The Supreme Court of South Carolina

In the Matter of Alma Celeste Defillo, Respondent.

Appellate Case No. 2015-000600

ORDER

Respondent is a lawyer previously admitted to the practice of law in Florida who operated a law firm and offered legal services in South Carolina.[1] On August 13, 2014, this Court permanently debarred respondent from seeking any form of admission to practice law in South Carolina and imposed other sanctions.[2] In the Matter of Defillo, 4009 S.C 314, 762 S.E.2d 592 (2014). The Office of Disciplinary Counsel petitions this Court to appoint the Receiver, Peyre T. Lumpkin, to protect the interest of respondent's South Carolina clients pursuant to Rule 31of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that Mr. Lumpkin is hereby appointed to protect the interests of respondent's South Carolina clients. Mr. Lumpkin shall assume responsibility for respondent's South Carolina client files and any trust account(s), escrow account(s), operating account(s), or other law office account(s) respondent may maintain in this state. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain in this state that are necessary to effectuate this appointment.

IT IS FURTHER ORDERED that respondent shall immediately forward all client files and property, bank statements, cancelled checks, disbursement schedules,

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[1] Respondent is not licensed to practice law in South Carolina.

[2] At the time of the debarment, respondent was a member of the Florida Bar. On January 23, 2015, the Supreme Court of Florida suspended respondent from the practice of law in that state for one (1) year.

trust account records, and the like which have any nexus to her South Carolina clients to Mr. Lumpkin. Without regard to the location of the funds, respondent shall immediately deliver all client funds which have any nexus to her South Carolina clients to Mr. Lumpkin. Mr. Lumpkin shall deposit these funds in a separate account and may make disbursements from the account that are necessary to effectuate this appointment.

This Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail addressed to her South Carolina office and the authority to direct that this mail be delivered to Mr. Lumpkin's office. Respondent shall promptly forward all other mail related to any South Carolina clients to Mr. Lumpkin.

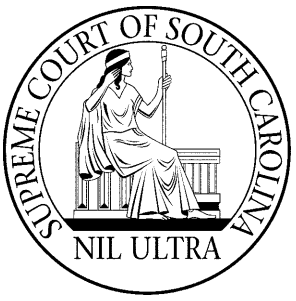
Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

March 24, 2015



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 1, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lexie Dial, III, Petitioner.

Appellate Case No. 2013-001970

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27512
Heard March 5, 2015 – Filed April 1, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

H. Wayne Floyd, of West Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Christina Catoe Bigelow, both of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in *State v. Dial*, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, Acting Chief Justice, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Leo A. Dryer, Respondent

Appellate Case No. 2015-000624

ORDER

The Office of Disciplinary Counsel (ODC) and respondent request the Court transfer respondent to incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). ODC and respondent also request the Court appoint Robert Joseph Lowe, Jr., Esquire, as successor lawyer pursuant to Rule 31(j), RLDE.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Robert Joseph Lowe, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lowe shall take action as required by Rule 31(j), RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lowe may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lowe's requests for information and/or documentation and shall fully cooperate with Mr. Lowe in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Robert Joseph Lowe, Jr., has been duly appointed by this Court and that

respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

March 27, 2015

The Supreme Court of South Carolina

In the Matter of Joseph Dargan McMaster, Respondent

Appellate Case No. 2015-000639

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.

Columbia, South Carolina

March 30, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, Deceased, Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center and Stephen W. Law, D.O., Dr. Richard Young, M.D., and Grand Strand Urology, LLP, Defendants,

Of Whom Stephen W. Law, D.O. is also an Appellant,

And Of Whom Dr. Richard Young, M.D., and Grand Strand Urology, LLP, are Respondents.

Appellate Case No. 2010-167127

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5306
Heard February 11, 2015 – Filed April 1, 2015

AFFIRMED

J. Boone Aiken III, of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, and Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia, for Appellant.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, and Ruskin C. Foster, of Mike Kelly Law

Group, LLC, both of Columbia, for Respondent/Appellant.

Marian Williams Scalise and Lydia Lewis Magee, both of Richardson Plowden & Robinson, P.A., of Myrtle Beach, and Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, P.A., of Columbia, for Respondents.

KONDUROS, J.: In this cross-appeal from a medical malpractice action, Sean Fay (Sean) argues the trial court erred in granting Dr. Richard Young's motion for a directed verdict on public policy grounds. In the appeal against Sean, Dr. Stephen Law argues the trial court erred in (1) denying his motion for a judgment notwithstanding the verdict (JNOV), (2) excluding evidence of Sean's admitted extramarital affair, and (3) refusing to enroll the judgment against him using the jury's determination of six percent negligence on his part and instead using joint and several liability. We affirm.

FACTS/PROCEDURAL HISTORY

At approximately 8:00 a.m., Saturday, January 26, 2002, Kelly Fay (Kelly), accompanied by her husband Sean, presented to Grand Strand Regional Medical Center's (the Hospital[1]) emergency room, complaining of abdominal and right flank pain. Kelly believed it was caused by a kidney stone because she had previously experienced the same pain, which had been a kidney stone. Dr. Stephen Law, the emergency room physician, examined her approximately four minutes after she arrived. She complained of mild nausea but had not vomited, and she denied fevers and chills. Kelly initially described her pain level as being a seven or eight out of ten, and it decreased to a five or six out of ten after receiving pain medication.

Her vital signs and temperature were normal when they were first taken.[2] A

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[1] The Hospital settled with Sean while this matter was pending, and that portion of the appeal has been remitted.

[2] The medical records show multiple vital sign readings, but her temperature was only taken when she arrived around 8:00 a.m.

physical examination revealed moderate to severe flank tenderness on the right side, but the abdomen was soft, non-tender, and non-distended. Dr. Law suspected a kidney stone and ordered a kidney, ureter, and bladder (KUB) x-ray, which revealed a moderate-sized kidney stone in the right kidney. A CT scan confirmed this and indicated a half centimeter in diameter kidney stone in the ureter of the right kidney. To rule out infection, Dr. Law also ordered a urinalysis, which showed no blood or bacteria in the urine.

After deciding Kelly was stable to discharge, Dr. Law spoke with Dr. Young, the on-call urologist, on the telephone to make sure he was available to examine Kelly on Monday. However, Dr. Law testified he was not seeking advice or permission from Dr. Young to admit Kelly. Dr. Law spoke with Kelly and Sean, allegedly informing them to immediately return to the emergency department if she experienced uncontrollable pain, nausea, vomiting, fever, or chills.[3] Dr. Law additionally instructed them to call Dr. Young on Monday at 8:30 a.m. to schedule an appointment for that day. The nursing staff then provided written discharge instructions, which Kelly signed, informing the Fays to call or return to the emergency room if she developed a fever, intense pain, or vomiting. Kelly and Sean left the emergency room at approximately 12:00 p.m., and Kelly allegedly looked flushed, a little warm, and red. Notably, her temperature was not taken before she left.

About an hour later, after picking up a prescription, Kelly's temperature was, as testified to by Sean, either 101.3 or 101.6 degrees Fahrenheit. Over the weekend, she continued to experience a fever of 101.3 or 101.6 degrees Fahrenheit, severe chills, nausea, and vomiting. Kelly did not return to the emergency room because she would alternate between feeling better and worse throughout the weekend and believed she could wait until her appointment on Monday with Dr. Young.

After calling Dr. Young to schedule an appointment on Monday, Sean went to work that morning, planning to return to take Kelly to see Dr. Young around 2:00 p.m. After failing to reach her by telephone several times, Sean returned home around 1:30 p.m. to find Kelly unresponsive, gagging, and convulsive. EMS responded and found Kelly on the floor, hot to the touch, with shallow rapid

[3] Sean disputes this conversation occurred.

breathing. Upon arrival at the hospital, Kelly had a fever of 105 degrees. Kelly died Monday evening at the emergency room from clinical sepsis.[4]

Subsequently, Sean brought this wrongful death and survival action for medical malpractice against Dr. Law, the Hospital, and Dr. Young and his practice, Grand Strand Urology. The trial began on May 17, 2010. On May 26, at the close of all of the evidence, the trial court granted Dr. Young's motion for a directed verdict on public policy grounds. The jury returned a $3 million verdict against the Hospital and Dr. Law two days later.[5] On June 7, 2010, Dr. Law and the Hospital filed post-trial motions for JNOV, new trial absolute, and new trial *nisi* remittitur. The trial court filed its orders denying all post-trial matters on June 24, 2010. Dr. Law filed a motion to reconsider, which the trial court ultimately denied on August 26, 2011. This appeal followed.

LAW/ANALYSIS

As a threshold matter, Dr. Young argues Sean failed to timely serve his notice of appeal, and Sean argues Dr. Law failed to timely serve his notice of appeal. We find both parties' appeals are properly before us and address the merits.

I. Grant of Dr. Young's Directed Verdict Motion

Sean contends the trial court erred in granting Dr. Young's motion for a directed verdict. We disagree.

In ruling on motions for directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "The issue must be submitted to the jury whenever there is material evidence tending to

[4] Clinical sepsis or septic shock is an "overwhelming blood-borne infection within the body."

[5] The jury concluded Sean was four percent negligent and the trial court calculated the damages to be enrolled for the plaintiff to be $2.88 million.

establish the issue in the mind of a reasonable juror." *Id.* "Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Id.* at 319-20, 656 S.E.2d at 388.

The court must determine whether any evidence existed on each element of the cause of action. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). "If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." *Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 437, 613 S.E.2d 795, 799 (Ct. App. 2005). However, "[a] directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005).

The appellate court will reverse the circuit court's ruling on a directed verdict motion only when no evidence supports the ruling or the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

A plaintiff in a medical malpractice case must present (1) evidence of the generally recognized practices and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff, and (3) evidence that the defendant's departure from the generally accepted standards and practices was the proximate cause of the plaintiff's injuries and damages. *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 546, 694 S.E.2d 1, 4-5 (2010).

"The establishment of a doctor/patient relationship is a prerequisite to a claim of medical malpractice." *Roberts v. Hunter*, 310 S.C. 364, 366, 426 S.E.2d 797, 799 (1993). "The relation is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient." *Id.* (quotation marks omitted). "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis ex rel. Ellis v. Niles*, 324 S.C.

223, 227, 479 S.E.2d 47, 49 (1996). If a duty does not exist, the defendant in a negligence action is entitled to a directed verdict. *Id.* Although the court must determine whether the law recognizes a duty, "[t]he existence of a physician-patient relationship is a question of fact for the jury." *Fuller v. Blanchard*, 358 S.C. 536, 546, 595 S.E.2d 831, 836 (Ct. App. 2004) (quotation marks omitted).

In *Roberts*, our supreme court first considered whether a doctor-patient relationship may exist when the patient has not been examined or treated by the doctor. 310 S.C. at 366-68, 426 S.E.2d at 799-800. After summarizing several cases from other jurisdictions,[6] the court concluded granting the directed verdict in favor of the doctor was proper when the doctor did not examine the patient or review his file. *Id.* at 366-67, 426 S.E.2d at 799. One fact distinguishable from the present case, however, is the patient in *Roberts* voluntarily left the hospital before the doctor had the opportunity to examine him. *Id.* at 365, 426 S.E.2d at 798.

In *Ellis*, the supreme court affirmed the trial court's grant of a directed verdict for lack of a doctor-patient relationship and, therefore, a lack of duty. 324 S.C. at 228, 479 S.E.2d at 49. In *Ellis*, neither the trauma team leader nor the second in command undertook treatment of the patient or supervised his care, but the team leader did speak to the treating physician once on the telephone. *Id.* at 226, 479 S.E.2d at 48.

"[T]his court[] may affirm a trial [court's] decision on any ground appearing in the record and, hence, may affirm the trial [court's] correct result even though [it] may have erred on some other ground." *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292

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[6] *See Oliver v. Brock*, 342 So. 2d 1, 4-5 (Ala. 1976) (finding no relationship when consulting physician gave treating physician his opinion of the patient's condition, but no evidence was presented that consulting physician consented to treat the patient or to act in a consulting capacity); *Hill ex rel. Burton v. Kokosky*, 463 N.W.2d 265, 266-68 (Mich. Ct. App. 1990) (holding a doctor-patient relationship did not arise when the patient never sought medical advice or treatment from the doctor and the doctor did not have any contact with the patient, see any records, or even know the patient's name after the treating physician consulted with the doctor informally); *Mozingo ex rel. Thomas v. Pitt Cnty. Mem'l Hosp.*, 400 S.E.2d 747, 751 (N.C. Ct. App. 1991) (holding no relationship between supervising physician and patient when supervising physician arrived at the hospital after the child was born with disabilities and after any alleged negligence occurred).

S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987). The reasoning adopted by the trial court is not binding upon this court if the record discloses a correct result. *Id.*; *see also* Rule 220(c), SCACR.

We find the trial court did not err in granting Dr. Young's directed verdict motion because Sean failed to establish the existence of a doctor-patient relationship between Kelly and Dr. Young. Even viewing the evidence in the light most favorable to Sean, we find it shows only that Dr. Young briefly spoke with Dr. Law, who informed him Kelly was afebrile[7] with stable vital signs, was suffering from a half-centimeter moderately-to-severely obstructing stone located in the uteropelvic junction, and had a normal urinalysis, and he was preparing to discharge her. No evidence in the record established a doctor-patient relationship. Dr. Young never communicated with Kelly, never attempted to treat Kelly, and did not look at her records. Further, the Hospital's provision of her medical records to Dr. Young's office in anticipation of the Monday appointment does not create a doctor-patient relationship.

