitation. Father filed a Rule 59(e), SCRCP, motion seeking reconsideration, which the family court denied. This appeal followed.

ISSUE ON APPEAL

Did the family court err by requiring a fit parent to proceed with grandparent visitation due to an unconstitutional application of section 63-3-530(A)(33) of the South Carolina Code (Supp. 2011)?

STANDARD OF REVIEW

"[T]he proper standard of review in family court matters is de novo . . . ." *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Although this broad scope of review grants the appellate court the authority to find facts in accordance with its own view of the preponderance of the evidence, the appellate court is not required to ignore the family court's superior position to make

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[2] 376 S.C. 229, 249, 656 S.E.2d 737, 747 (2008) (finding "a biological parent[']s death and an attempt to maintain ties with the deceased parent[']s family may be compelling circumstances justifying ordering visitation over a fit parent[']s objection").

credibility determinations and to assign comparative weight to witness testimony. *Lewis v. Lewis*, 392 S.C. 381, 384–85, 709 S.E.2d 650, 651–52 (2011). The appellant bears the burden of convincing the appellate court that the preponderance of the evidence is against the family court's findings. *Id.* at 388, 709 S.E.2d at 653.

LAW/ANALYSIS

Father argues the family court erred in unconstitutionally applying section 63-3-530(A)(33) of the South Carolina Code (Supp. 2011) by requiring a fit parent to proceed with grandparent visitation. Specifically, Father contends the family court erred in not considering the children's best interests, giving too much weight to the Grandparents' relationship with the children, and making findings inconsistent with the GAL's report. We disagree.

Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Camburn v. Smith*, 355 S.C. 574, 579, 586 S.E.2d 565, 567 (2003). When considering grandparent visitation over a parent's objection, the family court must allow a presumption that a fit parent's decision is in the best interest of the child. *Camburn*, 355 S.C. at 579, 586 S.E.2d at 567 (citing *Troxel*, 530 U.S. at 68–69). Although parents and grandparents are not on equal footing in a visitation contest, the family court may still award visitation over a parent's objection if the contesting grandparents can meet certain requirements. *Id.* at 579–80, 586 S.E.2d at 568. Subsection 63-3-530(A)(33) codified these requirements and granted the family court the exclusive jurisdiction

> to order visitation for the grandparent of a minor child whe[n] either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats, if the court finds that:
>
> > (1) the child's parents or guardians are unreasonably depriving the grandparent of the opportunity to visit with the child, including denying visitation of the minor child to the

> grandparent for a period exceeding ninety days; and
>
> (2) the grandparent maintained a relationship similar to a parent-child relationship with the minor child; and
>
> (3) that awarding grandparent visitation would not interfere with the parent-child relationship; and:
>
> > (a) the court finds by clear and convincing evidence that the child's parents or guardians are unfit;[3] or
> >
> > (b) the court finds by clear and convincing evidence that there are compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

§ 63-3-530(A)(33) (Supp. 2011).[4]

As to the first requirement, we find Father unreasonably denied Grandparents visitation with the minor children for a period exceeding ninety days. The record demonstrates Mother is deceased and Grandparents presented undisputed

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[3] Grandparents concede that Father is a fit parent.

[4] Despite Father's contention that the subsequent 2014 amendment to subsection 63-3-530(A)(33) should apply, Grandparents filed their action in January 2014 when the 2010 amendment was in effect. Therefore, we apply the 2010 amendment. *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 397, 596 S.E.2d 42, 46–47 (2004) ("In South Carolina, the law in effect at the time the cause of action accrued controls the parties' legal relationships and rights." (quoting *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997))).

testimony that Father unreasonably deprived Grandparents of the opportunity to visit with the children for a period exceeding ninety days.[5]

As to the second requirement, we find that Grandparents had a significant and extensive relationship with the children. The record indicates Grandparents maintained a parent-child relationship with the children: taking the children to and from school, cooking for the children, bathing the children, buying clothes for the children, and taking the children to doctor's appointments.

