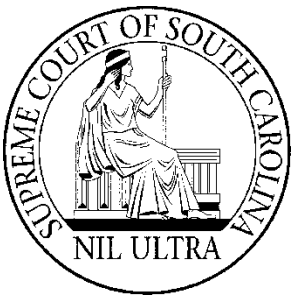

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 17, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

None

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

6060 – Charles Blanchard v. 480 King Street, LLC Pending

6061 – In the Matter of Shawn T. Daily Pending

6063 – The State v. Shawn D. Custer Denied 7/15/2024

6064 – Associated Receivables Funding, Inc. v. Dunlap, Inc. Pending

6065 – Kathleen Carter v. Joseph Carter Pending

6066 – Paul Roy Osmundson v. School District 5 Pending

6067 – The Estate of Delila Parrott v. Sandpiper Independent and Assisted Living Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

6068 – East Cherry Grove Co., LLC v. The State of South Carolina
Granted until 8/2/2024

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5965 – National Trust for Historic Preservation v. City of North Charleston Pending

5975 – Rita Glenn v. 3M Company Pending

5986 – The State v. James E. Daniels, Jr. Pending

5987– The State v. Tammy C. Moorer Pending

5994 – Desa Ballard v. Admiral Insurance Company Pending

5995 – The State v. Kayla M. Cook Pending

5999 – Jerome Campbell v. State Pending

6001 – Shannon P. Green v. Edward C. McGee	Pending
6004 – Joseph Abruzzo v. Bravo Media Productions, LLC	Pending
6007 – Dominic A. Leggette v. State	Pending
6011 – James E. Carroll, Jr. v. Isle of Palms Pest Control, Inc.	Pending
6016 – Vista Del Mar v. Vista Del Mar, LLC	Pending
6017 – Noel Owens v. Mountain Air Heating & Cooling	Pending
6019 – Portfolio Recovery Associates, LLC v. Jennifer Campney	Pending
6025 – Gerald Nelson v. Christopher S. Harris	Pending
6028 – James Marlowe v. SCDOT	Pending
6029 – Mark Green v. Wayne B. Bauerle	Pending
6030 – James L. Carrier v. State	Pending
6031 – The State v. Terriel L. Mack	Pending
6032 – The State v. Rodney J. Furtick	Pending
6034 – The State v. Charles Dent	Pending
6037 – United States Fidelity and Guaranty Company v. Covil Corporation	Pending
6038 – Portrait Homes v. Pennsylvania National Mutual Casualty	Pending
6039 – Anita Chabek v. AnMed Health	Pending
6042 – Renewable Water Resources v. Insurance Reserve Fund	Pending
6044 – Susan Brooks Knott Floyd v. Elizabeth Pope Knott Dross	Pending

6047 – Amazon Services v. SCDOR	Pending
6048 – Catherine Gandy v. John Gandy, Jr.	Pending
6052 – Thomas Contreras v. St. John's Fire District Commission (3)	Pending
6053 – Kaci May v. Dorchester School District Two	Pending
6056 – The Boathouse at Breach Inlet, LLC v. Richard S. W. Stoney	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending
2022-UP-425 – Michele Blank v. Patricia Timmons (2)	Pending
2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending
2023-UP-014 – Palmetto Pointe v. Island Pointe	Pending
2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-143 – John Pendarvis v. SCLD	Pending
2023-UP-201 – Nancy Morris v. State Fiscal Accountability Authority	Pending
2023-UP-241 – John Hine v. Timothy McCrory	Pending
2023-UP-246 – Ironwork Productions, LLC v. Bobcat of Greenville, LLC	Pending
2023-UP-260 – Thomas C. Skelton v. First Baptist Church	Pending
2023-UP-261 – Mitchell Rivers v. State	Pending
2023-UP-264 – Kathleen A. Grant v. Nationstar Mortgage, LLC	Pending
2023-UP-283 – Brigette Hemming v. Jeffrey Hemming	Pending
2023-UP-289 – R-Anell Housing Group, LLC v. Homemax, LLC	Pending
2023-UP-290 – Family Services Inc. v. Bridget D. Inman	Pending

2023-UP-291 – Doretta Butler-Long v. ITW	Pending
2023-UP-295 – Mitchell L. Hinson v. State	Pending
2023-UP-311 – The State v. Joey C. Reid	Pending
2023-UP-321 – Gregory Pencille, #312332 v. SCDC (2)	Pending
2023-UP-329 – Elisa Montgomery Edwards v. David C. Bryan, III	Pending
2023-UP-343 – The State v. Jerome Smith	Pending
2023-UP-346 – Temisan Etikerentse v. Specialized Loan Servicing, LLC	Pending
2023-UP-352 – The State v. Michael T. Means	Pending
2023-UP-365 – The State v. Levy L. Brown	Pending
2023-UP-366 – Ray D. Fowler v. Pilot Travel Centers, LLC	Pending
2023-UP-369 – Harland Jones v. Karen Robinson	Pending
2023-UP-375 – Sharyn Michali v. Eugene Michali	Pending
2023-UP-392 – Trina Dawkins v. Fundamental Clinical	Pending
2023-UP-393 – Jeffrey White v. St. Matthews Healthcare	Pending
2023-UP-394 – Tammy China v. Palmetto Hallmark Operating, LLC	Pending
2023-UP-396 – Kevin Greene v. Palmetto Prince George Operating, LLC	Pending
2023-UP-397 – Jennifer Rahn v. Priority Home Care, LLC	Pending
2023-UP-398 – The State v. Rashawn M. Little	Pending
2023-UP-399 – The State v. Donnielle K. Matthews	Pending

