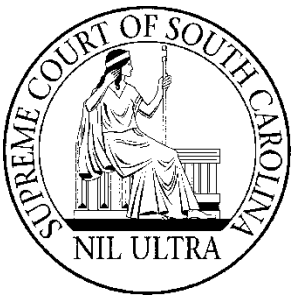


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 24**
**June 26, 2024**
**Patricia A. Howard, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Orthofix, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2023-000317

and

KCI USA, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2023-000318

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Appeal from Lexington County
William P. Keesley, Circuit Court Judge

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Opinion No. 28211
Heard March 5, 2024 – Filed June 26, 2024

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**AFFIRMED AS MODIFIED**

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Marcus Dawson Antley III and Jason Phillip Luther, both of Columbia, for Appellant.

James F. Reames III and Jennifer Joan Hollingsworth, both of Maynard Nexsen PC, of Columbia; Catherine A.

Battin, of McDermott Will & Emery, LLP, of Chicago, IL; and Michael J. Hilkin, of McDermott Will & Emery, LLP of New York, NY, all for Respondents.

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**JUSTICE KITTREDGE:** South Carolina law recognizes a sales tax exemption for the sale of durable medical equipment (DME) which is paid for directly by Medicaid or Medicare funds, but only when the seller's principal place of business is located in South Carolina (the DME exemption). *See* S.C. Code Ann. § 12-36-2120(74) (2014). Orthofix, Inc. and KCI USA, Inc. (collectively, Respondents) do not qualify for the DME exemption because their principal places of business are located out of state. As a result, purely because they participate in interstate commerce, Respondents have been forced to remit sales tax that other, similar in-state sellers have not. Respondents now raise identical dormant Commerce Clause challenges to the DME exemption. Agreeing with Respondents that the DME exemption facially discriminates against interstate commerce, the circuit court severed the unconstitutional "principal place of business in South Carolina" language from the DME exemption and ordered the South Carolina Department of Revenue (DOR) to refund the sales tax Respondents paid during the contested time periods.

We affirm the circuit court's decision as modified. We agree the DME exemption unconstitutionally discriminates against interstate commerce in violation of the dormant Commerce Clause and, under the facts of this case, the ordered refunds are therefore appropriate. However, because we find Respondents have not satisfied their burden of proof to show the legislature would have passed the remainder of the DME exemption absent the unconstitutional language, we decline to sever only the offending language and instead declare the entire DME exemption void going forward. We acknowledge our decision to invalidate the entire DME exemption presents a close question, as it is based on a lack of evidence regarding legislative intent rather than affirmative evidence to that effect. The legislature may, if it elects, reenact the exemption, save the unconstitutional limitation on a seller's principal place of business.

## I.

The facts have been stipulated by the parties and are not at issue here.

Respondents are both Delaware corporations, and each has its principal place of business out of state. They each hold a South Carolina retail sales license and sell

DME and related supplies in South Carolina.

Typically, under South Carolina law, a 6% sales tax is imposed on the gross proceeds of most sales in the state. S.C. Code Ann. §§ 12-36-910(A), -1110 (2014). However, section 12-36-2120 lists eighty-three categories of sales that are exempt from the standard 6% sales tax. *See generally id.* § 12-36-2120. At issue here is section 12-36-2120(74) (the DME exemption), which was enacted in 2007 and provides:

> Exempted from the [6% sales tax] are the gross proceeds of sales, or sales price of:
>
> . . . .
>
> (74) durable medical equipment and related supplies:
>
> (a) as defined under federal and state Medicaid and Medicare laws;
>
> (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
>
> (c) sold by a provider who holds a South Carolina retail sales license *and whose principal place of business is located in this State* . . . .

*Id.* § 12-36-2120(74) (emphasis added).

Respondents initially sold DME in South Carolina and remitted the 6% sales tax to the DOR without protest. Eventually, however, Respondents requested refunds for the sales tax paid during the period between October 1, 2014, and September 30, 2017 (KCI), and March 1, 2017, and March 31, 2020 (Orthofix).[1] The DOR denied the refund claims, explaining that Respondents did not qualify for the DME exemption because they had not satisfied the requirements of section

[1] *See* S.C. Code Ann. § 12-54-85(F)(1) (2014) ("[C]laims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later. . . .").

12-36-2120(74)(c). More specifically, the DOR denied the claims because Respondents' principal places of business were not in South Carolina.

Respondents separately appealed the decisions within the DOR, arguing that limiting the DME exemption only to sellers with principal places of business in South Carolina facially discriminated against out-of-state businesses, violating the dormant Commerce Clause of the United States Constitution. In response, the DOR issued two Department Determinations finding Respondents did "not meet the statutory requirements as written, [and therefore were] not entitled to a refund of sales tax paid for [DME]."[2]

Respondents each filed an action in the circuit court challenging the facial constitutionality of the DME exemption under the dormant Commerce Clause.[3] The DOR and Respondents then filed cross-motions for summary judgment in each case.

Following separate hearings, the circuit court granted summary judgment to each Respondent. The court found unconstitutional the DME exemption's facial discrimination against interstate commerce. Additionally, the court held the "principal place of business in South Carolina" requirement could be severed from the remainder of the DME exemption, thus extending the exemption's application to all sellers of DME, entitling Respondents to a refund.

The DOR directly appealed the circuit court's decisions to this Court, *see* Rule 203(d)(1)(A)(ii), SCACR, and we consolidated the cases for purposes of the appeals.

## II.

The Commerce Clause of the United States Constitution affirmatively grants

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[2] The Department Determinations did not address the impact, if any, of the dormant Commerce Clause on the DME exemption. This is completely understandable, however, given that an administrative agency has no authority to declare a state statute unconstitutional.

[3] Simultaneously, Respondents each filed a request for a contested case hearing with the Administrative Law Court (ALC). By agreement of the parties, the contested cases were stayed pending resolution of the circuit court actions. According to the parties, they consented to the stays because while the ALC can hold a statute unconstitutional as-applied, it does not have the authority to declare a statute facially unconstitutional.

Congress the power to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3 (providing Congress "shall have Power . . . [t]o regulate Commerce . . . among the several States"). Because the Constitution bestows authority over interstate commerce to Congress alone, the Commerce Clause impliedly limits states' regulatory powers in that arena. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); *Or. Waste Sys., Inc. v. Or. Dep't of Env't Quality*, 511 U.S. 93, 98 (1994). This implied "negative" aspect of the Commerce Clause limiting the states' ability to regulate interstate commerce is commonly referred to as the dormant Commerce Clause. *Fulton Corp.*, 516 U.S. at 330–31.

Broadly speaking, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Assoc'd Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (cleaned up). As a result, "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) (noting states "may not discriminate between transactions on the basis of some interstate element").

A state law that facially discriminates against interstate commerce is "virtually *per se* invalid." *Fulton Corp.*, 516 U.S. at 331; *Or. Waste Sys.*, 511 U.S. at 99 ("As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). In fact, "[F]acial discrimination by itself may be a fatal defect, regardless of the State's purpose, because the evil of protectionism can reside in legislative means as well as legislative ends." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (cleaned up) (explaining that in the case of a statute's facial discrimination against interstate commerce, courts must employ the "strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). As a result, courts will find improper economic protectionism if the law in question has either a discriminatory effect or a discriminatory purpose. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (internal citations omitted).

Here, we find the DME exemption has both a discriminatory effect *and* purpose. Looking first at the effect of the DME exemption, the statute clearly results in discrimination against interstate commerce on its face: a seller of DME with its principal place of business out-of-state is required to remit sales tax, whereas a similar seller of DME with its principal place of business in-state is not required to remit the tax. *See Fulton Corp.*, 516 U.S. at 333; *Bacchus Imps.*, 468 U.S. at 271

(striking down Hawaii's liquor tax exemption applicable only to locally produced brandy and wine, and explaining that "the effect [of Hawaii's tax exemption] is clearly discriminatory in that it applies only to locally produced beverages"). Indeed, the DOR offers no argument that the DME exemption does not have a discriminatory effect. The discriminatory effect of the DME exemption, standing alone, is sufficient for us to find the exemption violates the dormant Commerce Clause. *See Bacchus Imps.*, 468 U.S. at 270.

The DOR nonetheless argues the DME exemption is constitutional because it does not have a discriminatory purpose, and the differential treatment of in-state and out-of-state sellers is merely intended to "promote economic development" in South Carolina. However, "a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses." *Id.* at 272–73 ("States may not build up their domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States. Were it otherwise, the trade and business of the country would be at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States. It was to prohibit such a multiplication of preferential trade areas that the Commerce Clause was adopted." (cleaned up)); *id.* at 273 (finding unpersuasive Hawaii's argument that its legislature merely intended to promote local industry, rather than discriminate against foreign products, because if courts "were to accept that justification, [they] would have little occasion ever to find a statute unconstitutionally discriminatory"); *cf. Bos. Stock Exch.*, 429 U.S. at 326–28 (holding unconstitutional state tax benefits provided for the purpose of encouraging stock transactions on the New York Stock Exchange instead of out-of-state stock exchanges). Thus, we find the DME exemption also has a discriminatory purpose.

Accordingly, because the DOR has failed to "sho[w] that [the DME exemption] advances a *legitimate* local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,"[4] we conclude the DME exemption fosters the type of economic protectionism prohibited by the dormant Commerce Clause.

## III.

We emphasize we find unconstitutional only the portion of the DME exemption that requires a seller's principal place of business to be in-state in order to receive the

[4] *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis added).

sales tax exemption. The remainder of the DME exemption does not facially discriminate against interstate commerce and, thus, does not suffer from the same constitutional defect. Because only part of the DME exemption violates the dormant Commerce Clause, we next turn to the question of severability. *See Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 12, 413 S.E.2d 810, 814 (1992) ("A statute may be constitutional and valid in part and unconstitutional and invalid in part.").

"The test for severability is whether the constitutional portion of the statute remains complete in itself, [capable of being executed,] wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution." *Id.* at 13, 413 S.E.2d at 814–15 (cleaned up). Here, Respondents—as the proponents of the severability argument—bear the burden of showing not only that the unconstitutional part of the DME exemption is independent and separable from the remainder, but also that the legislature would have enacted the DME exemption even without the unconstitutional language.