In addition, by the time Dr. Law spoke with Dr. Young, Dr. Law testified he had already obtained a history, lab work, vital signs, and radiology studies and had decided Kelly was stable for discharge. Moreover, Dr. Law specifically testified he was not calling Dr. Young to get advice about Kelly or requesting him to evaluate her. Because "[t]he establishment of a doctor/patient relationship is a prerequisite to a claim of medical malpractice," and Sean failed to establish the existence of a doctor-patient relationship, we affirm the directed verdict. *Roberts*, 310 S.C. at 366, 426 S.E.2d at 799.

II. Denial of Dr. Law's JNOV Motion

Dr. Law argues the trial court erred in denying his JNOV motion because the only reasonable inferences to be drawn from the evidence are that (1) Dr. Law complied with all accepted standards of care for an emergency physician and did not cause harm to either Sean or Kelly and (2) the Fays' failure to return to the emergency room when Kelly's condition deteriorated proximately caused her death and their degree of fault at least exceeded fifty percent. We disagree.

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[7] Merriam-Webster defines "afebrile" as "not marked by or having a fever." Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/afebrile.

In ruling on motions for directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886. "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Parrish*, 376 S.C. at 319, 656 S.E.2d at 388. "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." *Id.* "Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Id.* at 319-20, 656 S.E.2d at 388.

The court must determine whether any evidence existed on each element of the cause of action. *Phelps*, 299 S.C. at 446, 385 S.E.2d at 824. "If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." *Martasin*, 364 S.C. at 437, 613 S.E.2d at 799. However, "[a] directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." *Guffey*, 364 S.C. at 163, 612 S.E.2d at 697.

The appellate court will reverse the circuit court's ruling on a directed verdict motion only when no evidence supports the ruling or the ruling is controlled by an error of law. *Law*, 368 S.C. at 434-35, 629 S.E.2d at 648. The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663.

A plaintiff in a medical malpractice action must present (1) evidence of the generally recognized practices and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff, and (3) evidence that the defendant's departure from the generally accepted standards and practices was the proximate cause of the plaintiff's injuries and damages. *Hoard*, 387 S.C. at 546, 694 S.E.2d at 4-5.

Further, "unless the subject is a matter of common knowledge, the plaintiff must use expert testimony to establish both the standard of care and the defendant's

failure to conform to that standard." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997). If expert testimony is the only evidence of proximate cause, the testimony must provide a "significant causal link . . . rather than a tenuous and hypothetical connection." *Hoard*, 387 S.C. at 546-47, 694 S.E.2d at 5. "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Id.* at 546, 694 S.E.2d at 5 (quotation marks omitted).

However, a testifying expert is not required to use the words "most probably" for the evidence to meet the test. *Martasin*, 364 S.C. at 438, 613 S.E.2d at 800; *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991) ("It is sufficient that the testimony is such as to judicially impress that the opinion . . . represents his professional judgment as to the most likely one among the possible causes . . . ." (alterations in original) (internal quotation marks omitted)).

We find the trial court did not err in denying Dr. Law's motions for JNOV for both reasons because, in viewing the evidence in the light most favorable to Sean, the evidence was sufficient for a jury to find Dr. Law negligent in Kelly's death.

Dr. Law had a doctor-patient relationship with Kelly—he examined her, ordered several tests and x-rays, diagnosed her, and made the decision to discharge her. The primary questions are whether (1) no evidence was presented from which a reasonable jury could find a breach of the standard of care that proximately caused her death and (2) the only reasonable inference was the Fays' failure to return to the emergency room when Kelly's condition deteriorated proximately caused her death and their degree of fault at least exceeded fifty percent.

First, several expert medical witnesses, including Dr. Law, testified the combination of a fever and a kidney stone presents a urological emergency and an emergency room physician breaches the standard of care by failing to rule out infection, one symptom of which is the presence of a fever. Additionally, Dr. Law even admitted a second temperature should have been taken, he did not order one, and he would not have released her if she had a fever. Dr. Law suspected a kidney stone as early as 8:52 a.m., but Kelly's medical records do not contain a temperature reading after 8:06 a.m. Furthermore, the CT scan conducted at 10:20

a.m. confirmed Kelly suffered from a moderately-to-severely obstructing kidney stone, yet again a temperature was not taken and Dr. Law did not order one taken. In addition, when Dr. Law spoke with Dr. Young and informed him he planned to discharge Kelly, he stated she was afebrile, but he did not have a current temperature.

Notwithstanding Kelly's lack of other symptoms that might demonstrate a fever, Sean testified he did not see anyone take Kelly's temperature the entire time, though the record does reflect a normal temperature at 8:06 a.m., when they arrived. In addition, the jury could have inferred Kelly had a fever in the emergency room when Sean testified to her having a temperature of 101.3 degrees Fahrenheit approximately an hour after leaving. Although the experts could not opine to a reasonable degree of medical certainty that Kelly had an infection when she left, Dr. Mike Siroky did testify she more likely than not had a fever when she left the Hospital. From this, a jury could have found Dr. Law's failure to determine whether she had a fever before she left at least partially caused her death.

In addition, the parties disputed whether Dr. Law informed the Fays of the urgency of a fever, chills, and a kidney stone and to return to the emergency room if those symptoms arose. Although the discharge instructions state to return to the emergency room if such symptoms arise, a jury reasonably could have found they were ambiguous because the instructions also stated to call the emergency room.

Concerning Dr. Law's argument that the only reasonable inference was the Fays' failure to return to the emergency room when Kelly's condition deteriorated proximately caused her death, we conclude a jury reasonably could have found the evidence suggested Dr. Law and the other medical professionals failed to sufficiently inform the Fays of the dangerousness of a fever and a kidney stone. For example, Dr. Law testified he instructed the Fays to return if Kelly developed a fever or nausea; however, he admitted he never told them it was an emergency. It is true the Fays failed to return to the emergency room even though Kelly awoke screaming, shivering, and having chills, had a constant fever of over 101 degrees Fahrenheit the entire weekend after leaving the hospital, and was nauseated and unable to eat the majority of the weekend. However, a jury reasonably could have found the Fays were less negligent given the ambiguity the discharge instructions created by informing the Fays to call the Hospital or to return; the factual dispute concerning Dr. Law's alleged verbal instructions; the fact the side effects of the prescribed medicine included nausea, vomiting, and fever; Dr. Law's admission he

never alerted them to the fact a kidney stone and a fever could be fatal; and Dr. Law's failure to verify Kelly did not have a fever before discharging her considering the significance fever has related to a kidney stone.

Accordingly, we find the trial court did not err in denying Dr. Law's motion for JNOV because, when viewing the evidence in the light most favorable to Sean, evidence existed from which a jury reasonably could have found Dr. Law was negligent and the Fays were less than fifty-one percent negligent. We therefore affirm.

III. Exclusion of Extra-marital Affair

Next, Dr. Law argues the trial court erred in excluding evidence of Sean's extra-marital affair. We disagree.

The admission of evidence is within the trial court's discretion. *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

Damages recoverable for wrongful death are those suffered by the statutory beneficiaries resulting from the death of the decedent, "including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship." *Ballard v. Ballard*, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802 (1994); *see also* S.C. Code Ann. § 15-51-20 (2005). Dr. Law contends the trial court erred in excluding the affair because it is relevant and probative in assessing the damages Sean sustained for the loss of society and companionship[8] resulting from Kelly's death.

Evidence is admissible only if it is relevant. Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of

[8] Consortium and society or companionship are often used interchangeably. *See Panhorst v. Panhorst*, 301 S.C. 100, 103, 390 S.E.2d 376, 378 (Ct. App. 1990) (defining consortium as "the conjugal society, comfort, companionship, and affection of each other").

consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevant evidence nonetheless "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE.

South Carolina appellate courts have not previously addressed the admissibility of evidence of an extra-marital affair by either the decedent or the beneficiary in wrongful death or survival actions. Although not quite analogous, our supreme court has considered the admissibility of the surviving spouse's remarriage in both contexts. *See Smith v. Wells*, 258 S.C. 316, 320-21, 188 S.E.2d 470, 471-72 (1972) (holding evidence of remarriage is improper in wrongful death action because it would require a speculative comparison of the merits of the first and the second spouse and the circumstances that led to the remarriage); *Moultrie v. Med. Univ. of S.C.*, 280 S.C. 159, 162, 311 S.E.2d 730, 732 (1984) (same); *Wooten v. Amspacher*, 279 S.C. 325, 326, 307 S.E.2d 232, 233 (1983) (holding evidence of remarriage is improper in survival action).

In the present case, the trial court did not abuse its discretion in excluding the evidence of the extra-marital affair. *See Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011) ("An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law."). Despite some ambiguity in the ruling,[9] we find the

[9] The trial court stated,

> I'm going to deny the Defendants the right to bring that evidence in, and exclude that evidence. I do that for this reason, it's clear from the opening arguments that this case is really about liability. It's not about damages. This issue of an affair really goes to damages, in the Court's opinion, and whether or not the loss of the spouse is as great as one may perceive that it is. . . . I'm just simply saying that that issue goes mainly to damages, not really to liability, but if it does go to liability, if the Defendants take the position that the truth of Mr. Fay and the reliability is directly an issue, credibility and reliability are directly an issue, I find under Rule 403 that that is so

trial court properly concluded the probative value of the evidence was substantially outweighed by its prejudicial effect under Rule 403, SCRE, for both liability and damages.

Here, Sean's affair occurred in 1999, two to three years before Kelly's death, and no evidence suggests more affairs occurred or were occurring at the time of her death. Additionally, after Sean confessed to Kelly, they remained married and moved to South Carolina together. Finally, the trial court concluded the probative value of the evidence was substantially outweighed by its prejudicial effect. *See Busillo v. City of North Charleston*, 404 S.C. 604, 610-11, 745 S.E.2d 142, 146 (Ct. App. 2003) (noting "a trial court has particularly wide discretion in ruling on Rule 403 objections" and should be reversed only in exceptional circumstances). Accordingly, we find the trial court did not abuse its discretion in excluding the evidence of the affair.

IV. Enrollment of Judgment

Dr. Law contends the trial court erred in refusing to enroll the judgment using the jury's determination of fault and instead using joint and several liability when the record contains clear evidence of an agreement by the parties, Sean in particular, to accept an apportioned verdict. We disagree.

In 1988, the General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act (the Act), which provided for contribution between multiple tortfeasors who were jointly and severally liable for a common liability, abrogating the common law rule against contribution. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999); S.C. Code Ann. §§ 15-38-10 to -70 (2005 and Supp. 2014). In 1991, our supreme court abolished the doctrine of contributory negligence and adopted comparative fault as the tort standard, permitting a plaintiff to recover if his or her negligence did not exceed that of the defendant or the combined negligence of multiple defendants. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244-45, 399 S.E.2d 783, 784 (1991).

> prejudicial that it is inappropriate because it is of minimal probative value, but high prejudicial value, and thus I'm going to exclude it.

Nonetheless, the appellate courts of South Carolina have reaffirmed the applicability of joint and several liability among multiple tortfeasors. *Branham v. Ford Motor Co.*, 390 S.C. 203, 235-36, 701 S.E.2d 5, 22-23 (2010); *see also Summer v. Carpenter*, 328 S.C. 36, 48, 492 S.E.2d 55, 61 (1997); *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 175-76, 467 S.E.2d 439, 442-43 (1996); *Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 475-78, 499 S.E.2d 509, 511-13 (Ct. App. 1998). In 2005, the General Assembly enacted an amendment to permit apportionment of fault among multiple tortfeasors; however, it did not become effective until July 1, 2005. S.C. Code Ann. § 15-38-15 (Supp. 2014) (noting the section became effective July 1, 2005).

The trial court initially granted Dr. Law's Rule 59(e) motion in part and ordered the Clerk to enroll the judgment using the percentages of fault determined by the jury. However, after a telephone conference with all parties, the trial court vacated its prior order and stated:

> The Court is now aware that the previous Order was incorrect when it stated that the parties agreed to be bound by the allocation of specific percentages of negligence found by the jury. The Court recognized its mistake after conducting a phone conference involving counsel for all the parties. Therefore, there was no basis for the Court to direct the Clerk to reform the verdict based upon these percentages of negligence and to enroll the verdict accordingly. The law in effect at the time of the incident that gave rise to this suit requires joint and several liability, and in absence of agreement to the contrary, this Court must follow that law.

The trial court's final order clearly finds no agreement between the parties and confirms the law in effect at the time of the injury must be applied in the absence of an agreement. The record supports the trial court's finding, and because the injury occurred in 2002 before the effective date of the Act's amendment, we affirm the trial court's enrollment of the judgment using joint and several liability.

CONCLUSION

The trial court's grant of Dr. Young's motion for a directed verdict, denial of Dr. Law's motion for JNOV, exclusion of the evidence of the extra-marital affair, and enrollment of the judgment using joint and several liability are

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George Ferguson, Claimant, Appellant,

v.

New Hampshire Insurance Company, Carrier for Amerco/U-Haul International, and Sean P. Unterkoefler d/b/a United Stand Moving, Employer, and S.C. Workers' Compensation Uninsured Employers Fund, Respondents.

Appellate Case No. 2013-001896

Appeal From The Workers' Compensation Commission

Opinion No. 5307
Heard January 13, 2015 – Filed April 1, 2015

AFFIRMED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, and Natasha M. Hanna, of Myrtle Beach, for Appellant.