2023-UP-400 – Paulette Walker v. Hallmark Longterm Care, LLC	Pending
2023-UP-406 – Carnie Norris v. State	Pending
2024-UP-003 – The State v. Quintus D. Faison	Pending
2024-UP-005 – Mary Tisdale v. Palmetto Lake City – Scranton Operating, LLC	Pending
2024-UP-007 – Shem Creek Development Group, LLC v. The Town of Mount Pleasant	Pending
2024-UP-018 – Mare Baracco v. County of Beaufort	Pending
2024-UP-022 – ARM Quality Builders, LLC v. Joseph A. Golson	Pending
2024-UP-023 – Wilmington Savings Fund v. Nelson L. Bruce (2)	Pending
2024-UP-024 – Kacey Green v. Mervin Lee Johnson	Pending
2024-UP-033 – The State v. David A. Little, Jr.	Pending
2024-UP-037 – David Wilson v. Carolina Custom Converting, LLC	Pending
2024-UP-044 – Rosa B. Valdez Rosas v. Jorge A. Vega Ortiz	Pending
2024-UP-046 –The State v. James L. Ginther	Pending
2024-UP-049 – ARO-D Enterprises, LLC v. Tiger Enterprises	Pending
2024-UP-052 – Vicki Vergeldt v. John Vergeldt	Pending
2024-UP-053 – R. Kent Porth v. Robert P. Wilkins, Jr.	Pending
2024-UP-056 – Joe Clemons v. Peggy H. Pinnell Agency, Inc.	Pending
2024-UP-057 – Natalie Barfield v. Michael Barfield	Pending
2024-UP-060 – The State v. Andres F. Posso	Pending

2024-UP-062 – Rachel Polite v. Karen Polite	Pending
2024-UP-067 – Saundra Hoffman v. State Farm	Pending
2024-UP-070 – The State v. Sean D. James	Pending
2024-UP-072 – The State v. Mark Gilbert	Pending
2024-UP-074 – The State v. Mark A. Hailey, Jr.	Pending
2024-UP-077 – Brittany C. Foster v. State	Pending
2024-UP-078 – Stephanie Gardner v. Berkeley County Sheriff's Office	Pending
2024-UP-083 – The Estate of Jo Eva Rice v. Fundamental Clinical and Operational Services, LLC	Pending
2024-UP-084 – Debbie Stroud v. THI	Pending
2024-UP-086 – Carr Farms, Inc. v. Susannah Smith Watson	Pending
2024-UP-087 – Stonington Community Association, Inc. v. Carl D. Taylor	Pending
2024-UP-114 – Robin Napier v. Mundy's Construction	Pending
2024-UP-117 – Shana Robinson v. State	Pending
2024-UP-126 – Kenneth Curtis v. Cynthia Glenn	Pending
2024-UP-160 – Adele Pope v. Alan Wilson (2)	Pending
2024-UP-167 – Julia Brooker v. Beacham O. Brooker, Jr.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Adam Rowell, Petitioner.

Appellate Case No. 2022-000571

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

Opinion No. 28215
Heard February 7, 2024 – Filed July 17, 2024

VACATED AND REMANDED

Billy J. Garrett, Jr., of The Garrett Law Firm, PC; Jane Hawthorne Merrill, of Hawthorne Merrill Law, LLC; and Clarence Rauch Wise, all of Greenwood, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

JUSTICE HILL: After a jury convicted Adam Rowell of two felony driving under the influence charges, he discovered one of the jurors, Juror 164, had failed to

disclose during *voir dire* that he had recently been arrested. Armed with this information, Rowell included it among other grounds in his motion for a new trial. Juror 164 was not present at the hearing on the new trial motion. After the hearing, Rowell requested another hearing so Juror 164 could be examined. Although the State consented to the request, the circuit court did not hold a second hearing and instead issued a written order denying Rowell a new trial. Rowell appealed. The court of appeals affirmed, holding the circuit court did not abuse its discretion in failing to conduct an evidentiary hearing with Juror 164. *State v. Rowell*, 436 S.C. 54, 870 S.E.2d 175 (Ct. App. 2022). We granted certiorari and now reverse.

I.

When the circuit court conducted the *voir dire* before Rowell's trial began, it asked whether any prospective juror or their close friends or family members had "ever been arrested or charged with a criminal offense through any state, local, or federal law enforcement agency." The question was the first of ten *voir dire* questions the circuit court asked collectively, instructing any jurors who needed to respond to come forward only after all ten had been asked. Juror 164 did not respond and ended up on Rowell's jury.