We find Respondents have not carried this burden, albeit through no fault of their own: there is simply nothing in the legislative history of the DME exemption to suggest one way or the other whether the legislature would have passed the exemption absent the unconstitutional language. More specifically the legislature did not discuss or debate the unconstitutional language in the DME exemption whatsoever, leaving us no possible avenue to discern whether that portion of the statute was crucial to its decision to provide the exemption. Moreover, in the absence of clear evidence of the legislature's intent, the lack of a savings clause in the DME exemption is, perhaps, telling. *See S.C. Tax Comm'n v. United Oil Marketers, Inc.*, 306 S.C. 384, 389, 412 S.E.2d 402, 405 (1991) ("In the absence of a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effected as an entirety or not at all."); *cf. Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 654 (1999) (explaining the existence of a clearly worded savings clause "evidences strong legislative intent" for the distinct portions of a statute to be treated independently).

Accordingly, we find Respondents have not shown the unconstitutional portion of the statute is independent and severable from the remainder. We therefore declare the entire DME exemption invalid but, again, invite the legislature to reenact the exemption—without the unconstitutional language—if it finds such action appropriate.

## IV.

The State, through the DOR, cannot provide sales tax exemptions in a manner that discriminates against interstate commerce. We affirm the circuit court's decision declaring the "principal place of business in South Carolina" language of the DME exemption unconstitutional under the dormant Commerce Clause. However, because Respondents have not carried their burden to show the legislature's intent, we decline to sever the unconstitutional language and instead declare the entire DME exemption invalid. Under the facts of this case, we affirm the circuit court's decision to order refunds to Respondents for the sales tax imposed upon the DME they sold during the contested time periods.[5] However, having found the DME exemption as a whole is invalid, we assume going forward that all sellers of DME—including Respondents—will be required to pay sales tax unless and until the legislature enacts a new, modified DME exemption. The decision of the circuit court is therefore affirmed as modified.

**AFFIRMED AS MODIFIED.**

**BEATTY, C.J., FEW, JAMES and HILL, JJ., concur. FEW, J., concurring in a separate opinion.**

[5] The DOR conceded that, should its arguments not prevail, refunds were appropriate. However, because Orthofix requested a refund for a period of time greater than the three-year statute of limitations provided for in section 12-54-85(F)(1), we limit the refund to Orthofix to the amount of taxes paid under the DME exemption for the period between April 1, 2017, to March 31, 2020.

**JUSTICE FEW:** I completely agree with Justice Kittredge's analysis and result in this case. I write separately to explain one additional reason I have for refusing to sever the unconstitutional geographical limitation on eligibility from the durable medical equipment (DME) sales tax exemption.

Sales taxes, of course, provide revenue to the State. Exemptions to sales tax reduce revenue. When the General Assembly chooses to enact a sales tax exemption, it carefully studies the impact such an exemption will have on State revenue. The extent to which an exemption will affect State revenue is part of the basis on which the General Assembly decides whether to enact a particular exemption.

In this situation, the General Assembly chose to permit only South Carolina businesses to have the benefit of the DME exemption. This choice eliminated from State revenues only a portion of the total revenues the State would otherwise earn from sales tax on DME. In deciding to enact the exemption, therefore, the General Assembly considered only the impact the geographically limited exemption would have on the State's revenue. It did not consider the impact a geographically unlimited DME exemption would have. If this Court were to sever the unconstitutional geographic limitation from the DME exemption, thereby expanding the scope of the exemption to all sellers of DME, this Court would be making the decision to limit State revenue in a way never considered by the General Assembly.

The South Carolina Constitution grants the General Assembly the exclusive power to provide for the revenues and expenditures of State government. *See* S.C. CONST., art. X, § 7 ("The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue."); *see also* 1 James Lowell Underwood, *The Constitution of South Carolina: The Relationship of the Legislative, Executive, and Judicial Branches* 8 (1986) (identifying "three key points in the use of the power of the purse: (a) the budget planning process, (b) the tax-raising and appropriations processes, and (c) the administration of the expenditure of funds following the passage of money bills," and stating, "All three of these tentacles of fiscal power stem from a common conceptual core: the branch that controls the power to appropriate money must also participate in the budget planning and post-appropriations phases in order to make its fund allocation legislation effective, and in order to discharge the legislature's role as protector of the public fisc from the abusive use of the monetary power").

There are many instances in which the courts of this State make decisions through the "judicial power" granted to us pursuant to article V, section 1 of our Constitution that impact "the public fisc" in a retrospective manner. In this case, however, were this Court to sever the unconstitutional geographical limitation, thereby expanding the DME exemption, we would be prospectively reducing State revenue. Such a decision should be made by the General Assembly, and if this Court were to do it, our decision would violate article X, section 7 and the separation of powers provision of article I, section 8.

For this additional reason, I join the majority opinion.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Samuel Paulino, Claimant, Petitioner,

v.

Diversified Coatings, Inc., Employer, and Amguard Ins. Co., Carrier, Respondents.

Appellate Case No. 2022-001095

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from the Workers' Compensation Commission

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Opinion No. 28212
Heard March 5, 2024 – Filed June 26, 2024

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**REVERSED**

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Stephen N. Garcia, of Garcia Law Firm, LLC, of Greenville, for Petitioner.

George D. Gallagher, of Speed, Seta, Martin, Trivett & Stubley, and Fickling LLC, of Columbia, for Respondents.

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**JUSTICE FEW:** The workers' compensation commission awarded Samuel Paulino total and permanent disability benefits because it found he sustained a fifty percent or greater loss of use to his back. The court of appeals reversed the commission's

award "because there is no medical evidence in the record that supported the [commission's] findings." In making this ruling, the court of appeals misapplied the "substantial evidence" standard for reviewing decisions of the commission. We reverse the court of appeals and reinstate the commission's award.

## I. Facts and Procedural History

In February 2015, Samuel Paulino was injured while employed as a custodian at Diversified Coatings, Inc. Paulino has been out of work since the injury. Paulino went to Dr. Timothy McHenry complaining of constant pain in his back. McHenry recommended and performed surgery to treat "a right-sided paracentral herniation at L3-4." After the surgery, Paulino continued to experience pain, prompting further medical treatment, including physical therapy. He completed twelve sessions with a physical therapist, Kashmira Patel. However, Paulino did not progress as anticipated, and subsequent evaluations revealed ongoing pain and limited mobility, leading to adjustments in his medications and additional treatment such as epidural steroid injections.

Despite the treatment, Paulino's pain persisted. McHenry sent Paulino for another MRI because "patient has just not done as expected in the post-op period." The MRI revealed "no significant neurological impingement remain[ed]" and "no indication for further surgery." At the same appointment, McHenry also wrote Paulino "continues to do much worse than we think he should at this point" and "I can't work with his current symptoms." McHenry referred Paulino to Dr. Jyoti Math for pain management.

Math adjusted Paulino's medications and observed his difficulty walking and restricted lumbar range of motion. After a few appointments with Paulino, Math noted Paulino's clinical progression was "gradually worsening." Math also determined Paulino should not return to work until he underwent a functional capacity evaluation.

Hayley Drews—a physical therapist—conducted the functional capacity evaluation and noted Paulino achieved a physical demand characteristics level of "medium" and an occasional lift maximum of fifty pounds. Drews also highlighted significant limitations and difficulties in performing various tasks due to Paulino's ongoing pain.

At a follow-up visit after his functional capacity evaluation, Paulino told Math that he tried his best during the evaluation and his pain was aggravated after the evaluation for the next couple of days. He also told Math he was afraid he could not go back to work with the restrictions Drews recommended. Math noted that considering the duration of the pain, Paulino would most likely have chronic pain issues. Math recommended Paulino start a work conditioning program and not return to work without the proper conditioning. She wrote that Paulino had reached maximum medical improvement. On the same day, Math completed a Form 14B and provided that Paulino had a twelve percent permanent physical impairment to the lumbar spine. When asked what Paulino's "permanent physical limitations" were, Math provided: "Light work duty," "no lifting > 10 Lb.," and "needs work conditioning."

McHenry responded to a questionnaire sent by Paulino's attorney. McHenry stated Paulino had reached maximum medical improvement and assigned a thirteen percent impairment rating to the whole person. Dr. Glenn Scott—also at the request of Paulino's attorney—reviewed the functional capacity evaluation and wrote that Paulino "would not be able to sustain the workplace activities indicated by the FCE for a full eight hour day, particularly not on a day-after-day basis."

At a hearing before the single commissioner, Diversified argued Paulino was not permanently and totally disabled. Paulino argued he was permanently and totally disabled under either section 42-9-10 or 42-9-30(21) of the South Carolina Code (2015).[1] The commissioner received Paulino's medical records and heard his testimony. Paulino testified that he did not think he would currently last two hours at his job with Diversified because he would "have to exert a lot of force; you have to get down." Paulino testified the functional capacity evaluation was easier than his job at Diversified and that he was in "a lot of pain" when he took the evaluation. He said he needed help getting out of bed for three days following the evaluation.

The single commissioner found, "Pursuant to § 42-9-30(21), Claimant has sustained a greater than 50% disability to the spine, and therefore is permanently and totally

[1] Paulino also argued he suffered a compensable injury to his psyche. The single commissioner found Paulino had suffered an injury to his psyche under section 42-1-160 of the South Carolina Code (2015). The appellate panel affirmed that finding and it is not at issue on appeal.

disabled, and Defendants having failed to rebut that presumption, Claimant is thereby entitled to compensation under § 42-9-10(B)." The single commissioner also found Paulino's impairment ratings were low "based on the poor surgical result" and that "based on the medication list alone, [Paulino] has suffered a major disability." The appellate panel affirmed and adopted the same findings of fact and conclusions of law as the single commissioner.

The court of appeals reversed in an unpublished opinion. *Paulino v. Diversified Coatings, Inc.*, Op. No. 2022-UP-096 (S.C. Ct. App. filed Mar. 9, 2022). The court of appeals held "the Commission erred in affirming the single commissioner's determination that Claimant's back is impaired greater than fifty percent because there is no medical evidence in the record that supported the single commissioner's findings." 2022-UP-096, at *1. Paulino filed a petition for a writ of certiorari, which we granted.