As to the third requirement, we find awarding grandparent visitation will not interfere with Father's relationship with the children. Grandmother's testimony demonstrates that the children developed a positive relationship with Grandparents prior to Mother's death and spent time with Mother at Grandparents' house. Grandmother knew the children had a loving relationship with Father, respected that relationship, and insisted that visitation would not interfere with Father's ability to parent. Therefore, we find granting limited grandparent visitation of one weekend per month and one week during the summer will not interfere with Father's relationship with the children. *See Marquez*, 376 S.C. at 249, 656 S.E.2d at 747 (finding an award of two weeks visitation during the summer and one week during the Christmas holidays did not interfere with the father's relationship with the child); *Dodge v. Dodge*, 332 S.C. 401, 416, 505 S.E.2d 344, 352 (Ct. App. 1998) (finding the proposed visitation amount reasonable under the circumstances and awarding grandparents one weekend of visitation with grandchildren each month and two weeks during the summer after the death of grandchildren's biological mother).

Finally, we find compelling circumstances justify granting visitation over Father's objection.[6] Our supreme court specifically addressed the issue of compelling

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[5] On appeal, Father does not contest that Grandparents met this statutory requirement.

[6] Father argues the family court improperly considered Grandparents' best interest, rather than the children's best interest, when the family court found, "[Grandparents] are fit and proper individuals and there is no evidence that having a relationship with the minor children is not in *their* best interest." (emphasis added). Father contends "their" refers to the Grandparents' best interests and not the children's. When read in context of the preceding sentence in the family court

circumstances in *Marquez*. The acutely similar facts make *Marquez* dispositive of this issue.

In *Marquez*, a maternal grandmother sought visitation of her daughter's youngest child after her daughter's suicide. 376 S.C. at 233–34, 656 S.E.2d at 739. The maternal grandmother only saw her daughter's children intermittently since their birth due to her living and working out of state. *Id.* at 238–39, 656 S.E.2d at 741–42. In *Marquez*, because the youngest child's stepfather adopted the child, the supreme court recognized the stepfather is treated as the child's parent. *Id.* at 249 n.11, 656 S.E.2d at 747 n.11. Our supreme court affirmed the family court's limited visitation award—two weeks during the summer months and one week during the Christmas holidays—to the grandmother. *Id.* at 249, 656 S.E.2d at 747. Addressing its decision in *Camburn* and applying section 63-3-530, our supreme court held, "a biological parent[']s death and an attempt to maintain ties with that deceased parent[']s family may be compelling circumstances justifying ordering visitation over a fit parent[']s objection." *Id.*

Turning to the present case, we find the family court correctly relied on *Marquez* to find compelling circumstances existed to justify ordering visitation over Father's objection. Father argues the facts of this case are unique and different from *Marquez.* Notwithstanding the similarity in the death of a biological parent, the circumstances here provide a stronger basis for finding compelling circumstances than in *Marquez*. Unlike the maternal grandmother in *Marquez*, who only saw her grandchildren rarely before moving closer to them just before seeking visitation, Grandparents developed deep ties with their grandchildren from birth, and saw the children multiple times each week until Mother's funeral. Grandparents fostered this relationship by taking the children to and from school, cooking for the children, bathing the children, buying clothes for the children, and taking the children to doctor's appointments. Even after Mother's death, Grandparents continued to attempt to visit the children. Although one witness advocated against visitation, other witnesses advocated for Grandparents' visitation, testifying that the children loved Grandparents, the children wanted Grandparents involved in their lives, and that prohibiting Grandparents' visitation could be harmful to the children.

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order, which referenced the best interest of the minor children, we find "their" refers to the minor children, not Grandparents. Therefore, we find the family court did not improperly consider Grandparents' best interests.

See Camburn, 355 S.C. at 579, 596 S.E.2d at 568 (finding significant harm to the child constituted compelling circumstances). Therefore, we find compelling circumstances exist to justify granting grandparent visitation over Father's objection.

Because we find Grandparents satisfied section 63-3-530(A)(33)'s requirements, the family court's limited visitation award to Grandparents is

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.