After he was convicted, Rowell learned Juror 164 had been arrested the week before the trial for possession with intent to distribute marijuana, unlawful neglect of a child, and possessing a controlled substance within the proximity of a school. Although these charges had been administratively referred to the same assistant circuit solicitor who was prosecuting Rowell, there is no suggestion the solicitor had actual knowledge of the pending charges against Juror 164 before Rowell's trial had concluded.

In its ruling denying Rowell a new trial, the circuit court found Juror 164's lack of response to *voir dire* was "unintentional" because the *voir dire* question about arrests was embedded in a series and the structure of the questioning could have confused the average juror. The court of appeals affirmed, agreeing with the circuit court that once a finding is made that no intentional concealment occurred the inquiry "ends," and therefore, there was no need to examine Juror 164 or hold another hearing.

II.

A.

This case calls upon us to again address the question of how trial courts should resolve allegations that a juror concealed information during *voir dire*. The case before us concerns such an allegation raised by a defendant in a motion for a new

trial after he had been convicted. The post-trial inquiry is more searching than when the alleged concealment surfaces during trial, for then the trial court has broad discretion to replace the juror with an alternate.

Our state and federal constitutions guarantee a party the right to an impartial jury, and "*voir dire* can be an essential means of protecting this right." *Warger v. Shauers*, 574 U.S. 40, 50 (2014); U.S. Const. amends. VI, XIV; S.C. Const. art. I, § 14. The trial court has the solemn duty to ensure "that every juror is unbiased, fair and impartial." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982). Jury selection is a pivotal stage of any trial, and it is vital that jurors truthfully answer *voir dire* questions. *Id.* at 371, 287 S.E.2d at 490. The trial court, the parties, and their counsel rely on these responses in assessing whether a juror should be dismissed for cause or peremptorily struck during the selection process.

The right to peremptory strikes is not constitutionally guaranteed but is granted by statute. *State v. Potts*, 347 S.C. 126, 131, 554 S.E.2d 38, 40 (2001); S.C. Code Ann. § 14-7-1050 (2017); S.C. Code Ann. § 14-7-1110 (2017). By allowing parties to reject a certain number of jurors who cannot be challenged for cause, the peremptory strike right enhances the fairness of the trial process, which in turn elevates public confidence in our justice system.

Challenges for cause are also provided by statute. If a party challenges a juror for cause, the circuit court must examine the juror to determine if the juror "is sensible of any bias or prejudice" about the case. S.C. Code Ann. § 14-7-1020 (2017). The challenging party may also present supporting evidence, and the juror must be excused if "the juror is not indifferent to the cause." *Id*.

Once a party has exhibited due diligence and timely raises a juror concealment claim, our precedent tells us the first step in analyzing the claim is to determine whether the concealment was intentional or unintentional. We defined the difference in *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001):

> We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far

> removed in time that the juror's failure to respond is reasonable under the circumstances.

Under this framework, if the concealment was intentional, it was inferred the juror was biased. *State v. Coaxum*, 410 S.C. 320, 328, 764 S.E.2d 242, 245–46 (2014). The moving party was entitled to a new trial as long as the party could show prejudice by demonstrating the information concealed would have either supported a challenge for cause or been a material factor in the use of the party's peremptory challenges. But if the concealment was unintentional, no bias could be inferred and the moving party could only receive a new trial if the party proved the concealed information suggested bias and the information would have been a material factor in the party's use of a peremptory challenge or would have resulted in a successful challenge for cause. *See id.* at 329, 764 S.E.2d at 246; S.C. Code Ann. § 14-7-1020 (describing process for setting aside a biased juror for cause). As we explained in *Coaxum*, "[i]n other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias." *Id*. at 329, 764 S.E.2d at 246.

We believe the time has come to abandon the intentional versus unintentional distinction. The distinction has proven unwieldy. This case is a good example of how awkward it is to apply, for it requires us to use an objective test (whether the *voir dire* question was ambiguous) to decide if a juror's conduct (withholding information the question sought to obtain) reveals that most subjective of human traits: bias.

We conclude a better path is to simplify the inquiry. Where a party claims a juror has withheld material information in response to a *voir dire* question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias. This will typically turn on the nature of the information withheld, rather than the nature of the juror's state of mind in not disclosing it. The nature of the fox's disguise matters little to the chicken.

We have always maintained that it is the nature of the information concealed that drives the inquiry. *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). The juror's intent may bear on the inquiry, but the ultimate question remains whether the juror was biased and whether the bias, in turn, caused prejudice. *See, e.g.*, *State v. Stone*, 350 S.C. 442, 448–49, 567 S.E.2d 244, 247–48 (2002) (holding trial court abused discretion in removing juror during sentencing phase of capital trial where juror's innocent nondisclosure of "scant acquaintance" with witness did not affect her impartiality and "would neither have supported a challenge for cause nor would it have been a material factor" in party's exercise of preemptory strikes).