## II. Standards for Decision by the Commission and Judicial Review

The commission decides questions of fact, S.C. Code Ann. § 1-23-380(5) (Supp. 2023), and it does so by the familiar preponderance of the evidence standard, *see Hill v. Jones*, 255 S.C. 219, 225, 178 S.E.2d 142, 145 (1970) (stating a claimant must "prove his right to benefits by the greater weight or preponderance of the evidence"); *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 209, 143 S.E.2d 376, 380 (1965) ("We have held in numerous cases that the claimants who assert their right to compensation must establish by the preponderance of the evidence the facts which will entitle them to an award . . . ." (citing *Glover v. Columbia Hosp. of Richland Cnty.*, 236 S.C. 410, 414, 114 S.E.2d 565, 567 (1960))).[2] Our standard for reviewing

[2] Our point here is exclusively that the commission uses the preponderance of evidence standard, and we are cautious about citing the "burden of proof" language in *Hill* and *Herndon*. Though Paulino clearly bore the burden of demonstrating he lost fifty percent or more of the use of his back, the claimant does not always bear the factual burden in workers' compensation cases. *See, e.g.*, *Pilgrim v. Eaton*, 391 S.C. 38, 49, 48-50, 703 S.E.2d 241, 246, 246-47 (Ct. App. 2010) (stating, "On the question of a burden of proof for the amount of compensation due for a compensable injury, the Workers' Compensation Act is silent, and our courts have hardly spoken," and discussing various scenarios). In fact, Diversified bore the burden of rebutting the presumption of total and permanent disability that arose under subsections 42-9-30(21) and 42-9-10(B).

the commission's factual findings is set forth in subsection 1-23-380(5)(e), which provides, "The court may reverse or modify" a decision from the workers' compensation commission if "the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See also Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017) ("The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission." (citing S.C. Code Ann. § 1-23-380 (Supp. 2015))). We have repeatedly stated, "'Substantial evidence' . . . is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached . . . to justify its action." *Clemmons*, 420 S.C. at 287, 803 S.E.2d at 270 (quoting *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000)); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted) (same). There is nothing in the commission's standard for decision nor in our standard of review that requires a claimant establish his claim by "medical evidence." The court of appeals erred by imposing such a standard.

## III. Analysis

Reviewing the commission's factual finding that Paulino suffered a fifty percent or greater loss of use of his back under the proper substantial evidence standard, we hold the commission's award is supported by substantial evidence and thus should have been affirmed.

Generally, the degree of a claimant's loss of use to a scheduled member is a question of fact for the commission. *Clemmons*, 420 S.C. at 288, 803 S.E.2d at 271. In *Clemmons*, however, we reversed the commission's factual finding that the claimant suffered less than a fifty percent loss of use of his back based primarily on the very high numerical impairment ratings given to him by multiple medical professionals. *Id.* We stated, "Every doctor and medical professional who assigned an *AMA Guides* impairment rating indicated Clemmons lost more than seventy percent of the use of his back, including Dr. Drye, whom the Commission particularly relied on in making its findings." *Id.* Thus, the medical evidence in *Clemmons* was overwhelming, leaving what we called "*no* evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back." *Id.*

The court of appeals relied on *Clemmons* in concluding there is "no medical evidence in the record" to support the commission's findings. Diversified, in turn, argues *Clemmons* stands for the proposition that doctors' medical impairment ratings are "virtually outcome determinative" of a claimant's entitlement to permanent and total disability compensation under subsection 42-9-30(21).[3] Diversified argues that even if impairment ratings do not control, they are "clearly the paramount factor for the Commission's consideration." It contends—still relying on *Clemmons*—the appellate panel erred by ignoring the controlling nature of the medical impairment ratings of twelve percent to the back from Math and thirteen percent to the whole person from McHenry. We do not discount the importance of medical impairment ratings given by the professionals treating an individual claimant, particularly when the commission finds those professionals to be credible. However, both the court of appeals and Diversified have overread *Clemmons*.

In *Clemmons*, the claimant underwent back surgery but continued to experience pain in his neck and back as well as difficulty balancing and walking. 420 S.C. at 285, 803 S.E.2d at 269. Two doctors and a physical therapist assigned him seventy-one, ninety-one, and ninety-nine percent impairment ratings to the spine. 420 S.C. at

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[3] Diversified also argues the appellate panel erred by finding Paulino's loss of use to his back was greater than fifty percent without specifying the exact percentage of the loss because in *Clemmons* this Court remanded to the commission for a new hearing in part to determine the percentage loss of use. However, there is nothing in subsection 42-9-30(21) that requires the commission to make a finding as to the exact percentage of a claimant's loss of use of his back when the loss is fifty percent or more. The statute simply establishes a rebuttable presumption a claimant is permanently and totally disabled "where there is fifty percent or more loss of use of the back." S.C. Code Ann. § 42-9-30(21). In *Clemmons*, we remanded to the commission primarily for its determination of whether the employer could rebut the presumption of total disability; we left no room for the commission to find less than a fifty percent loss of use to the back. 420 S.C. at 289-90, 803 S.E.2d at 272. Further, in *Linen v. Ruscon Construction Co.*, 286 S.C. 67, 332 S.E.2d 211 (1985), this Court affirmed the appellate panel's finding of over fifty percent loss of use to the back even though the panel did not provide an exact percentage. 286 S.C. at 69, 332 S.E.2d at 212. Thus, the appellate panel was not required to assign a precise disability rating to Paulino's back.

285-86, 803 S.E.2d at 269-70. The doctor that assigned him a seventy-one percent rating to his spine assigned a twenty-five percent rating to the whole person. 420 S.C. at 285, 803 S.E.2d at 269. The claimant also presented medical testimony from a separate doctor that the claimant lost more than fifty percent functional capacity to his back. 420 S.C. at 286, 803 S.E.2d at 270.

The court of appeals' and Diversified's reliance on *Clemmons* is misplaced because this case is distinguishable. Four doctors testified in that case the claimant suffered at least a fifty percent impairment rating to his spine, including two doctors who assigned ratings of over ninety percent. There was—we stated—"*no* evidence" to the contrary. 420 S.C. at 288, 803 S.E.2d at 271. Importantly, we did not hold a claim for benefits under section 42-9-30 must be proved by medical evidence, nor did we hold that medical evidence is conclusive. Instead, we explained that the record must be considered as a whole. 420 S.C. at 287, 803 S.E.2d at 270 (citing *Adams*, 341 S.C. at 404, 535 S.E.2d at 125).[4]

In many other cases, South Carolina courts have looked to additional evidence beyond medical professionals' impairment ratings to affirm the appellate panel's finding of loss of use to the back. *See, e.g.*, *Linen*, 286 S.C. at 68-70, 332 S.E.2d at 211-212 (affirming finding of fifty percent loss of use of the back based on other evidence in the record despite doctors assigning impairment ratings of 15% and 20%-30%); *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993) (affirming finding of a fifty-eight percent disability to the back based on testimony from the claimant); *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 291-93, 638 S.E.2d 66, 70-71 (Ct. App. 2006) (affirming finding of forty percent disability to the back based on claimant's testimony despite a doctor assigning an impairment ratings of eighteen percent to the lumbar spine); *c.f. Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("[M]edical testimony should not be held conclusive irrespective of other evidence." (quoting *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946))).

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[4] The court of appeals correctly recognized that, "Although medical evidence 'is entitled to great respect,' the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record." *Paulino*, 2022-UP-096, at *2 (quoting *Burnette v. City of Greenville*, 401 S.C. 417, 427, 737 S.E.2d 200, 206 (Ct. App. 2012)).

In *Linen*, the claimant received two doctors' impairment ratings of 15% and 20%-30%. 286 S.C. at 68-69, 332 S.E.2d at 212. The appellate panel awarded compensation for total and permanent disability for a fifty percent or more loss of use to the back. 286 S.C. at 68, 332 S.E.2d at 211. On appeal, this Court considered the testimony of the two doctors who assigned ratings, the claimant's testimony, and a vocational expert's testimony. *Id*. The doctors highlighted the claimant's physical limitations, including difficulty walking and bending down. 286 S.C. at 68-69, 332 S.E.2d at 212. The claimant testified about his severe lower back pain and limited standing and sitting capabilities, and he estimated a seventy-five percent loss of use to his back. 286 S.C. at 69, 332 S.E.2d at 212. The vocational expert testified that the claimant was not employable. *Id*. We affirmed because "the finding of fifty percent loss of use of the back [was] supported by substantial evidence." *Id*.

The "substantial evidence" standard of review requires courts to balance the evidence to determine whether it "would allow reasonable minds to reach the conclusion that the [commission] reached . . . ." *Clemmons*, 420 S.C. at 287, 803 S.E.2d at 270 (citation omitted). When considering the record as a whole—both medical evidence and non-medical evidence—if substantial evidence supports the commission's findings, the court must affirm.

Here, there is substantial evidence to support the commission's determination. Specifically, we discuss (1) the finding by the single commissioner about Paulino's "poor surgical result," (2) Paulino's functional capacity evaluation, and (3) Paulino's testimony and statements made to his doctors.

### i. Surgical Result

The appellate panel found, "Claimant's impairment ratings are very low based on the poor surgical result." The court of appeals focused on this finding, stating "no evidence in the record indicates a 'poor surgical result,'" and "we find the Commission erred in adopting this medical opinion of the single commissioner." *Paulino*, 2022-UP-096, at *1. We believe the court of appeals' emphasis on this finding was misplaced, as we read the statement to be more of an explanatory comment than a medical finding. Nevertheless, we discuss the evidence regarding whether Paulino's surgery alleviated his back impairment.

First, McHenry's surgery report does not indicate that Paulino's spine surgery was "a success," as the court of appeals wrote. *Paulino*, 2022-UP-096, at *1. McHenry never used the word "success." Notably, at the *same appointment* where McHenry reviewed the MRI results that indicated no significant impingement remained, McHenry wrote that Paulino "continues to do much worse than we think he should at this point." We read McHenry's notes regarding the MRI results to mean only that a second surgery would not alleviate Paulino's symptoms, which is not evidence of the first surgery being a success.

In addition, although McHenry stated Paulino was not a candidate for a second surgery, the record before the commission was replete with notes from McHenry, Math, and Patel indicating Paulino did not recover well from his first surgery. For example, McHenry reported "patient has just not done as expected in the post-op period" and that Paulino "[c]ontinues not to do well overall." At Paulino's final physical therapy appointment, Patel noted he had "not progressed as anticipated and pain has been a limiting factor." Math stated Paulino's clinical progression was "[g]radually worsening."

Finally, McHenry and Math prescribed heavy pain medications to Paulino at his appointments after the surgery. The appellate panel recognized this when it found, "based on the medication list alone, Claimant has suffered a major disability." Paulino was also treated with an injection to his back after he reported the medications were not helping adequately. All of this evidence supports the appellate panel's explanation that the impairment ratings given by Paulino's doctors were low because of his "poor surgical result."