Stanford Ernest Lacy, Peter H. Dworjanyn, and Christian Stegmaier, all of Collins & Lacy, PC, of Columbia, and Ashley Ryon Kirkham, of Turner Padget Graham & Laney, PA, of Columbia, for Respondents Amerco/U-Haul International and New Hampshire Insurance Company; Lisa C. Glover, of the Uninsured Employers' Fund Division of the State Accident Fund, of Columbia,

for Respondent SC Workers' Compensation Uninsured Employers Fund; and Sean P. Unterkoefler, pro se.

SHORT, J.: In this appeal from the Workers' Compensation Commission, George Ferguson argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in finding he failed to carry his burden of proving (1) eMove, Inc. was his statutory employer; (2) he was an employee of Sean Unterkoefler d/b/a United Stand Moving (Unterkoefler); and (3) Unterkoefler employed four or more employees during the relevant period, making Unterkoefler an uninsured employer subject to the South Carolina Workers' Compensation Act (the Act). We affirm.

FACTS

eMove operates an internet marketplace where individuals or businesses renting moving trucks can search for and hire local moving companies to assist with loading and/or unloading rental trucks. eMove contracts with local moving companies to provide the loading and unloading services.[1] eMove customers sign up for the moving service on its website and select the moving company of their choice. eMove then sends a text message to the moving company informing them of the customer's booking information. After the job is completed, eMove releases the customer's payment for the services to the moving company, keeping fifteen percent of the total amount paid by the customer for its services.

Unterkoefler[2] executed a contract with eMove in March 2009 to provide moving help to eMove's customers.[3] Unterkoefler testified he took part in a telephone training session with eMove and eMove gave him advice on how to keep its customers happy. eMove also explained what the moving companies could and

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[1] On its website, U-Haul calls the subcontractor a "Moving Helper" and defines a "Moving Helper" as "an independent individual or company who participates in the Moving Help marketplace."

[2] Unterkoefler did not register his business with the South Carolina Secretary of State or file taxes for his business. eMove did not provide him with any tax forms, such as a W-2 or a 1099. Unterkoefler started the business by visiting eMove's website and signing up for an account.

[3] Unterkoefler testified in his deposition he was not a subcontractor of eMove.

could not do, including making clear to Unterkoefler he could not have any side agreements or direct contact with a customer except through eMove.

Unterkoefler provided a labor service to his customers and did not have a moving truck or equipment. He used rental moving trucks, blankets, dollies, and other items supplied by his customers. He also set the days and times he would perform moving services and set his own rates, times, and coverage areas. Unterkoefler operated the moving business himself, and when he could not complete the job on his own due to the size or having multiple jobs at the same time, he asked for help or gave the job to someone else. He paid whomever he worked with per job in cash and did not take any money for himself unless he participated in the job. Ferguson testified he performed approximately ten to fifteen moving jobs between April/May 2010 and August 2010 and he worked with three other movers at various times.

Ferguson was working part time for Unterkoefler on August 21, 2010, when he injured his right hand while moving a washer/dryer unit. On August 27, 2010, Ferguson had surgery on his small right finger. He did not allege an injury to his right shoulder until after his deposition in March 2012.

Ferguson filed a Form 50, seeking workers' compensation benefits from the August 21 accident. He claimed injuries to his right hand and right arm. He served the form on United Stand Moving, eMove, New Hampshire Insurance Company, and the South Carolina Uninsured Employers Fund (the Fund).[4] eMove and New Hampshire Insurance Company filed a Form 51, denying all allegations made by Ferguson. Ferguson filed an amended Form 50, claiming injuries to his right shoulder, right hand, right arm, and right knee. eMove and the Fund each filed a Form 51 in response. Unterkoefler did not make a formal appearance in the case and did not file any pleadings; however, his deposition was taken.

After a hearing, the single commissioner denied benefits and dismissed the case. The commissioner found Ferguson failed to prove he was an employee of

[4] Amerco/U-Haul, which owns eMove, is insured through the New Hampshire Insurance Company. Unterkoefler is uninsured; thus, the South Carolina Uninsured Employers Fund was added as a party. Unterkoefler did not purchase workers' compensation insurance, believing it was not required because he had less than three employees.

Unterkoefler and failed to prove eMove was his statutory employer. Ferguson filed a Form 30 Notice of Appeal, and the Appellate Panel affirmed the single commissioner. This appeal followed.

STANDARD OF REVIEW

"The determination of whether a worker is a statutory employee is jurisdictional and therefore the question on appeal is one of law." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999). Thus, this court reviews the entire record and decides the jurisdictional facts in accord with the preponderance of the evidence. *Id.*

LAW/ANALYSIS

I. eMove

Ferguson argues the Appellate Panel erred in finding he failed to carry his burden of proving eMove was his statutory employer. We disagree.

The initial question is whether eMove has "owner" liability under section 42-1-400 of the South Carolina Code (2015). If so, eMove would be deemed Ferguson's "statutory employer" and liable for workers' compensation. *See Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980) (holding an owner, in effect, becomes the employee's statutory employer, even though in law the owner is not the immediate employer of the injured worker).

Section 42-1-400 provides:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he

> would have been liable to pay if the workman had been immediately employed by him.

This court must make two determinations in assessing whether owner workers' compensation liability will attach to eMove. First, eMove must qualify as a business under the Act. "For the purposes of workers' compensation, '[t]he test is not whether the employer is in business for profit, but whether the employer is in business at all. If he supplies a product or service, it is immaterial what he does with his profits, or whether he expects or gets any profits at all.'" *Harrell*, 337 S.C. at 321, 523 S.E.2d at 770 (quoting 4 Arthur Larson, Workers' Compensation Law § 50.44(a) (1998)).

Second, Ferguson's work must have constituted part of eMove's trade, business, or occupation. "The activity is considered 'part of [the owner's] trade, business, or occupation' for purposes of the statute if it (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; or (3) has previously been performed by the owner's employees." *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). "If the activity at issue meets even one of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.'" *Id.* "Owners are treated as statutory employers in these situations because an owner should not be able to avoid workers' compensation liability by subcontracting out the work of their business." *Harrell*, 337 S.C. at 322, 523 S.E.2d at 771. "[A] subcontractor is an independent contractor contracting with the contractor to do part of the work which the contractor has previously agreed to perform." *Murray v. Aaron Mizell Trucking Co.*, 286 S.C. 351, 355, 334 S.E.2d 128, 130 (Ct. App. 1985).

Ferguson argues eMove's sole source of revenue is the fifteen percent it collects from the total amount paid by the customer for a moving job completed by the local moving company and "[i]f people like Unterkoefler and Ferguson did not do the moving jobs, eMove would have no revenue at all." Ferguson asserts:

> eMove knew moving jobs require at least a two-person crew. Even if one member of the crew was an independent contractor, eMove knew the other was certainly an employee. eMove also knew that many, if not most, of its subcontractors were too small to require workers' compensation insurance. eMove cannot claim

> ignorance of the risks faced by the downstream employees engaged in a very physical, dangerous job. Indeed, its contract seems knowingly designed to circumvent statutory employer liability.

eMove asserts the Appellate Panel properly relied on *Murray*. In *Murray*, this court held a trucker, who was injured while hauling lumber from a work site of a contract logger to a lumber manufacturer's plant, was the statutory employee of the contract logger rather than the lumber manufacturer because of the implied contract between the contract hauler and the contract logger whereby the contract hauler would transport lumber for the contract logger when needed. *Id.* at 356-57, 334 S.E.2d at 131. Further, eMove maintains unlike in *Murray*, Unterkoefler was not obligated to perform any work for eMove and was only obligated to perform jobs for customers that selected his company and scheduled an appointment for his services. Additionally, it argues the record contains no evidence to support Ferguson's assertion that eMove's marketplace fee is its sole source of revenue.

eMove contends it is not in the business of moving and eMove merely provides a service or marketplace in which U-Haul truck renters and movers can meet to assist with moving help. The Appellate Panel found the actual moving was not a part of eMove's trade, business, or occupation and eMove's business was to match U-Haul renters with moving help. The Appellate Panel further found Ferguson presented no evidence eMove contracted with anyone to move or engaged in any moving itself. Therefore, the Appellate Panel found Ferguson failed to prove eMove was his statutory employer.

Based on our review of the record, we find the Appellate Panel correctly found eMove was not Ferguson's statutory employer. While eMove does rely on the movers to receive fifteen percent of the total amount paid by the customer for the local mover's services, eMove is not a moving company. eMove's business or trade is to create a marketplace where U-Haul renters can meet movers.

II. Unterkoefler

Ferguson argues the Appellate Panel erred in finding he failed to carry his burden of proving he was an employee of Unterkoefler. We disagree.

Section 42-1-130 of the South Carolina Code (2015) defines an "employee" as:

> [E]very person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . .

Section 42-1-360 of the South Carolina Code (2015) provides the Workers' Compensation Law does not apply to:

> (1) a casual employee, as defined in Section 42-1-130; or
>
> (2) any person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous calendar year of less than three thousand dollars regardless of the number of persons employed during that period.

Thus, Ferguson must prove he was an employee of Unterkoefler and Unterkoefler regularly employed four or more employees. "Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work." *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). "In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Id.*

At the hearing before the Commissioner, the Fund contended Ferguson was not an employee of Unterkoefler and, in the alternative, Unterkoefler subcontracted the jobs from eMove to Ferguson. The Commissioner found Ferguson failed to prove he was an employee of Unterkoefler.

Considering the first of the four factors of control, the right to control, Ferguson worked for Unterkoefler part time and helped him load and unload trucks rented by customers of Unterkoefler. In the few jobs Ferguson completed for Unterkoefler on his own, like the one when he was injured, Unterkoefler did not exercise control over the work he performed. Unterkoefler merely gave Ferguson the customer's information. The customer dictated the date, time, and location of the job. When the job was completed, Unterkoefler gave Ferguson cash for the entire cost of the job. Unterkoefler testified he did not financially benefit from a job completed by Ferguson unless he performed the job with Ferguson.

Regarding the furnishing of equipment, Unterkoefler provided a labor service to his customers. He did not have his own moving truck or equipment, and he used the truck his customers rented and any equipment that came with their rental truck. He did not have a uniform for himself or anyone who helped him. He and his helpers also used their own transportation to travel to and from the customer's residence.

Concerning the method of payment, Unterkoefler was paid by the job and split his earnings with the number of helpers he had during the job, paying them in cash. Finally, as to the right to fire, Unterkoefler could choose to use someone other than Ferguson for a job. Ferguson could also decline or refuse to perform a job. There was no set schedule, and Ferguson did not work on a consistent basis.

Therefore, after reviewing the evidence, we find the Appellate Panel correctly found Unterkoelfer was not Ferguson's employer.

III. Uninsured Employer

Ferguson argues the Appellate Panel erred in finding he failed to carry his burden of proving Unterkoefler employed four or more employees during the relevant period, making Unterkoefler an uninsured employer subject to the Act. We disagree.

Section 42-1-360(2) provides the Workers' Compensation Law does not apply to

> any person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous

> calendar year of less than three thousand dollars regardless of the number of persons employed during that period.

"Regularly employed" has been defined by this court as "employment of the same number of persons throughout the period with some constancy." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 257, 647 S.E.2d 691, 702 (Ct. App. 2007). "Where employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual." *Hernandez-Zuniga*, 374 S.C. at 248, 647 S.E.2d at 697-98. In determining the relevant time period, the Commission should consider "(1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation, and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite." *Id.* at 257, 647 S.E.2d at 702.

Ferguson asserts the relevant time period in this case was the period during July and August 2010 when he was working with Unterkoefler with regularity. During July and August, Ferguson testified he worked as many as five jobs a week. He also testified he worked with three other movers at various times. Ferguson agreed he would defer to Unterkoefler's testimony on whether Unterkoefler had any employees. Unterkoefler testified he did not have any employees. He stated, "I pretty much operated myself . . . I had some friends here and there, but no one in particular person for a certain – for a long, lengthy time. It was kind of just based on when I got the work I found someone to help me." He further testified that at any given time, the most people doing a job were himself and three helpers.

The Appellate Panel found Ferguson failed to prove Unterkoefler regularly employed four or more employees, and therefore, he was not subject to the Act. After reviewing the evidence, we conclude Unterkoefler regularly employed less than four workers during the identified relevant time period. Thus, Unterkoefler was exempt from the Act when Ferguson sustained his injury, and the Appellate Panel did not have jurisdiction to consider his claim.

CONCLUSION

Accordingly, the decision of the Appellate Panel is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henton T. Clemmons, Jr., Employee, Appellant,

v.

Lowe's Home Centers, Inc.-Harbison, Employer, and Sedgwick Claims Management Services, Inc., Carrier, Respondents.

Appellate Case No. 2013-001668

Appeal From The Workers' Compensation Commission

Opinion No. 5308
Heard November 5, 2014 – Filed April 1, 2015

AFFIRMED

Preston F. McDaniel, of McDaniel Law Firm, of Columbia, for Appellant.

Weston Adams, III, Kelly Fitzharris Morrow, and Helen Faith Hiser, all of McAngus Goudelock & Courie, LLC, of Columbia and Mount Pleasant, respectively; and M. McMullen Taylor, of Mullen Taylor, LLC, of Columbia, for Respondents.