We therefore hold today that when a juror untruthfully answers or fails to answer a material *voir dire* question, the juror's bias may not be presumed, and a new trial may be ordered only when prejudice is proven by showing the concealed information reveals a potential for bias *and* would have made a difference in the moving party's use of a peremptory strike or resulted in a successful challenge for cause. We overrule the "intentional versus unintentional" framework erected by the line of cases that began with *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982), and includes *Coaxum* and *Woods*.

This standard aligns with our decisions in other juror misconduct contexts, where we have required a showing of prejudice. *See, e.g.*, *State v. Green*, 432 S.C. 97, 99–101, 851 S.E.2d 440, 440–41 (2020) (evaluating prejudice of bailiff's comment to jury). The standard we set forth today for a juror's concealment of information during *voir dire* focuses on the potential bias of the juror and how the bias may prejudice a party. This protects a party's fundamental right to a fair and impartial jury, as well as society's interest in the finality of judgments.

The United States Supreme Court has struck the balance a bit differently. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (plurality opinion) ("We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause."). We have the right to interpret the South Carolina Constitution in a more expansive manner. *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001).

B.

We next address whether the trial court should have granted Rowell the second hearing. As our cases illustrate, a hearing on juror misconduct claims is almost always preferred. *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013). Although we stop short of requiring a full-blown evidentiary hearing based on the mere allegation of juror nondisclosure, a trial court must document cogent and compelling reasons for not holding one. We hold it was error for the circuit court to decline the request for an evidentiary hearing so Juror 164 could be examined as to whether his pending charges could have caused him to be biased. *See id*. ("[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing."); *Woods*, 345 S.C. at 585–86, 550 S.E.2d at 283 (explaining trial court ruled on new trial motion alleging juror concealment after holding an evidentiary hearing during which the juror testified);

see also Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 160, 760 S.E.2d 111, 119 (Ct. App. 2014).

Accordingly, we reverse the court of appeals' opinion and remand for an evidentiary hearing on Juror 164's failure to disclose his pending criminal charges. At the hearing, the circuit court shall decide whether Rowell has proven prejudice by demonstrating the withheld information suggests a potential bias, and, if so, whether it would have supported a challenge for cause or would have been material to his use of peremptory strikes.

We recognize the practical difficulty of revisiting this issue after such a long passage of time and the demands it may make on finite human memories, even assuming Juror 164 is available to testify. But that is as far as we will speculate about what the remand hearing may reveal or what its result should be.

VACATED and REMANDED WITH INSTRUCTIONS.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, Petitioners,

v.

City of Columbia, Respondent.

And

Larry Strickland, Denious L. Dimery and Bailey G. McClinton, Petitioners,

v.

City of Columbia, Respondent.

Appellate Case No. 2022-001494

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
R. Scott Sprouse, Circuit Court Judge,

Opinion No. 28216
Heard April 17, 2024 – Filed July 17, 2024

AFFIRMED AS MODIFIED

Lucy Clark Sanders and Nancy Bloodgood, both of Bloodgood & Sanders, LLC, of Mt. Pleasant; Susan K. Dunn, of Charleston; and Christopher James Bryant, of Columbia, all for Petitioners.

W. Allen Nickles, III, of Nickles Law Firm, of Columbia, and Jacqueline Marie Pavlicek, of Columbia, both for Respondent.

JUSTICE HILL: Petitioners are ten retired City of Columbia firefighters seeking to hold the City to what they contend was a promise to provide them free health insurance for life. Petitioners' legal journey reaches us after traveling two paths. The first path began in 2009 when several of the Petitioners sued the City after the City Council voted to require all active and retired employees under the age of sixty-five participating in the City's group health plan to contribute a part of the cost of the premiums. Judge Barber granted the City summary judgment, but the court of appeals reversed, finding Petitioners' promissory estoppel claim could proceed, and remanded that claim. *Bishop v. City of Columbia*, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013). We declined the City's petition for certiorari.

The second path started in 2013, while *Bishop* was awaiting trial after the remand. In that year, the City Council extended the premium contribution requirement to Medicare supplemental coverage for all retirees over the age of sixty-five. This extension triggered another lawsuit by several of the Petitioners.

The two lawsuits were consolidated for nonjury trial before Judge Sprouse. Petitioners' sole theory was that the doctrine of promissory estoppel barred the City from charging anything for health insurance coverage. Judge Sprouse ruled for the City. The court of appeals affirmed, holding Petitioners' promissory estoppel claim failed because they did not establish the City had made an unambiguous promise of free lifetime health insurance on which Petitioners could reasonably rely. *Cruz v. City of Columbia*, 437 S.C. 204, 877 S.E.2d 479 (Ct. App. 2022).

This time, we granted certiorari to address the issue of the City's liability under promissory estoppel. We affirm the court of appeals decision as modified.

I.