### ii. Functional Capacity Evaluation

The appellate panel found, "Although Claimant was found to have completed his functional capacity evaluation dated November 20, 2017 at a medium demand level, various issues in completing the evaluation were noted." The notes from the functional capacity evaluation indicate Drews observed Paulino performing with significant issues during almost every exercise. For example, for an exercise that called for Paulino to walk for thirty minutes, Drews noted, "Aerobic capacity was unable to be determined because of intense pain and antalgic gait on treadmill." Drews wrote that Paulino "was unable to tolerate the 5% grade and the minimum 2.0mph walking speed to complete test." He was able to walk only at 1.5mph for twenty minutes "with significant compensations." For an exercise that called for

Paulino to stand still for thirty minutes, Drews wrote: "Frequent weight shift onto LEFT side, slow increase in pain reported in low back and numbness down R LE foot as stand progressed." The evaluation consisted of fourteen parts, and Drews documented various complications and pain for nearly every exercise.

Despite the extensive list of complications, the court of appeals focused on the conclusion that Paulino could perform medium work duties. *See Paulino*, 2022-UP-096, at *1 ("Claimant's physical therapist opined that he could perform medium work duties that involved flexing and rotating his lumbar spine."). However, after Math reviewed the functional capacity evaluation, she recommended Paulino not return to work without proper conditioning. Additionally, Math assigned permanent physical limitations of *light* work duties and no lifting greater than ten pounds. Scott—the doctor contacted by Paulino's attorneys—also reviewed the functional capacity evaluation report and concluded, "within a reasonable degree of medical certainty," that Paulino "would not be able to sustain the workplace activities indicated by the FCE for a full eight hour day, particularly not on a day-after-day basis." The complications Paulino experienced during the evaluation, along with the doctor's disagreement with Drews's recommendation, are evidence that support the appellate panel giving less weight to the "medium" work duties recommendation assigned at Paulino's functional capacity evaluation.

Further, Paulino's testimony indicates the results of the functional capacity evaluation might be incomplete. Paulino testified he was in "a lot of pain" while taking the evaluation and that he needed help getting out of bed for three days following the exam. Paulino testified the evaluation took only about two hours and twenty minutes, and he would not be able to take the same evaluation the very next day or do the evaluation for a full workweek.

#### iii. Paulino's Testimony and Statements to His Doctors

The court of appeals held that "because Claimant failed to rebut Dr. Math's twelve-percent impairment rating to his back with medical evidence, we find the Commission's findings of fact adopted from the single commissioner's order are inconclusive." *Paulino*, 2022-UP-096, at *2. The court of appeals explained:

> Because Claimant did not testify as to the character of his back injury, the specific ways his back injury prevents him

> from leading a normal life, the limitations the back injury places on his physical activities, and because he failed to present evidence of a . . . back impairment rating greater than twelve percent, we find substantial evidence does not support the Commission's finding as to the scheduled-member.

*Id*.

While Paulino did not testify extensively at the hearing about how the injury affected him, there is other evidence in the record from which it could be inferred. For example, at Paulino's December 6, 2017 appointment with Math, she wrote: "[Paulino] reports that his pain is activity limiting. He feels that his pain is not adequately controlled. Patient was concerned that he is not able to participate in his daily activities due to the pain." Paulino also told his doctors that he was experiencing pain in his back at every appointment. There is no indication in the medical records that the doctors who treated Paulino were skeptical in any way about what he told them. The single commissioner also did not question Paulino's credibility when he testified at the hearing. Instead, the single commissioner found that Paulino "was honest and clear in his testimony."

All of this evidence supports the appellate panel's conclusion that Paulino suffered a greater than fifty percent loss of use to his back. The medical records overwhelmingly document Paulino's struggles after surgery, with reports indicating his poor recovery and ongoing pain. The functional capacity evaluation highlighted Paulino's challenges in performing basic tasks. Paulino's own testimony, although mainly concerning his background and work history, corroborated his ongoing pain and activity limitations he consistently reported to his doctors.

We acknowledge it is a close call whether there is substantial evidence to support the commission's finding that Paulino suffered a more than fifty percent loss of use to his back in light of two impairment ratings below twenty percent. But our review is limited to a determination of whether the evidence as a whole "would allow reasonable minds to reach the conclusion that the [commission] reached . . . ." *Clemmons*, 420 S.C. at 287, 803 S.E.2d at 270 (citation omitted). In light of all the evidence presented to the commission, we hold that the appellate panel's decision was supported by substantial evidence.

## IV. Conclusion

For these reasons, we reverse the court of appeals and reinstate the appellate panel's order.

**REVERSED.**

**BEATTY, C.J., KITTREDGE, JAMES and HILL, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Respondent,

v.

Gabrielle Olivia Lashane Davis-Kocsis, Petitioner.

Appellate Case No. 2022-000850

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Berkeley County
Maite Murphy, Circuit Court Judge

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Opinion No. 28213
Heard April 16, 2024 – Filed June 26, 2024

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**AFFIRMED**

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Jason Scott Luck, of Luck VI Ltd. Co., of Bennettsville, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Julianna E. Battenfield, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

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**JUSTICE FEW:** Gabrielle Davis-Kocsis was convicted of murder, two counts of kidnapping, first-degree burglary, and criminal conspiracy, all arising out of a confrontation between drug dealers. The court of appeals considered numerous issues and affirmed. We granted Davis-Kocsis's petition for a writ of certiorari to address two issues. The first is whether section 16-3-910 of the South Carolina Code (2015) prohibits sentencing a defendant for kidnapping and murder when the kidnapping and murder victims are different. The second is whether the trial court erred in admitting a recording of a 911 call over a Rule 403, SCRE objection. We affirm the court of appeals.

## I. Facts and Procedural History

In 2015, Mark Connor—the murder victim—stole cash and a motorcycle from Davis-Kocsis. Davis-Kocsis—one of the drug dealers—offered seven grams of methamphetamine to anyone who could give her information about Connor's whereabouts. After learning Connor was staying at a drug house known as "Miss Rose's house," Davis-Kocsis, Matt Grainger, and three others went to the house and broke in.

Connor, Whitney Chance, Alexis Murray, and several others were staying at Miss Rose's house at the time of the burglary. According to the State, Davis-Kocsis sprayed bear mace throughout the house. She then began shouting at the occupants of the house, trying to locate Connor. One of the members of Davis-Kocsis's group held a gun to Murray's forehead while the others looked for Connor. Murray and Chance—the kidnapping victims—testified at trial they did not feel free to leave.

When the burglars found Connor, Grainger began fighting with him, and Grainger shot him. The burglars quickly fled the house after the shooting. Connor later died from the gunshot, and Grainger ultimately pled guilty to his murder. Davis-Kocsis was also charged with murder, along with two counts of kidnapping, first-degree burglary, and criminal conspiracy.

Before trial, Davis-Kocsis moved under Rule 403 to exclude a ten-minute recording of Murray's 911 call. In the recording, Murray explains what happened, begs for Connor not to die, and identifies Davis-Kocsis (by nickname) as being involved in the crime. The trial court did not listen to the recording but asked how long it was and what was on it. The parties then gave descriptions of what was on the recording.

Davis-Kocsis argued the call would "stir up the passions and prejudices of the jury . . . using emotion rather than facts." The State argued the recording should not be excluded because, "It actually gives [in] real time what is taking place in that moment in trying to give law enforcement the address, the description of the cars, trying to get the description of the assailants in real time." The trial court denied the motion, finding the recording was "intended for corroborative purposes and establishing the elements of the offense."

The State offered the 911 recording into evidence through its first witness. Davis-Kocsis renewed her Rule 403 objection, which the trial court overruled. The State played the 911 recording then and again during its closing argument, and the jury requested to listen to it during deliberations.

During closing argument, the State argued Davis-Kocsis was guilty of murder and kidnapping under "the hand of one is the hand of all" accomplice liability theory.[1] The jury found Davis-Kocsis guilty of all charges. The trial court sentenced her to

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[1] Although "the hand of one is the hand of all" accomplice liability theory is not an issue before this Court, this case presents the classic factual scenario to illustrate how the theory works. Davis-Kocsis, Grainger, and the others in their group mutually agreed to burglarize Miss Rose's house to retrieve Davis-Kocsis's money, but there is no indication any of them initially intended to murder or kidnap anyone. Davis-Kocsis raised this issue to the court of appeals, arguing the State failed to prove she had the necessary criminal intent for kidnapping. *State v. Davis-Kocsis*, 436 S.C. 468, 486, 872 S.E.2d 415, 424 (Ct. App. 2022). As the court of appeals explained, however, "it does not matter if the defendant knows whether his codefendant is going to undertake a particular criminal act." *Id.* When the group mutually agreed to commit an armed home invasion against rival drug dealers, all members of the group became liable for any unplanned crimes that might naturally occur in the course of the burglary, such as murder or kidnapping. *See Butler v. State*, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021) ("Under the theory the 'hand of one is the hand of all,' when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime." (citing *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017))). Under the law, therefore, all participants in the planned burglary may be convicted for murder and kidnapping.

concurrent terms of fifty years for murder, thirty years for each of the two counts of kidnapping, fifty years for first-degree burglary, and five years for criminal conspiracy.

The court of appeals affirmed. *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415 (Ct. App. 2022). Davis-Kocsis filed a petition for a writ of certiorari raising two issues. We granted the petition.

## II. Kidnapping Sentences

Davis-Kocsis argues the court of appeals erred in affirming her kidnapping sentences under section 16-3-910, which provides: "Whoever shall unlawfully . . . kidnap . . . any other person . . . is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years *unless sentenced for murder* as provided in Section 16-3-20." § 16-3-910 (emphasis added).

This Court has interpreted section 16-3-910 to prohibit a trial court from sentencing a defendant for kidnapping when he is also sentenced for murdering the same victim. *State v. Copeland*, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982); *State v. Perry*, 278 S.C. 490, 495-96, 299 S.E.2d 324, 327 (1983); *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 464 (1998). The court of appeals held "the trial court properly sentenced Kocsis for the kidnappings of Murray and Chance because Kocsis was only sentenced for murdering [Connor]—not Murray and Chance—and thus, the prohibition found in section 16-3-910 does not apply." *Davis-Kocsis*, 436 S.C. at 489, 872 S.E.2d at 426. Davis-Kocsis argues section 16-3-910 "does not require the kidnapping victim and murder victim to be the same person" for the prohibition to apply, relying on companion cases *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984), and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984). The State argues this Court decided the prohibition does not apply when the murder and kidnapping victims are different in *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 31, 637 S.E.2d 313, 315 (2006).