LOCKEMY, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission, Henton Clemmons contends the Appellate Panel erred in (1) proceeding with a hearing to determine his permanent disability

award over his objection, (2) not finding him permanently and totally disabled due to a compensable work-related back injury, (3) not making a separate award for myelopathy as a neurological injury, (4) not making a separate award for a low back injury, and (5) assigning great weight to the medical opinion of his authorized treating physician. We affirm.

FACTS

Clemmons works for Lowe's Home Centers as a cashier. On September 12, 2010, he entered a trailer at the store where he worked and slipped on wet straw, landing on his back, neck, and head. Clemmons was originally treated by Doctor's Care after he complained of low back pain radiating to his legs. Initial medical examinations diagnosed him with back strain, radiculopathy,[1] and right knee strain. After Clemmons's condition deteriorated, he was referred to Dr. Thomas Armsey of Midlands Orthopedics for further evaluation and treatment.

On November 1, 2010, Dr. Armsey's examination revealed acute ataxia.[2] In his report, Dr. Armsey recorded:

> Clemmons and his mother report that he was a perfectly functional 38-year-old male until his work-related accident. Since that time his gait has been severely ataxic, he cannot dress because of poor balance, [and] has been bed ridden because of his inability to ambulate. He has had multiple falls because of his poor balance which is all reported as beginning September 12, 2010. He has had ventricular shunts[3] placed as a child. . . .
>
> I am concerned about a brainstem or cerebellar lesion, possibly complications from his intraventricular shunts

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[1] Radiculopathy is a "[d]isease of the spinal nerve roots." *Stedman's Medical Dictionary* 1187 (24th ed. 1982).

[2] Ataxia is defined as "an ability to coordinate the muscles in the execution of voluntary movement." *Stedman's*, *supra*, at 135.

[3] Clemmons suffers from hydrocephalus—"[a] condition marked by an excessive accumulation of fluid dilating the cerebral ventricles, thinning the brain, and causing a separation of cranial bones." *Stedman's*, *supra*, at 663.

> with his recent trauma. I am certain that his ataxia is not coming from his lumbar spine and his right knee has no mechanical abnormalities on clinical exam and therefore his sensation of instability is likely neurologic at the knee as well. I would recommend an immediate neurology or neurosurgery referral. He is essentially wheelchair bound [] and will not return to work until cleared by a neurosurgeon/neurologist.

Dr. Armsey referred Clemmons to Dr. Randall Drye, a neurosurgeon. A neurologic examination revealed Clemmons had normal strength and reflexes, but an MRI showed spinal cord compression from disk herniation. Dr. Drye diagnosed Clemmons with "herniated nucleus pulposus [(herniated disc)] with cord compression and severe myelopathy,[4] C5 and C7."

On November 9, 2010, Clemmons underwent an anterior cervical discectomy and fusion of C5 and C7. After the surgery, Clemmons returned to the hospital complaining of poor sensation and control of his legs, and he was transferred to HealthSouth rehabilitation facility. By November 24, 2010, Clemmons had recovered 90% of normal sensation in his legs with only mild spasticity and reported no issues with pain. In a November 30, 2010 report, Dr. Drye stated:

> When we met in the office initially and we garnered his history he clearly reported no prior history of significant neck or neurologic problems prior to a fall at work. This occurred, according to the patient, on 9/12/10 when he slipped on some straw in a trailer and impacted on his back and the back of his head. This mechanism of injury is completely consistent as the force and flexion of the head and neck can result in a tear in the vulnerable disc and subsequent herniation. . . . Clemmons'[s] condition was perhaps worsened by the fact that he has congenital stenosis of the spine but again by history, he reports no prior symptoms of radicular nature or spinal cord

[4] Myelopathy is defined as a "[d]isturbance or disease of the spinal cord." *Stedman's*, *supra*, at 918.

> dysfunction. For that reason, I believe that within a reasonable degree of medical certainty, his disc herniations, spinal cord impingement and subsequent myelopathy as well as the intervening surgery were a direct result of his fall at work.

Following his inpatient rehabilitation, Clemmons continued with outpatient physical therapy. After completing physical therapy, Clemmons had "regained relatively normal function in the upper extremities with no major complaints of numbness, tingling or weakness"; however, mild residual spasticity affected his gait and balance.

On November 30, 2010, Clemmons filed a Form 50, alleging he sustained an injury to his "head, back[,] and legs" as a result of the work-related accident. Lowe's admitted Clemmons sustained a work-related injury to his low back and right knee and agreed to pay Clemmons temporary total disability benefits from the date of the accident until properly terminated. Lowe's, however, denied Clemmons suffered an injury to his head or left lower extremity and further denied the extent of Clemmons's injuries.

On February 2, 2011, the parties entered a consent order in which Lowe's agreed to accept the back, neck, and right knee as compensable injuries. Lowe's also agreed to pay Clemmons temporary total disability benefits from the date of the accident until properly terminated due to a finding of maximum medical improvement (MMI), a return to work, or agreement of the parties.

On June 7, 2011, Dr. Drye concluded Clemmons had reached MMI, assigning a 25% whole person impairment "based on [his] injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." Thereafter, Lowe's asked Clemmons to provide a settlement demand pertaining to permanent disability. On September 22, 2011, Clemmons signed a Form 17, indicating he had returned to work with restrictions but at a salary not less than before the injury. He accepted a position with Lowe's as a cashier with accommodations allowing him to sit and request assistance as needed.

On January 4, 2012, Lowe's filed a Form 21 requesting a hearing to determine any compensation due for permanent total disability or permanent partial disability and requesting credit for overpayment of temporary benefits. In response to Clemmons's request for an additional medical evaluation, Lowe's withdrew its

Form 21 request in order to provide for another evaluation from Clemmons's treating neurosurgeon, Dr. Drye.

On June 18, 2012, Dr. Drye examined Clemmons and reviewed recently performed magnetic imaging studies of Clemmons's lumbar spine and neck. Clemmons reported neck and back stiffness and pain experienced in the morning, which improved as he moved about. Dr. Drye characterized this pain as "axial," "myofascial," and suggestive of "arthritic-type symptoms." Dr. Drye noted Clemmons had gained considerable weight and advised him that losing weight would likely help reduce his back pain. Dr. Drye stated Clemmons "denies any radicular symptoms down the leg and continues to have some altered gait from his previous myelopathy as well as a long-standing, pre-injury inversion to his right foot and ankle." Dr. Drye concluded Clemmons had reached MMI and reaffirmed his earlier impairment rating of 25% whole person to the back.

Thereafter, Lowe's requested Clemmons "provide . . . a settlement demand at [his] earliest convenience." After it received no settlement demand, Lowe's filed another Form 21 request for overpayment of temporary benefits and to determine any permanent disability it owed Clemmons.

On September 5, 2012, Clemmons saw Dr. Howard Mandell, a neurologist, for an independent medical evaluation. Dr. Mandell noted Clemmons's "symptoms are stable now, not improving and not worsening for the past several months at least." Dr. Mandell concluded Clemmons did not "require additional treatment concerning his injuries other than perhaps ongoing physical therapy for balance and gait." Dr. Mandell also concluded there was "no indication" that Clemmons required further surgery. Finally, Dr. Mandell observed that Clemmons "still has spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run[,] and difficulty with balance. I would say he is probably 85% better but still has this 15% neurological injury left over."

On September 6, 2012, Clemmons saw Dr. Leonard Forrest of the Southeastern Spine Institute for another independent medical evaluation. Dr. Forrest noted Clemmons's hydrocephalus "[has] left him with some cognitive deficits, but overall otherwise he was doing physically well until [his work-related injury]." Dr. Forrest stated Clemmons had reached MMI and agreed with a twenty-five pound lifting restriction. Dr. Forrest assigned him a 30% permanent impairment rating for his neck and 10% for his "low-back related symptoms and problems[,]"

resulting in a permanent impairment rating of "at least 40%." Dr. Forrest concluded Clemmons's loss of function to his back "would be over 50%."

On September 11, 2012, Clemmons saw physical therapist, Tracy Hill, for a functional capacity evaluation. According to Hill, Clemmons qualified for a whole person impairment rating of 28%, "which convert[ed] to a 80% cervical spine impairment." She found that he also qualified for a whole person impairment rating of 8%, "which convert[ed] to a 11% lumbar spine impairment."

Also on September 11, 2012, Clemmons received another independent medical evaluation by Dr. Gal Margalit of Sunset Family Practice. Dr. Margalit concurred with Dr. Drye's opinions concerning continuing work restrictions and weight loss. Dr. Margalit, however, disagreed with Dr. Drye's impairment rating, stating Clemmons "lost more than 50% of the functional capacity of his back."

On September 13, 2012, Clemmons received a vocational assessment by Harriet Fowler. Fowler noted Clemmons was currently working at Lowe's in a light duty job in a satisfactory manner and had experienced no wage loss as a result of his injury. She stated that due to his condition, Clemmons was restricted from the medium, heavy, and very heavy categories of work and "technically from the light category-although obviously he is performing a light duty job, apparently satisfactorily." Fowler concluded Clemmons had experienced a 99.94% loss of access to the job market; however, she further stated his loss of access to the job market would be 76%, assuming he could perform light duty work. She advised that light duty labor may not be sustainable for Clemmons over a long period, and therefore, working at a sedentary level may provide a better chance for sustainable employment.

On September 25, 2012, the single commissioner held a hearing to determine the issues raised in the Form 21 filed by Lowe's. Clemmons argued the hearing on the Form 21 request for a determination of permanent disability benefits violated due process because he had a right to request compensation at a time of his choosing. Clemmons further asserted that he had not reached MMI and was entitled to a second opinion regarding his back and neurological dysfunction. Alternatively, he argued that if the single commissioner found he had reached MMI, then he was entitled to permanent total disability due to either (1) a 50% or more loss of use of the back under subsection 42-9-30(21) of the South Carolina Code (2015) or (2) loss of earning capacity under section 42-9-10 of the South Carolina Code (2015).

Lowe's asserted Clemmons had reached MMI, that a second opinion was unnecessary in light of the additional evaluation by his treating physician, and that Clemmons was not entitled to permanent total disability under subsection 42-9-30(21) or section 42-9-10.

The single commissioner found Clemmons sustained a 48% permanent partial disability to his back under section 42-9-30, which included "any radicular symptoms to his right leg." The single commissioner also found Clemmons was not entitled to permanent total disability pursuant to section 42-9-10 because he had returned to work for almost two years. Clemmons appealed to the Appellate Panel, which affirmed the single commissioner's order in its entirety. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "[An appellate] court can reverse or modify the [Appellate Panel]'s decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Id.* "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* (internal quotation marks omitted). The possibility of drawing two different conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007).

"Where there are conflicts in the evidence over a factual issue, the findings of the [Appellate Panel] are conclusive." *Hall v. United Rentals, Inc.*, 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). "The [Appellate Panel] is the ultimate fact finder in [w]orkers' [c]ompensation cases . . . ." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight of the evidence is for the Appellate Panel. *Id.* "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995).

LAW/ANALYSIS

I. Form 21 Request for Hearing

A. Due Process

Clemmons argues the Appellate Panel violated his substantive and procedural due process rights to request a hearing for a determination of his permanent disability award at a time of his choosing. According to Clemmons, only he "has the right to bring a cause of action for a determination of [permanent disability] benefits and it is a denial of due process to force [him] to a premature determination of those benefits where he has not made a request that he be awarded any benefits whatsoever under the [Workers' Compensation] Act (the Act)." We disagree.

To establish a procedural due process claim, a person must show deprivation of his liberty or property interests due to the government's failure to provide notice, an opportunity to be heard in a meaningful way, or judicial review. *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). This court previously has identified "adequate notice," "adequate opportunity for a hearing," "the right to introduce evidence," and "the right to confront and cross-examine witnesses" as the minimal due process requirements in a contested case proceeding such as a workers' compensation hearing. *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012).

Clemmons has failed to show a procedural due process violation. The Commission held hearings to determine Clemmons's permanent disability benefits after notice was provided to both parties. At the hearings, Clemmons had the right to call any witness, cross-examine all adverse witnesses, and was allowed to present any admissible evidence to support his claim. Clemmons's primary complaint with the Commission proceeding with a hearing at this time appears to be that he was entitled to a "second opinion" regarding the extent of his impairment; however, after Dr. Drye assigned Clemmons an impairment rating of 25% whole person to the back, Clemmons received evaluations from Dr. Forrest, Dr. Mandell, Dr. Margalit, Hill, and Fowler, which the Commission considered in deciding his permanent disability benefits. Accordingly, the procedure employed by the Commission comported with due process.

B. Authority to Hear Claim

Clemmons next argues the Commission lacked statutory authority and jurisdiction to hold a hearing to determine his permanent disability benefits because he did not request a hearing to determine those benefits. He asserts that under subsection 42-9-260(E) of the South Carolina Code (2015), "An employer may request a hearing at any time to address termination or reduction of *temporary* disability payments"; however, the Act does not allow an employer to request a hearing to pay permanent disability benefits. (emphasis added). We disagree.

Section 42-17-20 of the South Carolina Code (2015) provides:

> If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this title within fourteen days after the employer has knowledge of the injury . . . either party may make application to the [C]ommission for a hearing in regard to the matters at issue and for a ruling thereon.

In *McMillan v. Midlands Human Resources*, this court held an employer has a statutory right under section 42-17-20 to request a hearing when it has knowledge of an injury for more than fourteen days, and the parties fail to reach an agreement for compensation. 305 S.C. 532, 534, 409 S.E.2d 443, 444 (Ct. App. 1991).