Because promissory estoppel is an equitable doctrine, our scope of review allows us to view the evidence anew and reach our own conclusions about what facts the evidence establishes. *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008).

II.

Born of equity, the doctrine of promissory estoppel enables a party to enforce an obligation against another even when one of the formal requisites of a contract is missing. The doctrine is designed for the rare instance when equity's aid is necessary to prevent the rank injustice that would ensue if a party could avoid being held to a clear promise he made on which the other party foreseeably and reasonably relied to his detriment. The essential elements of promissory estoppel are:

> (1) [T]he presence of a promise unambiguous in its terms, (2) reasonable reliance upon the promise by the party to whom the promise is made, (3) the reliance is expected and foreseeable by the party who makes the promise, and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Thomerson v. DeVito, 430 S.C. 246, 255–56, 844 S.E.2d 378, 383 (2020).

Petitioners invoke the doctrine of promissory estoppel to enforce the City's alleged promise of free lifetime health insurance. They claim City employees made the promise verbally and in newsletters and retirement letters the City sent them.

The court of appeals disagreed, holding any promise by the City to this effect was ambiguous because the details concerning the scope of the insurance offered were not sufficiently specific. The court of appeals further held Petitioners had not proven reasonable reliance on the City's promise because the retirement letters stated only that the City's "current" policy was to provide free health insurance. We affirm the court of appeals but reach our conclusion by different reasoning.

In our view, Petitioners have not proven the City promised them anything other than that their health insurance coverage requirements might change. But more importantly, Petitioners had no right to rely on the verbal or written statements made

by City employees. There is no evidence these employees had actual authority to bind the City on matters dealing with future health insurance benefits.

The City of Columbia is governed by the council-manager form of government. Under this form, "[a]ll legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council . . . ." S.C. Code Ann. § 5-13-30 (2004). Only the City Council—not the City Manager or any other City employee—has the power to adopt the City budget. S.C. Code Ann. § 5-13-30(3); *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646–47 (1991) (holding city manager under council-manager form of government had no authority to set city policy nor could manager's "acts be said to represent official policy in view of the legislative authority granted to the municipal council" by § 5-13-30). The decision to enter a group health insurance plan and make the benefits part of an employee's compensation is part of the budgeting process and, therefore, a legislative act. *See Functions of council—Legislative*, 4 McQuillin Mun. Corp. § 13:4 (3d ed. 2023).

There is no dispute that neither Petitioners' supervisors nor the City's human resources employees had the authority to promise free lifetime health insurance to Petitioners. Such a decision could only be made by the City Council. The record demonstrates that several Petitioners understood it was the City Council's exclusive prerogative to set such benefits and that the "current" policy could change. When the policy did change, Petitioners had no right, under promissory estoppel or otherwise, to remain under the old policy. This was the conclusion Judge Barber reached in his well-reasoned order, and it is the conclusion we reach today. To the extent *Bishop* conflicts with this conclusion, it is overruled.

We understand how Petitioners—who faithfully dedicated their working lives as first responders protecting public safety—could believe they had been at best misled about the cost of insurance benefits they could look forward to at retirement. We also understand how they might believe that equity, through the doctrine of promissory estoppel, should step in and hold the City to what they perceive to be the City's word.

But equity's force wanes when it seeks to impose obligations on public bodies, funded as they are by the taxpayers. Both law and equity agree that when it comes to legislative acts and policy decisions, a public body speaks with one voice. Here, that voice is the City Council.

Although this case concerns promissory estoppel, and not its cousin equitable estoppel, estoppel in general is subject to limiting principles. One of these principles is that a public body may not generally be estopped to deny liability for the statements or conduct of its agents unless the agent acted within the scope of their actual authority. *Ahrens v. State*, 392 S.C. 340, 352, 709 S.E.2d 54, 60 (2011). A public body may also, under certain circumstances, be estopped "in matters that do not affect the exercise of its police power or the application of public policy." *Id.* at 352–53, 709 S.E.2d at 60.

Here, the statements on which Petitioners rely were made by public employees who were not authorized to bind the City. The statements concerned public policy the speakers were powerless to create. Like any citizen dealing with the government, Petitioners were charged with notice of the limits of a public employee's actual authority. When they chose to rely on statements exceeding those limits, they did so at their peril, a peril beyond equity's rescue.

The Supreme Court of Illinois has decided a remarkably similar case the same way using the same reasoning. *Matthews v. Chicago Transit Auth.*, 51 N.E.3d 753, 780–82 (Ill. 2016) (rejecting employees' promissory estoppel claim against Chicago Transit Authority to continue providing retirees free lifetime health insurance, stating a "CTA employee cannot act in such a manner as to form a contract without the approval of the Chicago Transit Board . . . . [T]he CTA can only be contractually bound by official action taken by the Chicago Transit Board").