We agree with the State and stand by our holding in *Vazquez* that a defendant may be sentenced for both murder and kidnapping when there are different victims for each crime. *Vazquez*, 364 S.C. at 302, 613 S.E.2d at 363. We acknowledge that in *Livingston* and *Stroman* the defendants' kidnapping sentences were vacated, even though the sentences related to victims who were not murdered. However, no party

in those cases asked the Court to differentiate between the victims. *Livingston*, 282 S.C. at 8, 317 S.E.2d at 133; *Stroman*, 281 S.C. at 514, 316 S.E.2d at 400. In fact, in a brief filed jointly in *Livingston* and *Stroman*, the State conceded all of the kidnapping sentences should be vacated, not just the sentences related to the murder victims. Thus, we hold *Vazquez* controls. We overrule *Livingston* and *Stroman* to the extent they are inconsistent with *Vazquez*.

The State argues the sentencing issue is unpreserved because Davis-Kocsis did not object to the imposition of the kidnapping sentence at trial. The court of appeals noted Davis-Kocsis "never specifically raised to the trial court that she could not be sentenced for the kidnappings of Murray and Chance in light of her murder sentence for [Connor], and thus, this argument would traditionally be unpreserved." *Davis-Kocsis*, 436 S.C. at 488-89, 872 S.E.2d at 425 (emphasis omitted). However, the court of appeals found an exception applied and reached the merits. 436 S.C. at 489, 872 S.E.2d at 426. The State argues this was error.

Generally, a challenge to sentencing must be raised at trial or the issue will not be preserved for appellate review. *State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991). However, in *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999), this Court reached the merits of a sentencing ruling that was not objected to at trial due to "exceptional circumstances." 333 S.C. at 463, 510 S.E.2d at 425. We explained that exceptional circumstances are present when (1) the State concedes the trial court erred by imposing an illegal sentence and (2) there is a real threat the defendant will remain incarcerated beyond his legal sentence. 333 S.C. at 463-64, 510 S.E.2d at 425. *Johnston* controlled when the court of appeals decided this case and when the parties filed their briefs to this Court.

In *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023), however, we modified *Johnston* and held "that when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence." 439 S.C. at 351, 887 S.E.2d at 137. We did this because, "In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus." *Id*.

While we do reach the merits in this case, we reiterate that—going forward—the issue-preservation standard for illegal sentences is the standard set forth in *Plumer*.

## III. 911 Call

Davis-Kocsis also argues the trial court erred by admitting the recording of the 911 call because its probative value was substantially outweighed by the danger of unfair prejudice. The court of appeals held there was no "manifest abuse of discretion" in admitting the recording. *Davis-Kocsis*, 436 S.C. at 490, 872 S.E.2d at 426 (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 848 (2006)).[2] The court of appeals emphasized the recording had probative value in corroborating the witnesses' testimony because the defense attacked their credibility.[3] *Id*. The 911 call identifies Davis-Kocsis as one of the perpetrators of the crime. The 911 call also contains a description of what happened shortly after the crime was committed, and Murray testified to the same general series of events she described on the recording. The probative value of this corroboration is significant, considering Davis-Kocsis's defense relied heavily on discrediting the State's witnesses.

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[2] Over the years, this Court and our court of appeals have used the phrase "manifest abuse of discretion" to describe our standard for reviewing a trial court's evidentiary rulings. However, the word "manifest" has no meaning in this context and does not impact the standard. Some courts have used the term "manifest error" to signify "An error by the trial court that has an identifiably negative impact on the trial to such a degree that the . . . rights of a party are compromised," or "An error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Error*, BLACK'S LAW DICTIONARY (11th ed. 2019). However, the term "manifest error" has no application in South Carolina. Our standard of review is simply to determine whether the trial court acted within its discretion. *See State v. Middleton*, 441 S.C. 55, 60, 893 S.E.2d 279, 281 (2023) (reviewing an evidentiary ruling to determine whether "the trial court acted within its discretion"). If so, we affirm; if not, we turn to whether the error caused prejudice, and if so, we reverse.

[3] In her opening statement, Davis-Kocsis explained that many of the witnesses used methamphetamine, which caused them to stay up for days and weeks at a time. She suggested this undermined their credibility.

The danger of unfair prejudice is very low. Davis-Kocsis argues the recording is raw and emotional. There is no doubt the call is emotional as it captures the moments right after the crime where a friend of the caller is fighting for his life after being shot. However, the recording was not so provocative as to rise to the level of "unfair prejudice." It would be no surprise to the jury that someone at a crime scene watching her friend die would be emotional. There is nothing in the record that indicates the recording "create[d] a 'tendency to suggest a decision on an improper basis . . . .'" *State v. Jones*, 440 S.C. 214, 259, 891 S.E.2d 347, 371 (2023) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

Generally, "All relevant evidence is admissible." Rule 402, SCRE. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.[4] The significant probative value of the recording was not substantially outweighed by the minimal danger of unfair prejudice, and the trial court did not err in admitting the recording over Davis-Kocsis's Rule 403 objection.

Davis-Kocsis makes two other arguments that the recording should have been excluded. First, she argues the trial court erred in admitting the 911 call for "corroborative purposes" because the State offered the recording during the testimony of its first witness. She argues that before any evidence has probative value in corroboration, the proponent must first present other evidence to corroborate. We disagree. The trial court has discretion to base an assessment of probative value on testimony or evidence that has not yet been presented but appears likely to be presented later. Thus, this argument has no merit.

Second, Davis-Kocsis argues the trial court's failure to listen to the 911 call before admitting it into evidence "represents an abuse of discretion." This argument is

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[4] The trial court stated that "although [the recording] may be prejudicial, the probative value outweighs the prejudicial effects." This was a misstatement of the Rule 403 standard because it does not restrict the analysis to "unfair" prejudice. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *unfair* prejudice . . . ." (emphasis added)). For an appellate court to determine whether the trial court has acted within its discretion, it is important for the trial court to correctly state the point of evidence law at issue.

unpreserved. Davis-Kocsis never objected to the admission of the recording on the basis that the trial judge did not listen to the recording. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). She also never urged the trial judge to listen to the call. *Cf. State v. King*, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017) (holding the trial court abused its discretion when it "adamantly refused" to listen to a recording before ruling on its admissibility).

While we believe it is generally the better practice for a trial court to listen to a recording or watch a video before ruling on a Rule 403 objection, it is not absolutely required in every case. Here, the parties explained to the trial court what was on the recording, and no party specifically requested the court listen to it. If a party feels it is necessary for the trial court to first listen to a recording before ruling, it should explain to the court why it needs to listen and why the parties' descriptions of what was on the recording are not sufficient.

**AFFIRMED.**

**BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Jerry D. Vinson, Jr., concur.**

# The Supreme Court of South Carolina

Re: Amendments to Rules 413 and 502, South Carolina Appellate Court Rules

Appellate Case No. 2024-000689

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ORDER

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Pursuant to Article V, Section 4 of the South Carolina Constitution, we amend Rule 14 of the Rules for Lawyer Disciplinary Enforcement, which are found in Rule 413 of the South Carolina Appellate Court Rules; and Rule 14 of the Rules for Judicial Disciplinary Enforcement, which are found in Rule 502 of the South Carolina Appellate Court Rules. These amendments, which specify the method to file a complaint against a lawyer or a judge, are set forth in the attachment to this order. The amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
June 24, 2024

Rule 14, RLDE, Rule 413, SCACR; and Rule 14, RJDE, Rule 502, SCACR, are amended to insert new paragraph (d) in both rules, which is set forth below. Current paragraphs (d) and (e) of both rules, and internal references to those rules, are renumbered as paragraphs (e) and (f).

> **(d) Filing Complaint with Disciplinary Counsel.** Filing of a complaint with the Office of Disciplinary Counsel, along with any relevant supporting documentation or exhibits, shall be made by:
>
> > **(1)** Delivering one unbound copy to the Office of Disciplinary Counsel. Delivery of a copy under this provision means handing it to an employee of the Office of Disciplinary Counsel.
> >
> > **(2)** Depositing one unbound copy in the U.S. Mail, properly addressed to the Office of Disciplinary Counsel with sufficient first-class postage attached.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Paul Roy Osmundson, Appellant,

v.

School District 5 of Lexington and Richland Counties, Respondent.

Appellate Case No. 2023-000104

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Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

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Opinion No. 6066
Heard June 4, 2024 – Filed June 26, 2024

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**REVERSED AND REMANDED**

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Joel W. Collins, Jr., of Collins & Lacy, PC, and Patrick Devin Quinn, of Nelson Mullins Riley & Scarborough, LLP, both of Columbia, for Appellant.

James Edward Bradley, of Moore Bradley Myers, PA, of West Columbia, for Respondent.

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**THOMAS, J.:** Paul Roy Osmundson appeals the dismissal of his action under the Freedom of Information Act (FOIA)[1] against School District 5 of Lexington and Richland Counties (the District), arguing the circuit court erred in (1) granting a

[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2023).

motion to dismiss for failure to request a hearing within ten days of service of the action, and (2) denying a motion to reconsider. We reverse and remand.

## FACTS

Osmundson, an editor at The State Media Co., filed this action against the District, alleging violations of the FOIA. The initial complaint was served on July 28, 2021. Osmundson alleged the Board of Trustees of the District refused Laurene Mensch's prior FOIA request, which requested a list of and details regarding prior and planned 2021 meetings. The complaint further alleged the Board secretly voted to terminate the Superintendent; removed from the minutes of the meeting an opinion of the South Carolina Attorney General that explained the need for meetings of Board officers to be open to the public; secretly negotiated a termination agreement with the superintendent, Dr. Christina Melton (the Superintendent); and deliberately misled the public regarding the Superintendent's "resignation." The complaint sought a declaratory judgment, including injunctive relief requiring "all Board of Trustees [meetings] and Meetings of Board Officers to be conducted openly and in strict compliance with . . . [the FOIA]; a civil fine; and attorneys' fees and costs." An amended complaint was filed on August 16, 2021. In addition to the allegations in the first complaint, it alleged the Trustees of the District circumvented the FOIA by creating standing committees that regularly met without compliance with the FOIA. As additional relief, it sought a declaration that the District's handling of the Superintendent's termination was a willful FOIA violation.