The Commission did not err in proceeding with a hearing to determine Clemmons's permanent disability award. Clemmons's injury occurred on September 12, 2010. On September 16, 2011, and July 24, 2012, Lowe's asked Clemmons for a settlement agreement for permanent disability compensation and received no settlement offer. Because fourteen days had passed since Clemmons's injury and the parties failed to reach an agreement as to an award for permanent disability, Lowe's had the right to request a hearing to determine compensation for any permanent disability, and the Commission was authorized to act on the request for a hearing under section 42-17-20.

Clemmons relies on *South Carolina Property & Casualty Insurance Guaranty Association v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund*, 303 S.C. 368, 401 S.E.2d 144 (1991) as support for his argument that the Commission lacks jurisdiction to determine an employee's permanent disability benefits when the employee does not request the hearing to determine permanent disability benefits. We disagree.

In *Carolinas Roofing*, the employee entered into a settlement agreement with his employer and its workers' compensation carrier that fully satisfied all liability under the Act. *Id.* at 370, 401 S.E.2d at 145. The employer's carrier became insolvent, making the South Carolina Property & Casualty Insurance Guaranty Association (Guaranty Association) responsible for providing coverage. *Id.* The Guaranty Association declined to pay the claim and filed a declaratory judgment in the circuit court seeking to determine its liability for the claim. *Id.* The respondents moved to dismiss the action, alleging the Commission had exclusive jurisdiction over the action. *Id.* The circuit court held the Commission had exclusive jurisdiction and entered a judgment in favor of the respondents. *Id.* On appeal, the issue before our supreme court was "whether there was a pending employee claim for compensation before the Commission at the time the action was commenced in circuit court." *Id.* at 371, 401 S.E.2d at 145. The supreme court held the settlement agreement terminated the employee's pending claim before the Commission; therefore, the Commission lacked jurisdiction to decide the issue raised by the Guaranty Association. *Id.* at 371-372, 401 S.E.2d at 146.

Unlike *Carolinas Roofing*, a "pending employee claim for compensation" existed here because Clemmons's claim for workers' compensation benefits had not been decided when Lowe's requested a hearing to determine the permanent disability award. Moreover, Clemmons and Lowe's never entered a settlement agreement to resolve any liability that existed under the Act. Therefore, the Commission had jurisdiction to hold a hearing upon Lowe's request to determine whether Clemmons was entitled to permanent disability benefits.

II. Permanent Total Disability

A. 50% or more loss of use of back

Clemmons next argues the Appellate Panel erred in not finding him permanently and totally disabled due to 50% or more loss of use of the back. He contends he met his burden of proving he sustained 50% or more loss of use to his back, and Lowe's failed to rebut the presumption, thereby making him entitled to permanent total disability under section 42-9-30. We disagree.

"[I]n cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and

compensated under [s]ection 42-9-10(B)." S.C. Code Ann. § 42-9-30(21) (2015). This presumption is rebuttable. *Id.*

"To qualify for total and permanent disability, a claimant must suffer a 50% or greater loss of use of his back." *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 115, 620 S.E.2d 99, 105 (Ct. App. 2005). "The [Appellate Panel]'s finding as to the degree of impairment is a question of fact." *Id.* "[T]he determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the [Appellate Panel] may gather from the injured employee, medical and vocational experts, and lay witnesses[.]" *Burnette v. City of Greenville*, 401 S.C. 417, 429, 737 S.E.2d 200, 206-07 (Ct. App. 2012). "While an impairment rating may not rest on surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009) (alteration in original) (internal quotation marks omitted). "The Appellate Panel is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony." *Id.* (internal quotation marks omitted).

Substantial evidence supports the Appellate Panel's finding that Clemmons was not entitled to permanent total disability under section 42-9-30 due to 50% or more loss of use of his back. After considering "the medical evidence as a whole," the Appellate Panel determined Clemmons sustained a 48% permanent partial disability to the back. In making this finding, the Appellate Panel relied on the medical reports of Dr. Drye who assigned Clemmons a 25% whole person impairment rating "based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residue symptoms." Dr. Drye noted Clemmons's stiffness and pain in his back was "strongly suggestive of arthritic-type symptoms," and advised Clemmons that continued stretching exercises as well as weight loss would help with his lumbar symptoms. Admittedly, Clemmons presented medical evidence that supported an award of 50% or more loss of use to the back. Specifically, Dr. Forrest opined that Clemmons's loss of function to his back "would be over 50%." Likewise, Dr. Margalit stated Clemmons "lost more than 50% of the functional capacity of his back." Nevertheless, after considering all the medical evidence, the Appellate Panel chose to place more weight on Dr. Drye's reports, which was in its discretion as the factfinder. Although the Appellate Panel could have reasonably concluded Clemmons's loss of use to the back was 50% or more, "where the medical evidence conflicts, the findings of fact of the [Appellate

Panel] are conclusive." *Mullinax*, 318 S.C. at 435, 458 S.E.2d at 78; *see also Harbin v. Owens-Corning Fiberglass*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) ("The existence of any conflicting opinions between the doctors is a matter left to the [Appellate Panel]."). Because substantial evidence supports the Appellate Panel's finding that Clemmons suffered a 48% permanent partial disability to the back, we affirm as to this issue.[5]

B. Wage Loss

Clemmons next argues the Appellate Panel erred in considering wage loss in deciding whether he suffered 50% or more loss of use of his back. We disagree.

"While [permanent total disability] is generally based on loss of earning capacity, [sub]section 42-9-30(21) states there is a rebuttable presumption of [permanent total disability] when a claimant has 50% or more loss of use of the back." *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 464, 732 S.E.2d 190, 195 (Ct. App. 2012). "Therefore, a claimant with 50% or more loss of use of the back is not required to prove loss of earning capacity to establish [permanent total disability]." *Id.*

The Appellate Panel addressed whether Clemmons was entitled to permanent total disability under sections 42-9-30 and 42-9-10. It first found Clemmons was not entitled to permanent total disability under subsection 42-9-30(21) because his loss of use of the back was 48%. *Cf.* S.C. Code Ann. § 42-9-30(21) (stating a claimant with 50% or more loss of use of the back is presumed to be permanently and totally disabled). The Appellate Panel then found Clemmons was not entitled to permanent total disability under section 42-9-10 because he had returned to work

[5] At oral argument, Clemmons contended the Appellate Panel erred in its award because all the medical evidence established his loss of use of the back was over 50%. Specifically, Clemmons pointed out subsection 42-9-30(21) addresses "loss of use" of the back, not "impairment" or "disability" and Dr. Drye's records do not support the Appellate Panel's finding of 48% permanent partial disability because they only addressed Clemmons's *impairment* rating. We disagree. Although Dr. Drye's records do not use the language "loss of use" of the back, we believe his 25% impairment rating provides substantial evidence to support the Appellate Panel's determination that Clemmons's loss of use of the back was not 50% or more.

for almost two years. Contrary to Clemmons's argument, the Appellate Panel considered loss of earning capacity when it addressed permanent total disability under section 42-9-10, not section 42-9-30. We find no error in the Appellate Panel's analysis because loss of earning capacity is generally a prerequisite to a finding of permanent total disability under section 42-9-10. *See Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 433, 716 S.E.2d 443, 445-46 (2011) ("It is well-settled that an award under [section 42-9-10] must be predicated upon a showing of a loss of earning capacity . . . ." (internal quotation marks omitted)). Because Clemmons returned to work in a job similar to that which he had prior to the accident making the same salary, the Appellate Panel did not err in finding he was not entitled to permanent total disability under section 42-9-10. *See Watson*, 399 S.C. at 462-63, 732 S.E.2d at 194-95 (noting an employee was not entitled to permanent total disability under section 42-9-10 when there was evidence she "could return to work in an occupation that complied with her job factor restrictions"). Finally, Clemmons argues that even if loss of earning capacity is a proper consideration in deciding permanent total disability under section 42-9-30, substantial evidence indicates he is permanently and totally disabled because his vocational evaluation determined he was excluded from more than 99% of the job market in the United States. Clemmons's argument erroneously attempts to infuse loss of earning capacity into the analysis of permanent total disability under section 42-9-30. Although Clemmons's exclusion from the job market would be an appropriate consideration when deciding permanent total disability under section 42-9-10, it is irrelevant under section 42-9-30. *See Watson*, 399 S.C. at 464, 732 S.E.2d at 195. Accordingly, we affirm the Appellate Panel as to this issue.

III. Myelopathy

Clemmons next argues the Appellate Panel erred in not making an award for myelopathy as a separate neurological injury. We disagree.

The Appellate Panel found "[Clemmons]'s permanent partial disability includes any radicular symptoms to his right leg." This finding was based on Dr. Drye's conclusion that Clemmons suffered a 25% whole person impairment "based on [his] injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." Thus, the Appellate Panel included residual myelopathy in its permanent partial disability award to the back, and it consequently rejected Clemmons's claim for a neurological award for myelopathy. We believe substantial evidence supports this finding. Although Dr. Mandell

observed that Clemmons "is probably 85% better but still has this 15% neurological injury left over," we do not believe he was assigning an impairment rating for myelopathy as a neurological injury; rather, he was explaining Clemmons had not recovered 100% of his pre-injury functioning. Furthermore, Dr. Drye noted Clemmons continued to have altered gait from his previous myelopathy; however, Dr. Drye did not offer a separate impairment rating for myelopathy and opined that Clemmons's current symptoms were consistent with "axial and myofascial pain and strongly suggestive of arthritic type symptoms." Accordingly, the Appellate Panel did not err in deciding not to make an award for myelopathy as a separate neurological injury.

IV. Low Back Injury

Clemmons next argues the Appellate Panel erred in not making a separate award for his low back injury. Specifically, he asserts that he presented substantial evidence showing he sustained an additional injury to his "low back" that was separate and distinct from the injury to his back. We disagree.

The Appellate Panel's finding that Clemmons sustained a 48% permanent partial disability to the back under subsection 42-9-30(21) included any impairment to the low back. *See Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 443, 446, 434 S.E.2d 292, 294-95 (Ct. App. 1993) (analyzing an injury to "the low back" under subsection 42-9-30(21)). Subsection 42-9-30(21) addresses "the loss of use of the back"; however, the term "back" is not defined in the Act. "In construing a statute, courts should give words their plain and ordinary meaning and should not resort to subtle or forced construction to limit or expand the statute's operation." *Hartford Acc. & Indem. v. S.C. Second Injury Fund*, 316 S.C. 420, 422, 450 S.E.2d 110, 111 (Ct. App. 1994) (defining the term "conceal" according to its "plain and ordinary meaning" when it was not defined in the Act). Merriam Webster's Collegiate Dictionary defines the "back" as "the rear part of the human body esp. from the neck to the end of the spine." *Merriam Webster's Collegiate Dictionary*, 83 (10th ed. 1993). Thus, the plain and ordinary meaning of the word "back" includes the low back. Moreover, section 42-9-30 does not recognize the "low back" as a separate scheduled member. Accordingly, this issue is without merit.

V. Weight Assigned to Dr. Drye's Opinion

Clemmons next argues the Appellate Panel erred in assigning great weight to the medical opinion of Dr. Drye because it contradicted the other medical evidence. We disagree.

The Appellate Panel did not err in assigning great weight to Dr. Drye's medical opinion. *See Etheredge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]."). Dr. Drye was Clemmons's authorized treating physician, and he treated Clemmons for over two years. After reviewing the medical evidence presented, the Appellate Panel determined Dr. Drye's medical reports "were the most persuasive." In a November 30, 2010 report, Dr. Drye stated Clemmons's "disc herniations, spinal cord impingement and subsequent myelopathy as well as the intervening surgery were a direct result of his fall at work." On June 18, 2012, Dr. Drye noted Clemmons "denies any radicular symptoms down the leg and continues to have some altered gait from his previous myelopathy as well as a long-standing, pre-injury inversion to his right foot and ankle." Although the June 18, 2012 report implies that Clemmons's myelopathy existed prior to his work-related injury, which contradicts the November 30, 2010 report, it was the Appellate Panel's duty as the factfinder to resolve this contradiction. *See Mullinax*, 318 S.C. at 435, 458 S.E.2d at 78 ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive."). Therefore, we find no error because this issue concerned a question of the weight assigned to the evidence.

CONCLUSION

Based on the foregoing, the Appellate Panel's decision is

AFFIRMED.

FEW, C.J., and McDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bluffton Towne Center, LLC, Respondent,

v.

Beth Ann Gilleland-Prince d/b/a The Law Office of Beth Ann Gilleland, LLC, Appellant.

Appellate Case No. 2013-000305

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5309
Heard November 4, 2014 – Filed April 1, 2015

AFFIRMED AS MODIFIED

Beth Ann Prince, pro se, for Appellant.

Russell Pierce Patterson, of Russell P. Patterson, P.A., of Hilton Head Island, for Respondent.

WILLIAMS, J.: In this civil matter, Beth Ann Prince (Tenant) appeals the master-in-equity's order awarding Bluffton Towne Center, LLC (BTC) $35,784 in rent and late fees for Tenant's breach of a commercial lease. Tenant argues the master erred in (1) finding the lease was terminated by abandonment; (2) finding Tenant was liable for future rents under the lease; (3) considering extrinsic evidence after finding the lease unambiguous; (4) not allowing Tenant to cross-examine Paul Watson, the managing member of BTC, about specific language in

the subject lease and language in two subsequent leases BTC entered into with different parties; and (5) failing to recognize the lease was ambiguous. We affirm as modified.