Some may see this result as at odds with the animating aim of promissory estoppel: to relax the formalistic fetters of contract law when necessary to prevent rank injustice. But the reason for the rule we are bound to apply here flows from a wider equitable source: the common good. If public bodies were liable under estoppel for missteps or misstatements of public employees acting outside of their statutorily defined roles, then public monies and public property would be at continuous risk. The law has long recognized the practical notion that it is better for private interests to bear the risk and yield to the public good in such unfortunate circumstances. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 583 (1992) ("Restrictions on municipal power are created to protect citizens. Although it may seem harsh to deny Berkeley a remedy for impairment of its franchise, it is better that Berkeley suffer from the mistakes of Mount Pleasant than for this Court to adopt a rule which, through improper combination or collusion, could be detrimental or injurious to the public."); *Notice Imputed to one Contracting with Municipality*, 10 McQuillin Mun. Corp. § 29:4 (3d ed. 2023) ("[P]ersons

dealing with a municipal corporation through its agent are bound to know the nature and extent of the agent's authority . . . . The doctrine of apparent authority is inapplicable in the context of a municipal contract . . . . A contrary doctrine would be fraught with danger." (internal footnotes omitted)).

We tack on a brief postscript. The court of appeals opinion quoted *Barnes v. Johnson*, 402 S.C. 458, 470, 742 S.E.2d 6, 12 (Ct. App. 2013), which states a party must prove promissory estoppel by "clear and convincing" evidence. We clarify today that—except in a case seeking specific performance of a land transfer, *see Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002)—a promissory estoppel claim need only be proven by the greater weight of the evidence. *Barnes* is therefore abrogated to the extent it states the "clear and convincing" evidence standard applies to all promissory estoppel claims.

To sum up, we affirm the court of appeals' holding that Petitioners are not entitled to relief on their claim of promissory estoppel. However, we vacate the court of appeals' reasoning.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Phillip Wayne Lowery, Respondent.

Appellate Case No. 2022-000806

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 28217
Heard March 26, 2024 – Filed July 17, 2024

REVERSED IN PART AND AFFIRMED IN PART

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Petitioner.

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Gary Howard Johnson, II, both of Columbia, for Respondent.

JUSTICE JAMES: Phillip Wayne Lowery was convicted of second offense driving under the influence. Lowery concedes he was under the influence, but he argues the only evidence he was driving a vehicle came from his statements to a patrol trooper that he claims were inadmissible under *Miranda v. Arizona*.[1] The court of appeals agreed and reversed the conviction and remanded for a new trial. *State v. Lowery*, 436 S.C. 349, 872 S.E.2d 197 (Ct. App. 2022). We reverse the court of appeals on this issue. Lowery also argues the charge should be dismissed because field sobriety tests and *Miranda* warnings from another trooper's dash camera video were not shown to the jury. The court of appeals held dismissal of the charge was not required. *Id.* at 361, 872 S.E.2d at 203. We affirm the court of appeals on this issue.

I.

Trooper David Vallin of the South Carolina Department of Public Safety responded to the scene of a two-vehicle accident in Greenville County. One of the involved vehicles left the scene before law enforcement arrived. Upon learning the departed vehicle was possibly at a Spinx gas station a short distance away, Trooper Vallin drove to the Spinx and encountered Lowery and a vehicle with a flat right-front tire in the parking lot. Lowery's daughter was the owner of the vehicle.

Trooper Vallin's eight-minute dash camera video was played for the jury. During the first thirty-three seconds of the video, Trooper Vallin asked Lowery where he had been and if he knew his tire was flat. Lowery told Trooper Vallin he "left Wild Country," "I pulled in here to call somebody to come help me change my tire," "did not know I hit nobody," and "I pulled in here and my tire was flat." Vallin asked Lowery how much he had had to drink, and Lowery responded he drank about five twelve-ounce beers. Lowery also told Trooper Vallin he was the only person in the vehicle.

Shortly thereafter, the video shows Trooper Vallin talking on his shoulder radio to another officer. Lowery was standing next to Vallin, but Vallin was not speaking to Lowery. Lowery then spontaneously stated, "I don't remember hitting nobody. I remember just pulling in here to get something to eat. If I hit somebody, I'm sorry. I just wanted to come by here—I called my buddy over here to come get me. I just wanted to get something to eat. If I hit somebody, I'm really sorry." Vallin ended his radio conversation and told another officer standing nearby that he could

[1] 384 U.S. 436 (1966).

leave the scene. Vallin then briefly acknowledged Lowery's spontaneous statements by saying "okay" and "I gotcha" as Lowery continued to talk. Trooper Vallin then instructed Lowery to stand by the disabled vehicle and asked Lowery who he wanted to tow it. As they discussed towing the vehicle, Lowery spontaneously stated, "I guess I screwed up. I can't lie about it."