The District filed an answer, generally denying the allegations. The District and Osmundson each filed a motion for summary judgment; the District filed a motion to dismiss; and the parties filed memoranda in support of and in opposition to the motions.

During a July 18, 2022 WebEx hearing on the motions, the District argued the issues were moot; thus, Osmundson was entitled only to attorney's fees. The District also argued the FOIA requires a plaintiff to *request* the hearing within ten days and Osmundson's failure to do so was a ground for dismissal.

Osmundson argued, *inter alia*, that he requested a hearing within ten days of service on all parties in the body of the amended complaint. Osmundson noted

"mindful[ness] of the fact that [the court was] operating under the very serious limitations of the Covid protocols" and argued the burden was not on a plaintiff to "strong arm the clerk of court or brow beat the judge's law clerk" to insure a hearing was held within ten days. Osmundson argued the statute imposes the duty on the court to schedule a hearing without a requirement for the party to do anything further other than to request it under the statute, which he did. Furthermore, Osmundson argued a party is incapable of unilaterally scheduling a hearing.

In a form order filed October 20, 2022, the circuit court found Section 30-4-100(A) of the FOIA required a hearing to be held within ten days of the service of the complaint "and a scheduling order to conclude the action [had to] be held within six months." Because "no hearing was held within the allotted timeframe[,]" the motion to dismiss was granted. Osmundson moved to reconsider, which the court denied. This appeal followed.

## STANDARD OF REVIEW

Osmundson's argument raises a legal question, which we review de novo. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010) (holding questions of statutory interpretation are questions of law which are subject to de novo review); *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012) (stating an appellate court employing the de novo standard of review is "is free to decide questions of law with no particular deference to the trial court").

## LAW/ANALYSIS

### A. DISMISSAL

Osmundson argues the circuit court erred in dismissing the action. We agree.

The FOIA provision relied upon by the circuit court provides the following:

> (A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter . . . . Upon the filing of the request for declaratory judgment or

> injunctive relief related to provisions of this chapter, *the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties.* If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause.

S.C. Code Ann. § 30-4-100(A) (Supp. 2023) (emphasis added); *see Davis v. S.C. Educ. Credit for Exceptional Needs Child. Fund*, 441 S.C. 187, 191 n.2, 893 S.E.2d 330, 332 n.2 (Ct. App. 2023) ("Initial hearings under FOIA are generally supposed to be scheduled 'within ten days of the service on all parties.'") (quoting S.C. Code Ann. § 30-4-100 (Supp. 2022))). Neither the circuit court nor the parties cite law interpreting the ten-day hearing requirement. Thus, we look to the law regarding statutory interpretation.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "[W]e must first attempt to construe a statute according to its plain language, and if the language of a statute is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310-11, 831 S.E.2d 429, 432 (2019) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

We find the plain meaning of this statute requires the chief administrative judge of the circuit court to schedule an initial hearing within ten days. The statute states "the chief administrative judge of the circuit court must schedule an initial hearing within ten days . . . ." § 30-4-100(A). Both the complaint and the amended complaint stated Osmundson sought "an initial hearing within ten days of service on all parties pursuant to § 30-4-100(A)." Our Legislature has not mandated a requirement that a party filing a FOIA action be the party responsible for scheduling an initial hearing and we decline to impose such a requirement. *See Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) ("If a statute's language is unambiguous and clear, there is no

need to employ the rules of statutory construction and [the appellate court] has no right to look for or impose another meaning.").

Based on the plain language of the statute, we find the circuit court erred in dismissing the action. However, we also find the legislative intent behind the ten-day requirement was to benefit FOIA applicants. *See State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."). A review of the legislative history indicates the amendments to the FOIA since its enactment have been to expand rights; thus, we find the purpose of the ten-day requirement was to expedite resolution, not to erect a procedural barrier. South Carolina's FOIA was enacted in 1978 and provided that a citizen could apply to the circuit court for injunctive relief if the application was made within sixty days of the alleged violation. 1978 S.C. Act No. 593, §11 (eff. Jul. 18, 1978). In 1987, it was amended to extend the time for filing to one year; provide additionally for declaratory relief; and state that violations constituted irreparable injury for which no adequate remedy at law existed. 1987 S.C. Act No. 118, § 8 (eff. May 26, 1987). In 2017, it was amended to add the language at issue in this case. 2017 S.C. Act No. 67, §4 (eff. May 19, 2017). We find the legislative history of South Carolina's FOIA indicates amendments have generally been *in favor of*, not against, requesters.

We find the circuit court erred in dismissing the action because no hearing was held within ten days of the date of service of the action; accordingly, we reverse and remand.[2]

## B. MOTION TO RECONSIDER

[2] Osmundson also argues the circuit court's dismissal of his action violates the spirit of our supreme court's orders addressing the Covid-19 pandemic. Because we reverse and remand based on the plain language of the statute, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

Osmundson argues the circuit court erred in denying his motion to reconsider based on Rule 59(g) of the South Carolina Rules of Civil Procedure because Osmundson did not provide a copy of the motion to the court, as required by the rule, within ten days of the filing of the motion. Because we reverse and remand based on the circuit court's erroneous dismissal of the action, we need not address this argument. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (stating an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

## C. THE DISTRICT'S ARGUMENTS

The District raises numerous arguments maintaining this court should affirm based on additional sustaining grounds. We decline to reach these issues. *See Cowburn v. Leventis*, 366 S.C. 20, 35 n.4, 619 S.E.2d 437, 446 n.4 (Ct. App. 2005) ("This court may review additional sustaining grounds raised by a respondent, and 'if convinced it is proper and fair to do so, rely on them or any other reason' raised on appeal and appearing in the record to affirm the lower court's judgment." (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000))); *id.* (declining to address additional sustaining grounds where the court was "not convinced it [was] proper and fair to do so").

## CONCLUSION

For the foregoing reasons, the order on appeal is

**REVERSED AND REMANDED.**

**MCDONALD and VERDIN, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The Estate of Delila Parrott, Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC, Appellant.

Appellate Case No. 2020-001643

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Appeal From Charleston County
Bentley Price, Circuit Court Judge

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Opinion No. 6067
Heard March 12, 2024 – Filed June 26, 2024

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**REVERSED**

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Stephen Lynwood Brown, Russell Grainger Hines, Matthew Oliver Riddle, Donald Jay Davis, Jr., and James Edward Scott, IV, all of Clement Rivers, LLP, of Charleston, for Appellant.

Todd Richard Lyle, of Lyle Law Firm LLC, and Paul L. Reeves, of Reeves Law Firm, LLC, both of Columbia; and John G. Boswell, of Raleigh, North Carolina, all for Respondent.

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**GEATHERS, J.:** In this wrongful death and survival action, Sandpiper Independent & Assisted Living-Delaware, LLC (Sandpiper) challenges the circuit court's order

following a bench trial finding Sandpiper liable for the death and conscious pain and suffering of Delila Parrott and awarding $1,000,000 to Parrott's estate (Respondent). Sandpiper argues that the circuit erred in finding that (1) Sandpiper owed Parrott a duty, (2) Sandpiper's breach of that duty proximately caused Parrott's death, and (3) Sandpiper failed to establish comparative negligence as a defense. Sandpiper also contests the circuit court's calculation of damages, arguing the award was wholly undue and speculative or excessive. We reverse.

## FACTS

Tragically, Delila Parrott, who was eighty years old, fell from a rocking chair she was standing on to hang curtains in her apartment at Sandpiper's independent living community. Though the exact timeline is disputed, Parrott could have fallen as early as the evening of Tuesday, June 3, 2014. The fall caused comminuted fracturing of Parrott's hip, resulting in complete immobility as she laid until the evening of June 6, when Sandpiper's staff entered Parrott's apartment and called emergency services.

Parrott spent four days in the hospital to treat her broken hip and other conditions related to her fall before being discharged and sent to a rehabilitation facility owned by Sandpiper. From rehab, she was moved into an assisted living community. Having never returned to an independent living community, she was hospitalized in January 2015 for mental health reasons, entered hospice care on January 31, 2015, and died on February 9, 2015—eight months after the fall. Her death certificate listed her causes of death as "failure to thrive" and "chronic schizophrenia," among other things. Respondent contended at the bench trial that Parrott's death was the result of a "long lie"—a medical condition that occurs when an elderly person is left immobile after a fall for an extended period as they await rescue—as opposed to her broken hip from the fall.[1] *See 4 Attorneys Medical*

[1] Included in the record as a trial exhibit is a 1996 special article from the New England Journal of Medicine examining the long lie phenomenon. This article notes that "[t]he total mortality was [67%] for patients who were estimated to have been helpless for more than [seventy-two] hours, as compared with [12%] for those who had been helpless for less than [one] hour." However, the study acknowledged that it was unable "to determine the independent influence of functional status, the length of time spent helpless, the extent of social support, diagnosis, demographic

*Advisor* § 33:123 (Monique Leahy ed., 2024) (explaining long lies in both injured and uninjured "fallers" and noting studies showing that older fallers who could not get up were "more likely to suffer a lasting decline in activities of daily living," but that the increased likelihood of death and hospitalization arising therefrom was not statistically significant).

## I. Background on Sandpiper and its Check-In Policy

In the independent living community where Parrott lived, Sandpiper offered several amenities to its residents. These amenities included two meals per day, planned activities for the residents, general maintenance services, weekly laundry and housekeeping services, and transportation for social events. Though it was not contained in the lease, Sandpiper also operated a daily check-in policy whereby a staff member would sign off for each resident on a sheet at the front desk once daily, confirming that the resident had been seen or at least heard from. Specifically, an internal document outlining procedures and policies for Sandpiper's front desk workers stated, "All residents must be seen by staff and initialed off every day. If you do not see someone, call them[. I]f you can't get them on the phone, go to the apartment and check on them." Corrine Carrington, the executive director of Sandpiper's independent living community, further explained:

> We check the residents daily, make sure we saw them. If we hadn't seen the residents by a certain time at night, we were to be calling them. If they didn't answer their phone, we should be going to the units to check on them, to make sure we saw them.

Carrington also explained that Sandpiper had duplicate keys for each apartment in addition to a master key and that if a resident who had not yet been checked on did not answer the door, the staff would use one of these keys to enter the apartment.