FACTS/PROCEDURAL HISTORY

On January 1, 2009, BTC entered into a commercial lease agreement with Tenant for office space in Bluffton, South Carolina. Under the three-year term lease, Tenant was required to make monthly rental payments of $1,825 from January 1, 2009, to December 31, 2011. At issue in this case is the default provision of the lease:

> **DEFAULTS.** Tenant shall be in default of this Lease if Tenant fails to fulfill any lease obligation or term by which Tenant is bound. Subject to any governing provisions of law to the contrary, if Tenant fails to cure any financial obligation within 10 days (or any other obligation within 30 days) after written notice of such default is provided by [BTC] to Tenant, [BTC] may take possession of the Premises without further notice (to the extent permitted by law), and without prejudicing [its] rights to damages. In the alternative, [BTC] may elect to cure any default and the cost of such action shall be added to Tenant's financial obligations under this Lease. Tenant shall pay all costs, damages, and expenses (including reasonable attorney fees and expenses) suffered by [BTC] by reason of Tenant's defaults. All sums of money or charges required to be paid by Tenant under this Lease shall be additional rent, whether or not such sums or charges are designated as "additional rent."

On December 18, 2009, Tenant emailed Watson to inform him she was closing her law practice. In the email, Tenant noted she would need to stay in the space through the end of January and "possibly some of February." She further stated, "I hope that you and I will be able to work something out amicably[] because I realize that the lease will not expire for another year. . . . I will also keep my eyes and ears open for anyone who may want the space." Watson responded to the email on the same day, stating he was not willing to forgive the remaining balance and assumed Tenant would honor her obligation under the lease.

On February 26, 2010, after Tenant defaulted on her rent payment for that month, Watson sent Tenant a written ten-day notice to pay or quit the premises. The notice stated, "You are hereby notified that you have ten (10) days to pay to the undersigned office rent now due from you in the amount of $1,875.00 as set forth below, or your right to possession of the . . . premises will cease and you must quit same." The notice further contained the following language:

> In the event you do not satisfy all the requirements of this ten (10) day notice by paying . . . [$1,875] and do either voluntarily or by court leave the premises, you will still be obligated and responsible for payment of monies set forth below, together with any additional costs, legal fees, expenses[,] and rents that continue to accrue under the terms of the lease because of non-payment.

Tenant did not respond, and on March 28, 2010, BTC's counsel emailed Tenant requesting that she (1) remove all of her possessions from the space, (2) pay the rent due for February and March 2010, (3) continue to make monthly payments until the space was relet, and (4) pass along the names of any potential tenants to BTC's rental agent. His email further stated if they could not reach an agreement along those lines, BTC would be forced to file an ejectment action and suit for back rent. In Tenant's email response, she explained that filing an ejectment action was unnecessary because she vacated the unit at the beginning of February 2010. Tenant further stated, "I am happy to assist in getting the place rerented, however, I am simply unable to pay the back rent, or else I would pay it."

BTC subsequently retrieved the keys from Tenant in April 2010. For the remainder of the lease term, BTC rented the unit to two separate tenants at reduced rates. In a March 9, 2012 letter, BTC's counsel informed Tenant she owed $34,850, but said he wanted to give her "an opportunity to try to work out a resolution of this matter" prior to filing an action for damages pursuant to the lease.

After the lease term expired, BTC filed suit for damages on April 16, 2012. The matter was tried before the master-in-equity for Beaufort County, South Carolina, on October 26, 2012.

At trial, Watson testified on behalf of BTC, and on cross-examination, Tenant questioned Watson regarding the sequence of events as well as the correspondence between the parties after Tenant defaulted under the lease. Tenant attempted to

elicit testimony from Watson regarding specific language in the subject lease. BTC objected to the line of questioning, arguing Tenant was improperly seeking Watson's legal interpretation of the lease, and the master sustained the objection. Tenant further tried to elicit testimony from Watson regarding language in two subsequent leases BTC entered into with different parties. BTC, however, objected on relevance grounds, and the master sustained the objection.

On December 26, 2012, the master issued an order granting judgment to BTC in the amount of $39,627.55. In his order, the master concluded the holding in *Simon v. Kirkpatrick*, 141 S.C. 251, 139 S.E.2d 614 (1927)—that a lessor's termination of the lease absolves a lessee from future obligations unless the lease provides the lessee is not relieved of such obligations—"does not state the modern law of damages for the breach of a lease in South Carolina today." Instead, the master found *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956), states the modern rule for damages a landlord may recover for a tenant's breach of the lease, holding Tenant was liable for future rents as damages under this rule. The master concluded in the alternative that, even if *Simon* remains valid law, BTC was still entitled to recover future rents because it reserved the right to all damages in the default provision of the subject lease. This appeal followed.

ISSUES ON APPEAL

I. Did the master err in finding Tenant terminated the subject lease by abandonment?

II. Did the master err in finding that *Simon* is no longer valid law and, pursuant to the ruling in *U.S. Rubber*, Tenant was responsible for future rents as damages to BTC under the default provision in the subject lease?

III. Did the master err in considering extrinsic evidence after finding the subject lease was unambiguous?

IV. Did the master err in not allowing Tenant to cross-examine Watson regarding language in the subject lease as well as language in two subsequent leases BTC entered into with different parties?

V. Did the master err in failing to recognize the lease was ambiguous?

STANDARD OF REVIEW

"A lease agreement is a contract, and an action to construe a contract is an action at law." *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) (citations omitted). "An action for breach of contract seeking money damages is an action at law." *Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013) (citing *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541–42 (Ct. App. 2008)). When reviewing a master-in-equity's judgment made in an action at law, "the appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." *Silver*, 376 S.C. at 590, 658 S.E.2d at 542. Nevertheless, the "reviewing court is free to decide questions of law with no particular deference to the [master]." *Id.* (quoting *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004)) (internal quotation marks omitted).

LAW/ANALYSIS

I. Termination by Abandonment

Tenant first argues the master erred in finding the subject lease was terminated by abandonment. According to Tenant, Watson's ten-day notice to pay or quit the premises was the equivalent of a termination by eviction. We disagree.

Any act that involves the "direct deprivation of possession" or "so affects the tenant's enjoyment of the premises" that the tenant relinquishes possession is an eviction. *Thomas v. Hancock*, 271 S.C. 273, 275, 246 S.E.2d 604, 605 (1978) (citation omitted). The act, however, must provide the tenant with a legal justification for relinquishing possession. *Id.* (citation omitted). Conversely, a tenant's abandonment—or voluntary surrender of possession—of leased premises does not constitute an eviction. *See id.* at 275, 246 S.E.2d at 606 (citation omitted).

Our supreme court has held "the relationship of landlord and tenant is terminated where the lessor, for his own purposes, re-enters and relets the demised premises upon the lessee's abandonment of the property and default in the payment of the rent." *Sur. Realty Corp. v. Asmer*, 249 S.C. 114, 119, 153 S.E.2d 125, 128 (1967) (citing *U.S. Rubber*, 231 S.C. at 95, 97 S.E.2d at 409). Nevertheless, "[w]hen a tenant delivers the keys of the leased premises to the landlord[,] and he receives them so as to be able to rent the premises for the account of the lessee, such is insufficient to terminate the lease or release the tenant from further liability for rent." *Id.* (citations omitted).

In the instant case, we find Tenant abandoned the leased premises. In a March 28, 2010 email, Tenant stated she had "vacated the unit at the beginning of February." She further explained that "[f]iling an ejectment action [was] simply unnecessary" because she had "been out of the unit for nearly two months, as Mr. Watson requested." Moreover, Tenant voluntarily surrendered possession of the premises by turning over the keys to BTC in April 2010. Because Tenant returned her keys and admitted to voluntarily vacating the leased premises prior to the February 26, 2010 notice to pay or quit the premises, the record simply does not support her argument that BTC evicted her and terminated the lease via the notice.

Based on the foregoing, we find the master properly concluded that BTC terminated the subject lease upon Tenant's abandonment by reentering and reletting the premises.

II. Damages Recoverable for Breach of a Commercial Lease

Next, Tenant argues the master erred in concluding *Simon* is no longer valid law and holding *U.S. Rubber* states the modern rule for damages recoverable for breach of a lease. While we agree the master erred in concluding *Simon* was overruled by *U.S. Rubber*, we find the master properly held BTC was entitled to recover future rents as damages under the theories of both *Simon* and *U.S. Rubber*.

A. *Simon* Remains Valid Law

As a preliminary matter, we find the master erred in concluding the rule set forth in *Simon* is no longer a valid statement of the law.

In his order, the master concluded—without further explanation—that *Simon* is no longer valid and does not set forth "the modern law of damages for the breach of a lease in South Carolina today." The master, however, failed to cite any case in which a court overruled *Simon* or gave its ruling negative treatment. Indeed, a review of the relevant case law reveals that *Simon* has not been overruled and, in fact, courts have cited its propositions with approval. *See, e.g.*, *U.S. Rubber*, 231 S.C. at 95, 97 S.E.2d at 409 (citing *Simon* for the proposition that, upon the lessor's reentry and reletting of the premises following the lessee's abandonment of the property, the lessor–lessee or landlord–tenant relationship came to an end); *Camden Inv. Co. v. Gibson*, 204 S.C. 513, 518–19, 30 S.E.2d 305, 307 (1944) (citing *Simon* as outlining the proper elements of damages available for breach of a lease contract).

Therefore, contrary to the master's findings, we hold that *Simon* remains valid law.

B. Liability Under *Simon* and *U.S. Rubber*

Although the master erred in concluding *Simon* is no longer valid law, we find he correctly concluded—in the alternative—that BTC was entitled to recover future rents under the damages term in the lease pursuant to *Simon*. Accordingly, we affirm as modified the portion of the master's order in which he analyzed the validity and applicability of *Simon*'s holdings to the facts of this case.

In *Simon*, the lessor entered into a three-year written contract under which he leased a vacant lot to the lessee. 141 S.C. at 253, 139 S.E. at 615. The lease contained the following default provision:

> It is agreed that if there is default in the payment of rent above stipulated for as much as 60 days after same is due, . . . [the lessor] shall have the right to re-enter and repossess said premises, at his option[,] and to expel and remove therefrom . . . [the lessee] or any other person occupying the same.

Id. at 254, 139 S.E. at 615. After the lessee refused to take possession of the leased premises and defaulted on the payment of two months' rent, the lessor gave notice that he was terminating the lessee's rights under the lease and reentered the premises. *Id.* at 261, 139 S.E. at 618. The lessor's notice stated the following: "You are due me two (2) months' rent at one hundred and fifty dollars ($150) each as of September 1, 1924, you having failed to make payment as per terms of lease, are thereby precluded from any further right or benefit thereunder." *Id.* at 254–55, 139 S.E. at 615–16. When the lessee refused to pay the three years of rent due under the lease, the lessor filed an action against him for breach of contract. *Id.* at 253–54, 139 S.E. at 615.

Because the lessee in *Simon* never took possession of the premises and notified the lessor he did not intend to do so, our supreme court concluded the landlord–tenant relationship was never consummated and the parties' relationship, instead, was that of lessor and lessee under a written lease contract. *Id.* at 256, 139 S.E. at 616. The court further found it was clear that, when the lessee refused to fulfill his obligation under the lease by taking possession of the lot, he breached the contract and

became liable to the lessor for damages resulting from the breach. *Id.* at 258, 139 S.E. at 617.

Moreover, the court stated "[t]he measure of damages is the difference between the rent fixed in the lease and the rental value of the premises for the entire term, at the time of the breach, together with such special damages as [the lessor] may prove to have resulted from the breach." *Id.* at 259, 139 S.E. at 617. In addition to this option, the court stated the lessor could have waited until the term expired and, "upon a showing of reasonable efforts to minimize his damage, sued for the damage actually sustained, the agreed rental less rental which he had in the meantime received or with proper effort should have received." *Id.*

The lessor in *Simon*, however, was not required to adopt any of the above-mentioned remedies because the default provision of the lease provided for one. *Id.* In fact, as the court noted, the lessor chose to adopt the remedy provided for in the lease by sending the notice, precluding the lessee from any further rights or benefits under the lease. *Id.* at 259–60, 139 S.E. at 617. Because the lessor chose this method, the court found it was illogical and unfair to preclude the lessee from all rights and benefits under the lease, while simultaneously holding him liable for future obligations under it. *Id.* at 260, 139 S.E. at 617. According to the court, the applicable rule provides as follows:

> [T]he termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but it does absolve him from future obligations, unless the lease shall provide that, notwithstanding this termination for cause by the lessor, the lessee shall not be relieved of such future obligations. The lease in the case at bar does not carry a provision to the effect mentioned.

Id. at 262, 139 S.E. at 618 (citation omitted).

Unlike the provision at issue in *Simon*, the default provision in the subject lease expressly reserved BTC's right to recover all damages resulting from Tenant's breach after reentering the premises. The default provision in this case provides, in relevant part, that BTC "may take possession of the Premises . . . without prejudicing [its] rights to damages. . . . Tenant shall pay all costs, damages, and expenses (including reasonable attorney fees and expenses) suffered by [BTC] by reason of Tenant's default."