Trooper Brandon McNeely also testified for the State. His testimony is relevant to Lowery's argument that the State did not comply with the provisions of South Carolina Code section 56-5-2953, which requires, in part, the videotaping of *Miranda* warnings and field sobriety tests at a DUI incident site. McNeely arrived at the Spinx after Trooper Vallin and administered three field sobriety tests to Lowery—the horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one leg stand test. Thereafter, he administered *Miranda* warnings to Lowery. The trial court granted Lowery's in limine request for Trooper McNeely's dash camera video to be redacted to delete any references that the collision was a hit and run and that a law enforcement officer's child was driving the other vehicle. The night before McNeely testified, the solicitor and defense counsel viewed the video together and agreed upon redactions. Lowery did not object to the sobriety tests and *Miranda* warnings being on the redacted video, and Lowery has never argued the tests and warnings were not on the redacted video.

During Trooper McNeely's testimony the following day, the State introduced the redacted video without objection from Lowery. At the beginning of the redacted video, McNeely asked Lowery several questions without Mirandizing him. Lowery told Trooper McNeely he was not driving and that someone dropped him off in the Spinx parking lot. The redacted video showed the entire HGN test. However, the video showed only part of the walk and turn test before freezing and going no further. None of the one leg stand test was shown on the corrupted video, nor were McNeely's *Miranda* warnings. Lowery did not object to the corrupted video, and McNeely then testified without objection that he administered the walk and turn test and the one leg stand test and that Lowery showed signs of impairment during those tests and during the HGN test. During cross-examination of Trooper McNeely, defense counsel elicited testimony that Lowery was "stumbling around" and slurring his words before McNeely began the sobriety tests. McNeely also testified without objection that he placed Lowery under arrest for DUI and Mirandized him.

Following Trooper McNeely's testimony, the State rested. Lowery moved for a directed verdict, arguing only that the State failed to prove Lowery was driving a vehicle. Lowery did not at that time cite any video deficiencies or any of the

videotaping requirements of section 56-5-2953. The trial court denied the motion.

Lowery presented his defense. He testified he did not drive a vehicle that night and that his friend Kim Pryor dropped him off at the Spinx so he could check on his daughter's disabled vehicle. Lowery admitted he did not remember a lot about the night of his arrest because he was "severely intoxicated." Ms. Pryor's testimony tracked Lowery's.

After resting, Lowery raised for the first time the issue of Trooper McNeely's corrupted video. Defense counsel argued he could not have objected at the time the video was admitted because he did not know what was going to happen. He also stated he did not know what was on the video and that the full field sobriety tests and *Miranda* warnings were not shown to the jury as required by statute. Lowery moved for a directed verdict on the ground that the State did not "meet the requirements as required under the DUI law [about] what needs to be shown." The solicitor argued defense counsel knew what was on McNeely's video because he and defense counsel had worked together the night before to redact the video. The trial court denied Lowery's motion and determined the State had "substantially complied" with provisions in section 56-5-2953 requiring field sobriety tests and *Miranda* warnings to be shown on video.

II. Admissibility of Statements

The admissibility of Lowery's statements to Trooper Vallin presents a mixed question of fact and law and therefore involves a two-step inquiry: appellate courts review "the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion" to be drawn from those facts is a question of law the appellate court reviews de novo. *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022). Whether Lowery was in custody is a question of law reviewed de novo. *See State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (holding the ultimate legal conclusion of whether, based on the facts, a statement was voluntarily made is a question of law subject to de novo review).

A criminal defendant is deprived of due process if his conviction is based, in whole or in part, on an involuntary confession. *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under *Miranda* . . . ." *State v. Brewer*, 438 S.C. 37, 45, 882 S.E.2d

156, 160 (2022) (quoting *State v. Saltz*, 346 S.C. 114, 135-36, 551 S.E.2d 240, 252 (2001)).

We have not addressed the issue of which party has the burden of proof as to (a) whether the defendant's statement was in response to interrogation and (b) whether the defendant was in custody when he made the statement. However, based on precedent in comparable situations, we hold the State has the burden of proof on these two points. *See State v. Green*, 440 S.C. 292, 304, 890 S.E.2d 761, 768 (2023) (holding that when a defendant objects to the State's attempted use of post-arrest silence for impeachment purposes and the defendant asserts that *Miranda* warnings were given, the burden is on the State to prove by a preponderance of the evidence that the defendant did not receive *Miranda* warnings prior to his silence); *Brewer*, 438 S.C. at 45, 882 S.E.2d at 160 ("Even if a defendant was advised of her *Miranda* rights but nevertheless chose to speak, '[t]he burden is on the State to prove *by a preponderance of the evidence* that h[er] rights were voluntarily waived.'"); *State v. Hart*, 436 S.C. 153, 160, 871 S.E.2d 202, 205 (Ct. App. 2022) ("Part of the State's burden during [a suppression hearing] is to prove that the statement was voluntary and taken in compliance with *Miranda*." (quoting *State v. Creech*, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1993))).