Residents at Sandpiper were also issued a "panic button"—a wearable device that allowed residents to call for help in an emergency. Carrington testified that although "the majority [of residents] probably wore their panic button[,] . . . it was not uncommon for some of them not to wear it." Carrington and Beth Auld, a

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variables, or a number of other factors on the outcomes of persons found dead or helpless in their homes."

longtime Sandpiper employee, agreed that the panic button was Sandpiper's primary response to falls. It is undisputed that Parrott was not wearing her panic button when she was attempting to hang the curtains.

## II. Background on Parrott

Parrott signed a lease to live at Sandpiper in April 2013. Joan Acosta, Parrott's daughter and personal representative, explained that, prior to this, even though Parrott "was still independent," Acosta "wanted to be proactive . . . and get [Parrott] in a situation where there would be transportation available, where she would have activities available, [and] where she was checked [on] every[ ]day." The lease Parrott signed contained the following language:

> Sandpiper is not responsible for the negligence of its [o]ccupants including acts or omissions that cause injury or death to other persons or damage to property. . . . You agree to be responsible . . . and hold Sandpiper . . . harmless from and against[] any and all claims . . . resulting from any injury to or death of any person and/or any damage to property caused by, resulting from, attributable to, or in any way connected with acts or omissions of or on the part of you as occupant.

The lease further stated:

> Both Sandpiper and you agree that your freedom to make personal health and *non-health related decisions*, the freedom to travel, to come and go as you please, *the decisions that* [*a*]*ffect and control your day-to-day activities* should all remain within your sole decision so long as it does not adversely affect other occupants. As such, both Sandpiper and you understand and realize that such decision making ability carries an inherent possibility of adversity that may directly or indirectly affect you as occupant. *Therefore, you . . . agree to assume such risk and related consequences and, as it relates to Sandpiper, . . . waive any and all liability against* [*Sandpiper*] *from any and all damages, both direct and*

> *indirect, that may result from such activities, the risks*[,] *and the . . . damages resulting from such activities.*

(emphases added). Though Parrott began suffering from mental health problems around 2009, which included periods of delusions, her condition was considered stable prior to the fall. In her report following Parrott's fall, Carrington described Parrott as "very private" and noted that Parrott had told her at least once that she (Parrott) did not want anyone in her apartment. Consequently, Carrington made a note on Parrott's file that Parrott was "fearful of people coming in without her knowledge" and that "no one is allowed in [Parrott's apartment] without [Parrott] being present." Carrington also testified that Parrott "was probably concerned about her privacy[] more than any other resident," but noted that a resident's privacy should not deter staff from entering for the purposes of conducting a check-in.[2]

Carrington also stated that about four months prior to the fall, Parrott had changed her locks. Carrington explained that she learned about the changed locks only after she came upon Parrott struggling to unlock her apartment and that though Parrott was hesitant to provide Sandpiper with a duplicate key for the changed locks, she ultimately relented and provided one.

## III. Parrott's Fall and Long Lie

Though the parties disputed at trial the timeline for Parrott's fall, the circuit court accepted Respondent's formulation: Parrott fell on the evening of Tuesday, June 3, and was not found until Friday, June 6, despite the daily check-in policy. Towards the end of the day on Wednesday, June 4, one of Sandpiper's employees, Rebecca Munoz, noticed that Parrott was not signed off on the daily check-in sheet. Consequently, Munoz walked over to Parrott's unit with the master key to check on her after unsuccessfully trying to call her. Munoz knocked on the door, but no one answered. Munoz attempted to enter the apartment using the master key, but it did not work because Parrott had changed her locks. However, Munoz did not walk the "very short distance" back to the office from Parrott's apartment to obtain the duplicate key that would have allowed her to enter the apartment.[3] Instead, she

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[2] Carrington later seemed to acknowledge that even though it *should* not impact a decision on whether to enter a resident's apartment, it *could*.

[3] Munoz claimed that she did not know where to find the duplicate key for Parrott's apartment after she tried to enter unsuccessfully with the master key. However, she

called Auld, who, in addition to being a longtime Sandpiper employee, is also Munoz's mother. Together, they decided Munoz did not need to enter Parrott's apartment that night to complete the check-in; instead, Munoz asked Auld to check on Parrott on Thursday. Although Auld did not recall the details of the conversation with Munoz, she agreed that Parrott's privacy concerns "definitely" factored into the decision not to enter Parrott's apartment, and Munoz testified to the same. Munoz completed her shift and went home having never visually confirmed Parrott's wellbeing. Munoz was not scheduled to work again until Friday, June 6.

The next day—Thursday, June 5—Auld reported to work and signed off on having seen Parrott. Auld later maintained to Carrington that her marking the check-in sheet was accurate and reflected the fact that Auld had seen Parrott on June 5. However, even though Sandpiper's practice was to preserve records of the check-in sheets, the June 5 record with Auld's signature no longer existed at the time of the trial. Additionally, Auld could not recall at trial exactly when or where she purportedly saw Parrott on Thursday. A friend and neighbor of Parrott's, Lila Watters, stated that she did not see Parrott on June 5 even though the two regularly dined together.

On Friday, June 6, Munoz returned to work. That evening, at the urging of Watters, Munoz used the duplicate key to enter Parrott's apartment and found Parrott lying on the floor. Though Parrott told EMS that she had fallen on Tuesday, she later told Carrington that she fell on Wednesday. Parrott's longtime physician, Dr. Richard Mills, testified:

> I would be willing to say with a reasonable degree of medical certainty that [Parrott] was on the ground most likely, in my mind, somewhere between thirty-six hours to three days. But I don't think it was in the four-hour to the twenty-four-hour range. And I tend to think that based on the things I saw . . . in the record that it was longer than that.

Respondent's theory of the case at the bench trial was that although Parrott recovered physiologically from her broken hip, the extended period of time she spent on the

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answered affirmatively when asked if she knew where to locate the key when she eventually returned and entered Parrott's apartment Friday evening.

floor amounted to a long lie. Further, they maintained that this long lie drained Parrott of her will to live and resulted in her death. Dr. Mills agreed at the bench trial that Parrott's long lie shortened her life. Dr. Mills explained that based on Parrott's recovery from the surgery for her hip, he expected her to live "many more years" and that her death within eight months was unexpected. Dr. Mills also testified that the longer the amount of time Parrott spent on the floor, the more adverse the consequences of the long lie would have been on her mental health.

Respondent also introduced testimony from Dr. Lawrence Bergmann, an expert witness in trauma, that Parrott's psychological condition continually declined following the fall and that the scientific literature supported finding a causal link between Parrott's time on the floor and her eventual death.[4]

In October 2016, Acosta, as personal representative of Parrott's estate, brought wrongful death and survival actions against Sandpiper, alleging that Sandpiper negligently caused Parrott's death by breaching its internal policy requiring a Sandpiper staff member to sign off on a check-in sheet each day indicating they had verified the wellbeing of each resident. Following a bench trial, the circuit court awarded Respondent $500,000 for the wrongful death cause of action and $500,000 for the survival action. Sandpiper moved post-trial for relief from the judgment, which the circuit court denied on November 18, 2020. This appeal follows.

## ISSUES ON APPEAL

I. Did the circuit court err by finding that Sandpiper owed Parrott a duty?

II. Did the circuit court err by finding that Sandpiper's breach of the duty it owed Parrott proximately caused Parrott's conscious pain and suffering and death?

III. Did the circuit court err by failing to find comparative negligence on the part of Parrott?

IV. Did the circuit court err in its calculation of the $1,000,000 award?

## STANDARD OF REVIEW

[4] Dr. Bergmann's testimony was presented via a deposition *de benne esse*.

"In an action at law tried by a judge without a jury, the appellate court will correct any error of law, but it must affirm the trial court's factual findings unless no evidence reasonably supports those findings." *Frazier v. Smallseed*, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct. App. 2009) (per curiam). Wrongful death and survival actions are actions at law. *See First Union Nat'l. Bank of S.C. v. Soden*, 333 S.C. 554, 574, 511 S.E.2d 372, 382 (Ct. App. 1998) ("[T]he character of an action as legal or equitable depends on the relief sought."); *see also Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005) ("An action in tort for damages is an action at law."); S.C. Code Ann. § 15-51-10 (2005) (establishing the wrongful death cause of action as "an action for damages.").

## LAW AND ANALYSIS

We hold that Sandpiper owed Parrott no duty because (1) internal policies cannot, standing alone, create a duty in South Carolina, and (2) there is no evidence that Parrott's harm was caused by her reliance on the check-in policy. Therefore, we reverse the circuit court.

Section 15-51-10 of the South Carolina Code imposes liability on tortfeasors who cause the death of another party through a wrongful act, neglect, or default that would have entitled the injured party to maintain an action for damages had they survived.[5] *See generally Land v. Green Tree Servicing, LLC*, 140 F. Supp. 3d 539,

[5] In full, the statute reads:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

544–45 (D.S.C. 2015) (exploring the history of wrongful death actions in South Carolina and concluding that "the plaintiff in a wrongful death action must establish that the wrongful act or *negligence* of the defendant caused the death of the decedent." (emphasis added)).

"A plaintiff must prove three elements on a negligence claim: '(1) a duty of care owed by [the] defendant to [the] plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.'" *Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 5 (Ct. App. 2021) (alterations in original) (quoting *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368–69, 635 S.E.2d 97, 101 (2006)). "If no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011). Here, Sandpiper contests the circuit court's conclusions on duty and causation.

"A tortfeasor's duty arises from his relationship to the injured party." *Ravan v. Greenville County*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993) (quoting *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986)). "It is essential [for] liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care." *Id.* Whether a duty exists is a question of law. *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020). Furthermore,

> [t]here is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its

§ 15-51-10.

> conduct to a standard which is adequate to protect others from unreasonable risk of harm.

*Araujo v. S. Bell Tel. & Tel. Co.*, 291 S.C. 54, 57–58, 351 S.E.2d 908, 910 (Ct. App. 1986) (footnote omitted).

In South Carolina, "there is no general duty to control the conduct of another." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). Consequently, "a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). However, there are five main exceptions to this rule:

> (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant.

*Babcock Ctr.*, 371 S.C. at 136, 638 S.E.2d at 656. Beyond these exceptions, "[a]n affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Id.* at 136, 638 S.E.2d at 656–57.