More importantly, unlike Tenant in this case, the lessee in *Simon* never actually took possession of the premises prior to the lessor sending a notice terminating his rights under the lease. The court in *Simon* was notably concerned with precluding the lessee from enjoying any rights and benefits under the lease, while also holding him responsible for the future obligations under it. In the instant case, however, Tenant occupied the leased premises for several years and renewed the subject lease prior to defaulting on rent payment and breaching the lease. Further, Tenant voluntarily abandoned the premises prior to Watson's notice to pay or quit, the effect of which was not to preclude her from entering the premises or exercising any rights or benefits under the lease.

The court in *Simon* found it would be unfair to hold the lessor "to a liability against which he could not have protected himself" when the lessor withdrew any consideration for the lessee's promise to pay rent and was enjoying the premises for his own benefit. *Id.* at 260–61, 139 S.E. at 617–18. The same cannot be said for the instant case. In fact, we believe it would be unfair to allow Tenant to simply abandon the leased premises and terminate rent payments at her own leisure—thereby breaching a written lease contract—without any consequence for such actions. In any event, we find that, under the rule in *Simon*, the default provision in the subject lease adequately provided for BTC's right to recover all damages upon Tenant's default in rent payments and breach of the lease.

Likewise, in *U.S. Rubber*, our supreme court faced a situation in which the lessor terminated the lease by reentering and reletting the property after the lessee abandoned the premises and defaulted in the payment of rent. 231 S.C. at 95, 97 S.E.2d at 409. Citing *Simon*, the court first noted that the landlord–tenant relationship came to an end upon termination of the lease and the tenant had no further obligation to the landlord for future rent thereafter. *Id.* (citing *Simon*, 141 S.C. at 261, 139 S.E. at 618). While the tenant no longer had an obligation for future rents, the court stated the tenant was still liable for damages resulting from its breach of contract. *Id.* The court explained that the measure for such damages was "the amount [the landlord] would have received as rent for the remainder of the term, had there been no default, less such amount as [it] may receive from the new tenant" because it was the landlord's duty to minimize any damages. *Id.* (citation omitted).

After a thorough review of the case law, we agree with BTC's contention that the above statement in *U.S. Rubber* is more reflective of the modern rule for damages recoverable upon the breach of a lease. In concluding the landlord was entitled to

recover damages due to the tenant's breach of contract, we find our supreme court in *U.S. Rubber* was merely expanding upon the *Simon* ruling and explaining a theory that has been adopted in this state as well as other jurisdictions. *See, e.g.*, *Richman v. Joray Corp.*, 183 F.2d 667, 671 (4th Cir. 1950) ("It is the rule in South Carolina that when a lessee declines to perform his contract, a cause of action immediately arises in favor of the lessor for full damages, present and prospective, which were the necessary and direct result of the breach; and the measure of the damages is the difference between the rent fixed in the lease and the rental value of the premises for the entire term at the time of the breach, together with such special damages as may have resulted from the breach."). Therefore, we hold that *Simon* and *U.S. Rubber* are not mutually exclusive of one another and may be read together.

Although the landlord–tenant relationship was terminated by Tenant's abandonment and BTC's reentry and reletting of the premises in the instant case, we find this sequence of events did not affect Tenant's contractual liability to BTC under the lease. Accordingly, we find the master properly concluded BTC was entitled to damages measured by the amount BTC would have received as rent for the remainder of Tenant's term had there been no default, less the amount of rent BTC received from the two subsequent tenants it acquired in an effort to mitigate damages. *See U.S. Rubber*, 231 S.C. at 95, 97 S.E.2d at 409.

Because we find BTC was entitled to recover under the theories of both *Simon* and *U.S. Rubber*, we affirm the master's ruling as modified.

III. "Damages" Term in the Subject Lease

Additionally, Tenant argues the master erred in construing the "damages" term in the subject lease to entitle BTC to recover future rents. We disagree.

Courts should construe contracts liberally "to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (citation omitted). When construing terms in a contract, a court "must first look at the language of the contract to determine the intentions of the parties." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted). Furthermore, a court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein. *Ecclesiastes Prod. Ministries*, 374 S.C. at 498, 649 S.E.2d at 502 (citation

omitted). If practical, a court should interpret the agreement so as to give effect to all of its provisions. *See id.* (citation omitted). "It is fundamental that[,] in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Id.* at 498–99, 649 S.E.2d at 502 (quoting *Brady v. Brady*, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952)). Generally, a contract is "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000)).

We find the master properly concluded the parties clearly and unambiguously intended for BTC to reserve all rights against Tenant for rents due during the full term of the lease. Unlike the lease at issue in *Simon*, the subject lease stated BTC could reenter and repossess the property without prejudicing its right to damages. Because the term "damages" was not specifically defined in the lease, the master had to first look to the four corners of the subject lease to determine the meaning and effect the parties intended to give the term. Not only did the lease reserve BTC's right to recover damages upon termination, but it also provided a specific damages formula in the default provision stating Tenant must pay all costs, damages, and expenses BTC suffers by reason of Tenant's default. The default provision further made clear that, upon termination of the lease, Tenant was not relieved of future obligations for damages resulting from her breach of the lease.

Reading the lease as a whole, we find the parties clearly and unambiguously intended that, upon default, Tenant would be liable to BTC for the rents due during the full term as damages. The "costs, *damages*, and expenses . . . suffered by [BTC] by reason of Tenant's defaults" undoubtedly includes the rent BTC was unable to recover during the remainder of the subject lease term due to Tenant's default. We find no other construction would provide full meaning to all of the terms in the lease.

Accordingly, we affirm the master's finding that BTC was entitled to recover future rents as damages from Tenant under the default provision of the lease.

IV. Extrinsic Evidence

Tenant also argues the master erroneously considered extrinsic evidence regarding the parties' intent after finding the subject lease was unambiguous. While we agree the master erred in admitting extrinsic evidence, we believe such error was harmless.

In construing or interpreting a contract, "it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (quoting *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984)) (internal quotation marks omitted). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Id.* (citation omitted). Moreover, "[i]f a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *Bates v. Lewis*, 311 S.C. 158, 161 n.1, 427 S.E.2d 907, 909 n.1 (Ct. App. 1993)) (internal quotation marks omitted); *see also Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 237 (Ct. App. 1987) ("No authority is needed for the proposition that extraneous evidence is not admissible to alter or vary the terms of an unambiguous written contract.").

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary[,] or explain the written instrument." *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) (citing *In re Estate of Holden*, 343 S.C. 267, 275, 539 S.E.2d 703, 708 (2000)). "Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties." *Id.* (citing *Holden*, 343 S.C. at 275–76, 539 S.E.2d at 708). Under the parol evidence rule, the terms of the writing are controlling, even if extrinsic evidence is admitted without objection or admitted over appropriate objection. *Adams v. Marchbanks*, 253 S.C. 280, 282, 170 S.E.2d 214, 215 (1969) (citations omitted).

In construing a master's order, an appellate court must do so in light of the master's intent "as discerned from the order as a whole." *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 123 n.1, 609 S.E.2d 811, 814 n.1 (Ct. App. 2005). "Adhering to this principle, this court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of

the issues presented." *Id.* (citing *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989)).

In this case, the master interpreted the default provision of the lease in paragraph 17 of his order and specifically reached the following conclusions:

> A more clear, unambiguous intention to reserve all rights against [Tenant] for the rents due during the full term is more difficult to imagine. Not only did [BTC] specifically reserve its right to damages (i.e., the recovery of future rents in the event of termination), but the lease provided a specific damage formula by providing [Tenant] must pay all costs, damages[,] and expenses as a result of default. It is clear the most critical, common[,] and obvious "damages" suffered by a [landlord] under a commercial lease is the payment of rent, which is the primary monetary obligation of the [tenant]. No other construction would provide full meaning to all of the terms of the Lease.

In paragraphs 18(a)–(c) and 19, however, the master discussed the correspondence between the parties, noting it was further evidence that BTC and Tenant construed the subject lease as an obligation for Tenant to pay future rents. Tenant argues that, by referencing certain testimony and exhibits to support his interpretation of the lease, the master erred in considering extrinsic evidence outside the four corners of the contract. We agree, but we find the master's error was harmless.

Based upon our review of the order as a whole, we find any error in considering extrinsic evidence was harmless because it is reasonable to infer the master was simply setting forth alternative grounds for his interpretation of the contract. *See Williams*, 363 S.C. at 123 n.1, 609 S.E.2d at 814 n.1 (noting that, in construing a judge's order, an appellate court must do so in light of the judge's intent "as discerned from the order as a whole"); *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 336, 676 S.E.2d 139, 145 (Ct. App. 2009) (stating it was "reasonable to infer that the circuit court was setting forth alternative grounds for its interpretation of the contract" by referencing certain testimony and exhibits in its order). Furthermore, the master's interpretation—based on the extrinsic evidence presented at trial—was consistent with the contract's language. *See Laser Supply*, 382 S.C. at 336, 676 S.E.2d at 145; *see also Jensen v. Conrad*, 292 S.C.

169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987) (holding a judgment will not be reversed for insubstantial errors that do not affect the result).

Accordingly, while the master erred in referencing extrinsic evidence in his order, we find the master was merely setting forth alternative grounds for his interpretation that the damages term in the lease unambiguously entitled BTC to future rents. Thus, we affirm the master's conclusion on this point because any error in referencing the extrinsic evidence was harmless, particularly when the master's interpretation was consistent with the contract's language.

V. Tenant's Cross-Examination of Landlord

Tenant further argues the master abused his discretion by not allowing her to cross-examine Watson about language in the subject lease as well as language in two subsequent leases BTC entered into with different parties. We disagree.

A. Language in the Subject Lease

Tenant contends the master erred in sustaining BTC's objection to the line of questioning during her cross-examination of Watson regarding BTC's intent behind specific language in the subject lease. Tenant argues that, because the master considered extrinsic evidence in reaching his decision, he abused his discretion by not allowing her to introduce evidence regarding intent. We find this issue is not properly preserved for appellate review.

"An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011); *see also S.C. Dep't of Soc. Servs. v. Mother*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (finding an issue abandoned because the appellant made "a conclusory argument without citation of any authority to support her claim"); *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) ("Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.").

In her brief, Tenant merely provided a recitation of the trial transcript and made a conclusory argument, while citing no legal authority to support her claim. Therefore, we find this issue is abandoned and not preserved for appellate review. *See Hunt*, 358 S.C. at 573, 595 S.E.2d at 851.

B. Language in Two Subsequent Leases

Tenant next contends the master erred in sustaining BTC's objection to the line of questioning during her cross-examination of Watson regarding language in two subsequent leases BTC entered into with two different tenants. Specifically, Tenant claims the master improperly sustained BTC's objection "on the grounds of inadmissibility as a subsequent remedial measure" pursuant to Rule 407, SCRE.[1] We find this issue is not properly preserved for appellate review.

Because the master clearly sustained BTC's objection on relevance grounds, Tenant's argument that he committed legal error by sustaining the objection pursuant to Rule 407, SCRE, is without merit. Aside from Rule 407, Tenant failed to cite any authority in support of her conclusory argument that the master erred in sustaining BTC's objection. Therefore, we find this issue is abandoned and not preserved for appellate review. *See Hunt*, 358 S.C. at 573, 595 S.E.2d at 851.

VI. Ambiguity

Finally, Tenant argues the master erred by failing to recognize the lease terms were ambiguous. We find this issue is not preserved for appellate review.

"It is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)) (internal quotation marks omitted). An argument not presented to the master on the record is not preserved for appellate review. *See Knight v. Waggoner*, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004) (stating appellants' justifications for a specific finding were asserted for the first time on appeal and, therefore, were not preserved for appellate review); *Wilson v. Builders Transp., Inc.*, 330 S.C. 287, 294, 498 S.E.2d 674, 678 (Ct. App. 1998) (finding that an argument not presented to the trial court on the record is not preserved for appellate review).

[1] Under Rule 407, SCRE, "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."

Based upon our review of the record, Tenant never argued to the master that the terms of the contract were ambiguous. In fact, when the master stated "no one told [him] that this is an ambiguous contract," Tenant replied, "I have not said it is an ambiguous contract." Therefore, we find Tenant's ambiguity argument is not preserved for appellate review because it was not raised to and ruled upon by the master.[2] *See Knight*, 359 S.C. at 496, 597 S.E.2d at 896; *Wilson*, 330 S.C. at 294, 498 S.E.2d at 678.

CONCLUSION

Based on the foregoing analysis, the master's decision is

AFFIRMED AS MODIFIED.

GEATHERS and McDONALD, JJ., concur.

[2] Tenant also argues the master erred in not construing ambiguous terms against the drafter of the lease. In light of our finding that Tenant's ambiguity argument is not preserved, we need not reach the second prong of Tenant's argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Rickerson, Appellant,

v.

John Karl, M.D. and Virginia Bell, CS, FNP,
Respondents.

Appellate Case No. 2013-001478

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5310
Heard January 6, 2015 – Filed April 1, 2015

REVERSED AND REMANDED

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Appellant.

Marian Williams Scalise and Lydia Lewis Magee, both of Myrtle Beach, and Sheila Marlouvon Bias, of Columbia, all of Richardson Plowden & Robinson, PA, for Respondents.

GEATHERS, J.: Appellant Thomas Rickerson appeals the trial court's dismissal of his notice of intent to file suit (NOI) with prejudice after Rickerson failed to comply with the mandatory mediation requirement of section 15-79-125 of the

South Carolina Code (Supp. 2014). We reverse the trial court's decision and remand this case.