Here, the circuit court based its finding of duty on the third exception—where the defendant voluntarily undertakes a duty. A formulation of this exception is contained in section 323 of the Restatement (Second) of Torts and has been oft-repeated by South Carolina courts:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (Am. L. Inst. 1965); *see also Doe 2 v. Citadel*, 421 S.C. 140, 147, 805 S.E.2d 578, 582 (Ct. App. 2017) ("Under South Carolina law, the Restatement [(Second)] of Torts establishes the recognition of a voluntarily assumed duty . . . ."). "In most of the cases finding liability [for a voluntary undertaking], the defendant has made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that [the danger] has been removed, or by depriving him of the possibility of help from other sources." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 at 381 (5th ed. 1984). In South Carolina, both subsections of section 323 apply only to duty and not to proximate cause. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 219, 826 S.E.2d 285, 294 (2019).

## I. Internal Policies as a Basis for a Legal Duty

Our courts have held that internal policies cannot establish the voluntary undertaking of a duty pursuant to section 323; instead, they can be used only as evidence to establish the contours of the standard of care once a duty has been established. *See Citadel*, 421 S.C. at 148, 805 S.E.2d at 583 ("[W]e find the internal policies created by [the respondent] do not establish a voluntary undertaking of a duty; rather, they can only serve as evidence of the standard of care if the duty was established by law."); *see also Wal-Mart*, 393 S.C. at 248, 711 S.E.2d at 912 (finding that an "internal policy cannot be said to constitute the voluntary undertaking of a duty," but instead could serve only as evidence of the standard of care); *Pacicca v. Jackson*, No. 3:21-CV-03136-DCC, 2023 WL 8242180, at *3 (D.S.C. Nov. 28, 2023) ("[U]nder South Carolina law, a company's internal policies do not establish a duty for purposes of a negligence claim."); *Bernstein v. Walmart, Inc.*, No. 2:22-CV-1637-BHH, 2024 WL 476300, at *4 n.1 (D.S.C. Feb. 7, 2024) ("[W]hile a failure to follow company internal policies 'may be evidence of a breach of a standard of care,' South Carolina law is clear that [the defendant]'s alleged failure to comply with its [standard operating procedure] does not create a duty towards [the plaintiff]." (quoting *Pacicca*, 2023 WL 8242180, at *3)); *see generally Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) ("[W]e

hold that evidence of [the r]espondent's deviation from their internal maintenance policies is admissible *to show the element of breach*." (emphasis added)); *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) ("In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of *failure to exercise due care*." (emphasis added)).

Courts in other jurisdictions have often reached similar conclusions. *See, e.g.*, *Killian v. Caza Drilling, Inc.*, 131 P.3d 975, 982 (Wyo. 2006) (distinguishing using violations of internal policies as evidence of the standard of care from using the same as evidence of duty); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 729 (Mich. Ct. App. 2002) ("Defendants are correct in their assertion that internal policies of an institution . . . cannot be used to establish a legal duty in a negligence claim."); *Doe v. Coe*, 135 N.E.3d 1, 12 (Ill. 2019) ("We first note that '[w]here the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required.'" (alteration in original) (quoting *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1272 (Ill. 1996))); *Estate of Catlin v. General Motors Corp.*, 936 S.W.2d 447, 451 (Tex. App. 1996) (holding that "the mere creation of an internal policy" prohibiting employees from drinking alcohol did not create a duty to plaintiffs injured by an inebriated employee's conduct and that "[m]ore [wa]s required"); *Doe v. Saint Francis Hosp. & Med. Ctr.*, 72 A.3d 929, 963 (Conn. 2013) ("[A]lthough a violation of an employer's work rules can be viewed as evidence of negligence, . . . regulations and policies do not themselves establish the standard of care." (quoting *Petriello v. Kalman*, 576 A.2d 474, 479 (Conn. 1990)); *Va. Ry. & Power Co. v. Godsey*, 83 S.E. 1072, 1073 (Va. 1915) ("A person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common.").

In *Citadel*, a young male (Doe) who was the victim of sexual abuse at the hands of a former camp counselor of The Citadel sued The Citadel alleging that it failed to act on an April 2007 report made to the college's general counsel that the counselor had sexually abused a former camper. 421 S.C. at 142–44, 805 S.E.2d at 579–80. Doe's abuse transpired from the summer of 2005 to the summer of 2007, and although Doe never attended "any summer camps or educational programs at The Citadel," he sued under the theory that but for The Citadel's failure to exercise due care in its 2007 investigation, the former camp counselor would have been exposed sooner and the harm to Doe would have been mitigated. *Id.* at 148, 805 S.E.2d at 582. The Citadel had adopted policies for the oversight of its camps and counselors, which Doe argued "required action following the April 2007

allegations." *Id.* Doe appealed the circuit court's grant of summary judgment in favor of The Citadel, arguing, in part, that these policies established the voluntary undertaking of a duty to investigate and arrest the former camp counselor. This court rejected this argument, finding that "any violation of an internal policy [requiring investigations into allegations of sexual abuse did] not give rise to the voluntary assumption of a duty and [did] not establish that The Citadel owed a duty of care as a matter of law." *Id.* at 149, 805 S.E.2d at 583.

In *Wal-Mart*, the aunt of a minor who was physically and sexually abused sued Wal-Mart for destroying photographs that the aunt had taken to prove to the Department of Social Services that the minor was being abused by the minor's father. 393 S.C. at 242–44, 711 S.E.2d at 909–10. The aunt took the roll of film containing the evidence of abuse to Wal-Mart to have the film developed, but when the aunt returned to pick up the photos, an employee told the aunt that the employee had destroyed some of them because the store's policy required destroying photos depicting nudity. *Id.* at 243, 711 S.E.2d at 909. The minor's abuse was proven several months later, and the aunt, as guardian ad litem for the minor, sued Wal-Mart, alleging that Wal-Mart caused the delay by violating its internal policies that the aunt maintained required the employee to turn the photos over to a supervisor rather than destroy them. *Id.* at 243, 711 S.E.2d at 910. Our supreme court affirmed the circuit court's grant of summary judgment to Wal-Mart, holding that Wal-Mart's internal policy requiring photos depicting nudity be turned over to management "cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law." *Id.* at 248, 711 S.E.2d at 912.

Here, the circuit court found that Sandpiper "had a policy of providing daily wellness checks and that this policy created a duty to . . . exercise reasonable care in utilizing the systems/protocols it put in place." To the extent that the circuit court relied on the mere existence of Sandpiper's check-in policy to create a duty, we reverse. *See Citadel*, 421 S.C. at 148, 805 S.E.2d at 583 (holding that internal policies do not create voluntary undertakings of a duty); *see also Wal-Mart*, 393 S.C. at 248, 711 S.E.2d at 912 ("It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.").

## II. Analysis Under Section 323 of the Restatement (Second) of Torts

Regardless of whether Sandpiper's check-in policy is an internal policy akin to those in *Citadel* and *Wal-Mart*, no evidence in the record supports the circuit court's conclusion that Parrott's reliance on the check-in policy caused her harm. Respondent points to *Wright* as controlling authority in this regard. In *Wright*, an opinion published after *Citadel* and *Wal-Mart*, our supreme court held that it was a question of fact for the jury as to whether an apartment complex voluntarily assumed a duty under section 323 when it undertook to provide a courtesy officer service to its tenants. 426 S.C. at 220–21, 826 S.E.2d at 295. Specifically, the apartment complex allowed residents affiliated with law enforcement "to receive reduced rent in exchange for their service as courtesy officers for the apartment complex." *Id.* at 207, 826 S.E.2d at 287. Employed as independent contractors for the complex, these courtesy officers were required to devote time to walking the property, answering calls from tenants about incidents on the property, and reporting daily to the property manager. *Id.* The plaintiff in *Wright* was the victim of an armed robbery in the parking lot of the apartment complex. *Id.* at 207–08, 826 S.E.2d at 287–88. Prior to moving in, an apartment complex manager told the plaintiff that there were security officers on duty even though an internal employee manual instructed employees to not indicate that the complex provided security to residents. *Id.* at 206, 826 S.E.2d at 287. However, this internal instruction was not made available to the plaintiff. *Id.* at 206–07, 826 S.E.2d at 287. Our supreme court held that summary judgment was inappropriate because resolution of the factual conflicts underlying the analyses of subsections (a) and (b) of section 323 was in the province of the jury. *Id.* at 221, 826 S.E.2d at 295. Importantly, the court in *Wright* was not asked to address or consider whether the courtesy officer program constituted an internal policy. The court also emphasized that its holding was tailored to the "existence of a duty under the narrow facts of this case." *Id.* at 220, 826 S.E.2d at 294.

In *Wright*, there was conflicting evidence as to whether the plaintiff relied on the courtesy officer program and whether the plaintiff's harm arose from this reliance. Here, on the other hand, there is no evidence supporting the circuit court's conclusion that Parrott suffered the harm from her long lie because of her reliance on Sandpiper's check-in policy. Specifically, Respondent proffered no evidence to suggest that Parrott took the risk of hanging curtains while standing on a rocking chair—or of not wearing her panic button—*because* she was relying on the expectation that someone from Sandpiper would have come by pursuant to the

check-in policy to rescue her. If anything, the evidence in the record suggests that Parrott was not keen on Sandpiper's check-in policy and the panic button system, which undermines the notion that Parrott's harm resulted from her reliance on the check-in policy. *See* Restatement (Second) of Torts § 323(b) (Am. L. Inst. 1965) (recognizing a duty may arise when "the [plaintiff's] harm is suffered *because of* the other's reliance upon the undertaking"); *see also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 at 381 (5th ed. 1984) ("In most of the cases finding liability [for a voluntary undertaking], the defendant has made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that [the danger] has been removed, or by depriving him of the possibility of help from other sources.").

The *Wright* court held that there was an issue of fact for the jury as to "whether any failure by [the apartment complex] to exercise due care in performing the undertaking [of offering a courtesy officer program] increased the risk of harm to [the plaintiff]." 426 S.C. at 221, 826 S.E.2d at 295. Here, however, the circuit court made no finding under subsection (a) that Sandpiper's negligent execution of its check-in policy increased Parrott's risk of harm. It is therefore unnecessary to analyze the instant case under subsection (a). *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Because we reverse the circuit court's finding that a duty existed, Respondent's wrongful death claim against Sandpiper must fail. *See Ravan*, 315 S.C. at 467, 434 S.E.2d at 308 ("It is essential [for] liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care."). It is therefore unnecessary to address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

## CONCLUSION

Based on the foregoing, the judgment of the circuit court is

**REVERSED.**

**HEWITT and VINSON, JJ., concur.**