FACTS/PROCEDURAL HISTORY

This appeal arises out of a medical malpractice case. Rickerson alleged that an antibiotic prescribed to him by Dr. John Karl and nurse practitioner and clinical specialist Virginia Bell (collectively, Respondents) negatively interacted with medication that had previously been prescribed for him by other physicians. As a result, Rickerson developed complications, including bleeding and renal failure, and had to be hospitalized.

On May 15, 2012, Rickerson filed an NOI pursuant to section 15-79-125,[1] which requires that parties in a medical malpractice action participate in a mediation conference within 120 days after the service of an NOI. Rickerson failed to state in the NOI that the case was subject to mandatory mediation and failed to include a line for the clerk of court to write in the name of a mediator.[2] Over the next few months, Respondents made numerous requests for Rickerson's medical records, and Rickerson authorized their collection of the records. During this time, the

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[1] Section 15-79-125 governs the prelitigation requirements for medical malpractice cases. Specifically, section 15-79-125 requires that a plaintiff, prior to filing or initiating a medical malpractice claim, "contemporaneously file [an NOI] and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100." § 15-79-125(A). "Filing the [NOI] tolls all applicable statutes of limitations." *Id.* Thereafter, the parties engage in discovery. § 15-79-125(B). Within ninety days and no later than 120 days from the service of the NOI, the parties must participate in a mediation conference. § 15-79-125(C). If the matter is not resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint. § 15-79-125(E).

[2] Rule 4(c) of the South Carolina Alternative Dispute Resolution Rules (SCADRR) states that in cases subject to presuit mediation under section 15-79-125(C), the NOI "shall contain language directed to the defendant(s) that the dispute is subject to pre-suit mediation within 120 days and must contain a place for the names of the primary and secondary mediators." It further states that "the [c]lerk of [c]ourt shall appoint a primary mediator and a secondary mediator" when the NOI is filed. Rule 4(c), SCADRR.

parties did not discuss mediation and made no attempt to schedule the mandatory mediation conference.

On December 13, 2012, the clerk of court filed a notice of alternative dispute resolution (ADR) and appointed a mediator to the case. After Rickerson received the notice, he contacted Respondents to set a date and time for mediation, but Respondents did not respond to the scheduling inquiry. Rickerson subsequently contacted the court-appointed mediator and requested that the mediator schedule the mediation for January 22, 2013.

Rickerson mailed a letter to Respondents on December 20, 2012, notifying them that he had scheduled a mediation conference with the court-appointed mediator; however, that same day, Respondents filed a motion to dismiss. In the motion, they contended the case should be dismissed with prejudice because the mediation conference had not been held within the 120-day statutory time frame.[3]

Because the statute of limitations had not yet run,[4] Rickerson filed an amended NOI on January 4, 2013, notwithstanding the pending motion to dismiss. Unlike the initial NOI, the amended NOI contained the name of the court-appointed mediator and the required statement that the case was subject to presuit mediation pursuant to section 15-79-125(C).

The court-appointed mediator later contacted the parties to reschedule the mediation. Rickerson agreed to mediate the case at a later date, but Respondents refused. In a letter to the mediator, Respondents stated that Rickerson failed to propose dates for presuit mediation within the statutory time frame and did not request an extension from the trial court. They further asserted that because the NOI should be dismissed, "no authority exist[ed] statutorily for the holding of the

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[3] Rickerson served the last defendant with the NOI on June 19, 2012; thus, to comply with the 120-day statutory deadline, mediation should have occurred by October 17, 2012.

[4] The statute of limitations for medical malpractice actions is three years "from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A) (2005). Rickerson's complications arose in July 2011; therefore, the statute of limitations would have run in July 2014.

pre-suit mediation." In a subsequent letter, the mediator stated that because of the "conflicting positions regarding the intent of the parties to mediate [the] case," he thought it would be inappropriate for him to issue a mediation results report to the court. Instead, he recommended the parties direct the dispute to the trial court for adjudication.

The trial court held a hearing on Respondents' motion to dismiss in April 2013. During the hearing, the court focused on the fact that no attempt had been made to schedule mediation until more than two months after the 120-day presuit mediation deadline.

The following month, the trial court issued an order of dismissal. In the order, the court stated that Rule 37(b), SCRCP, "authorizes dismissal of an action with prejudice as a lawful sanction." It determined that the sanction of dismissal was warranted in this case and granted Respondents' motion to dismiss Rickerson's NOI with prejudice. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in dismissing Rickerson's NOI with prejudice after he failed to comply with the 120-day mediation deadline set forth in section 15-79-125(C)?

STANDARD OF REVIEW

The decision of whether to impose sanctions is generally entrusted to the sound discretion of the trial court. *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). This court will not interfere with a trial court's exercise of its discretion with respect to the imposition of sanctions unless an abuse of discretion has occurred. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). The party appealing the order has the burden of establishing that the trial court abused its discretion. *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

LAW/ANALYSIS

Rickerson argues the trial court erred in dismissing the NOI with prejudice because the sanction of dismissal was not warranted under the circumstances and because the statutory time frame of section 15-79-125 was not jurisdictional. We agree the trial court is not divested of jurisdiction in the instant case. We also agree that the sanction of dismissal with prejudice was not warranted under the circumstances of this case.

Our legislature enacted section 15-79-125 as part of the Tort Reform Act of 2005 Relating to Medical Malpractice, which requires that a medical malpractice plaintiff file and serve the NOI before the plaintiff may initiate a civil action. § 15-79-125(A). After the plaintiff serves the NOI, the parties are required to participate in a mediation conference. Specifically, subsection (C) provides:

> Within ninety days and no later than one hundred twenty days from the service of the [NOI], the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.

§ 15-79-125(C).

Subsection (C) does not list any consequences for failing to timely comply with the mediation conference requirement. It does, however, provide that the mediation process is governed by the ADR rules,[5] unless the rules are inconsistent with the statute. § 15-79-125(C).

Rule 10(b), SCADRR, provides that if a party fails to comply with the ADR rules, "the court may . . . impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP." Under Rule 37(b)(2)(C), SCRCP, the trial court may impose sanctions such as striking pleadings, rendering a default judgment, or, as it did in the instant matter, dismissing the action.

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[5] Rule 1(c), SCADRR, also provides that the ADR rules "shall govern all mediations in [m]edical [m]alpractice actions as required by S.C. Code Ann. § 15-79-120 and S.C. Code Ann. § 15-79-125(C)."

"A dismissal under Rule 37(b)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion." *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). "When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of *bad faith, willful disobedience, or gross indifference* to the rights of the adverse party. *Id.* at 198-99, 511 S.E.2d at 719 (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991)). "[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

In those cases in which South Carolina appellate courts have reviewed dismissals of actions under Rule 37(b)(2)(C), the courts have generally upheld the trial court's decision to use dismissal as a sanction only when necessary to protect the rules of discovery or when there was evidence of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants. In *Davis v. Parkview Apartments*, our supreme court affirmed the trial court's issuance of a dismissal order as a sanction. 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014). The court determined that the sanctions imposed were not unduly harsh in light of the appellants' willful and repeated failure to comply with various orders of the trial court, which resulted in unnecessary delay and prejudice to the respondents. *Id.*; *see also McNair v. Fairfield Cnty.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct. App. 2008) (finding "the severe sanction" of striking the defendant's answer appropriate in light of the defendant's failure to produce documents seven and a half months after the trial court granted plaintiff's motion to compel, which this court determined amounted to willful disobedience and resulted in delay and prejudice to the plaintiff's right to have the claim heard); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding the trial court properly considered the severity of the sanction when it struck a pleading based on the appellant's intentional defiance of the trial court's order and his willful destruction of evidence); *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511

S.E.2d at 719 (finding the striking of the defendant's answer as a discovery sanction was warranted based on the defendant's egregious failure to comply meaningfully with four prior orders compelling discovery, even after being warned of the consequences of its failure to comply and after being assessed attorney's fees).

On the other hand, a sanction amounting to a judgment of default or dismissal has been deemed "too severe" without a showing of intentional misconduct or willful disobedience. For example, in *Kershaw County Board of Education*, our supreme court determined that dismissal was too severe of a sanction for the plaintiff's failure to comply with a court order to notify the defendants before it removed asbestos. 302 S.C. at 394-95, 396 S.E.2d at 371-72. The court based this determination on the fact that dismissal would not protect the rules of discovery and there was no evidence of intentional misconduct by the plaintiff. *Id.* at 395, 396 S.E.2d at 372; *see also Orlando v. Boyd*, 320 S.C. 509, 511-12, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of intentional misconduct when exclusion amounted to a judgment of default or dismissal); *Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 129-30, 378 S.E.2d 599, 601 (1989) (holding a $100 fine, not dismissal with prejudice, was the appropriate sanction for the eight plaintiffs' failure to answer interrogatories even despite warnings from the trial court and prior sanctions because the requesting party had not been prejudiced by not receiving formal responses to the interrogatories).

Moreover, in several recent decisions, our supreme court has chosen to reverse dismissals based on a technical application of the requirements of section 15-79-125 in favor of allowing cases to proceed on the merits. In *Ross v. Waccamaw Community Hospital*, our supreme court addressed the consequences of failing to comply with the prelitigation mediation requirement of section 15-79-125. 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013). The court rejected the argument that noncompliance mandated a penalty of dismissal for lack of subject matter jurisdiction, determining the mediation time period set forth in section 15-79-125 was not intended to place limitations on the trial court's subject matter jurisdiction. *Id.* at 63-64, 744 S.E.2d at 550-51. Instead, it held that "failing to comply with the 120-day statutory time period is a non-jurisdictional procedural defect." *Id.* at 64, 744 S.E.2d at 551. It further found the trial court "retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of estoppel and waiver to excuse noncompliance." *Id.*

The *Ross* court clarified that the 120-day time period for mediation was not meaningless and could result in dismissal; however, it emphasized that a dismissal is "a function of the court's discretion based on the facts and circumstances," not "a mandated one-size-fits-all result." *Id.* It explained that "the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Id.* at 63, 744 S.E.2d at 550. Consequently, the court expressly declined to "construe section 15-79-125 as a trap for plaintiffs with potentially meritorious claims"; instead, it stated that courts should "avoid dismissal of cases on technical grounds and . . . allow adjudication on the merits." *Id.* at 63, 65, 744 S.E.2d at 550-51 (quoting *Schulz v. Nienhuis*, 448 N.W.2d 655, 658-59 (Wis. 1989)); *see also Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 174, 763 S.E.2d 426, 432 (2014) (discussing the supreme court's intent "to permit medical malpractice cases to proceed on the merits rather than to affirm unwarranted dismissals based on technical noncompliance with the medical malpractice statutes"); *see, e.g., Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 540-41, 725 S.E.2d 693, 695, 698 (2012) (reversing the trial court's dismissal of the plaintiff's claim under section 15-79-125 and holding that the prelitigation expert affidavit does not need to include an opinion as to proximate cause and, therefore, the prelitigation affidavit was sufficient, allowing the medical malpractice claimant's case to proceed).

In this case, Rickerson filed his NOI in May 2012. The NOI did not include the required notice that the case was subject to mandatory presuit mediation pursuant to section 15-79-125. Further, the NOI did not contain a place where the clerk of court could fill in the names of a primary and secondary mediator. According to the parties, they did not discuss mandatory mediation at all during the 120-day time frame.

Although Rickerson failed to properly complete his NOI and failed to initiate the scheduling of mandatory mediation during the 120-day time frame, there is no indication that his failure to comply with the mandatory mediation requirement of section 15-79-125 was the product of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants. During the hearing on Respondents' motion to dismiss, Rickerson's counsel stated:

> The view that I took from the time limits that are set in the statute is that unless the parties were enforcing those and made an issue of those time limits, that as long as the discovery process was continuing to unfold and neither party was concerned about running out of time in order to mediate the case, that it would be acceptable to the parties to mediate the case when the parties became ready to do that.

Additionally, he pointed out that "there was an attempt to work with [Respondents], to cooperate in their collection of medical records." This statement is supported in the record. After Rickerson filed his NOI, Respondents' attorney filed numerous subpoenas for Rickerson's medical records, and Rickerson authorized Respondents' collection of the records.

Furthermore, once the clerk of court appointed a mediator in December 2012—after the mediation deadline imposed by section 15-79-125—Rickerson quickly contacted the court-appointed mediator to schedule the mediation conference. Although Respondents did not reply to Rickerson's scheduling inquiry, Rickerson scheduled the conference for January 22, 2013. Later, he was willing to reschedule after being notified that the mediator had a conflict.

The *Ross* court acknowledged that, under certain circumstances, dismissal may be an appropriate response to the failure to comply with the 120-day deadline. 404 S.C. at 64, 744 S.E.2d at 551. However, we do not find this to be a case in which a dismissal *with prejudice* is warranted. The purpose of the mandatory mediation requirement of section 15-79-125 is to foster the settlement of potentially meritorious claims and to discourage the filing of frivolous claims; therefore, a technical noncompliance with this statute, without bad faith, should not result in the dismissal of the case. *See id.* at 63, 65, 744 S.E.2d at 550-51. We reverse the trial court's dismissal of Rickerson's NOI with prejudice.[6]

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[6] In his brief, Rickerson raises several additional reasons why he believes the trial court erred in dismissing his NOI with prejudice. In light of our decision above, we need not address these arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing reasons, we reverse the trial court's order dismissing Rickerson's NOI with prejudice and remand the case to the trial court.

REVERSED AND REMANDED.

WILLIAMS and McDONALD, JJ., concur.