A. Routine traffic stop

"Even if an officer focuses his inquiries on a suspect, *Miranda* warnings are not warranted if the setting is non-custodial." *State v. Barksdale*, 433 S.C. 324, 332, 857 S.E.2d 557, 561 (Ct. App. 2021) (citing *State v. Easler*, 327 S.C. 121, 127-28, 489 S.E.2d 617, 621 (1997), *overruled on other grounds by State v. Greene*, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018)). *Miranda* warnings are "not intended to hamper the traditional function of police officers in investigating crime." *Miranda*, 384 U.S. at 477. Routine traffic stops are not "custodial interrogations" for purposes of the *Miranda* rule. *See Easler*, 327 S.C. at 127, 489 S.E.2d at 620; *State v. Peele*, 298 S.C. 63, 65-66, 378 S.E.2d 254, 255-56 (1989); *State v. Morgan*, 282 S.C. 409, 411-12, 319 S.E.2d 335, 336-37 (1984); *Barksdale*, 433 S.C. at 335, 857 S.E.2d at 562.

The trial court found Trooper Vallin's questioning was in furtherance of a routine traffic stop as contemplated in *Morgan*. The court of appeals disagreed and found the encounter with Lowery was not a routine traffic stop, citing *Easler*. *Lowery*, 436 S.C. at 356, 872 S.E.2d at 201. We agree with the court of appeals on this point. As in *Easler*, a scenario in which officers begin looking for an individual

after being told a driver left the scene does not typically constitute a routine traffic stop. Here, law enforcement began to search for a vehicle that was reportedly driven from the scene of a collision. The investigation was no longer a routine traffic stop and was instead a targeted investigation following a search for the driver of a missing vehicle. However, our holding on this point does not fully resolve the question of the admissibility of Lowery's statements.

B. Lowery's incriminating statements to Trooper Vallin

In the context of custodial interrogation, interrogation is either express questioning or its functional equivalent. *Easler*, 327 S.C. at 127, 489 S.E.2d at 621; *see also Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (explaining that *Miranda* warnings "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation"). Interrogation includes words or actions on the part of police that police should know are reasonably likely to elicit an incriminating response. *Easler*, 327 S.C. at 127, 489 S.E.2d at 621 (citing *Innis*, 446 U.S. at 301). However, "[v]olunteered inculpatory statements that are not in response to custodial interrogation are admissible without *Miranda* warnings." *State v. Owens*, 293 S.C. 161, 168-69, 359 S.E.2d 275, 279 (1987) (citing *State v. Koon*, 278 S.C. 528, 534, 298 S.E.2d 769, 772 (1982), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 504 n.3, 832 S.E.2d 575, 583 n.3 (2019)); *see also Miranda*, 384 U.S. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment . . . ."); *United States v. Ivey*, 60 F.4th 99, 112 (4th Cir. 2023) ("[S]pontaneous or volunteered statements that are not the product of interrogation or its functional equivalent are not barred by *Miranda*, even if the defendant is in custody when the statements are made." (quoting *United States v. Williams*, 16 F. App'x 90, 92 (4th Cir. 2001) (per curiam))).

During the first thirty-three seconds of the video, Trooper Vallin, without Mirandizing Lowery, questioned Lowery as to where he had been before arriving at the Spinx parking lot and how Lowery was able to drive with a flat tire. These questions were "interrogation," as they were reasonably likely to elicit incriminating responses. Lowery made several incriminating responses to these questions. If Lowery was in custody, these initial incriminating statements to Trooper Vallin were inadmissible; however, we need not decide whether Lowery was in custody, as Lowery later volunteered other equally incriminating statements that he was driving. Lowery made these later statements spontaneously and not in response to anything Trooper Vallin said or did. As noted above, Vallin was speaking with another officer on his shoulder radio when Lowery spontaneously stated, "I don't remember hitting

nobody. I remember just pulling in here to get something to eat. If I hit somebody, I'm sorry. I just wanted to come by here—I called my buddy over here to come get me. I just wanted to get something to eat. If I hit somebody, I'm really sorry." Trooper Vallin ended his radio conversation and briefly acknowledged Lowery's statements by saying "okay" and "I gotcha," but, again, Vallin neither said nor did anything to elicit the statements. Later, when Lowery and Vallin were discussing who Lowery wanted to tow the vehicle, Lowery spontaneously stated, "I guess I screwed up. I can't lie about it." Trooper Vallin neither said nor did anything to elicit this incriminating statement. These admissible volunteered statements created a jury issue as to whether Lowery was driving the vehicle. *See Ivey*, 60 F.4th at 112 (holding the detained defendant's unprompted incriminating statements made when officers were speaking amongst themselves and not to the defendant were admissible because no interrogation was taking place and, therefore, *Miranda* was not implicated).

We additionally hold that any error by the trial court in admitting the incriminating statements made by Lowery during the first thirty-three seconds of Trooper Vallin's video was harmless beyond a reasonable doubt in light of the admissible volunteered statements. *See State v. Byers*, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("[T]he materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990))).

III. Section 56-5-2953

Citing South Carolina Code section 56-5-2953, Lowery argues the trial court should have directed a verdict in his favor because Trooper McNeely's corrupted redacted video, as played for the jury, did not show Lowery being Mirandized and did not include all three field sobriety tests. The court of appeals held the video did not comply with subsection 56-5-2953(A) because it did not show the sobriety tests or *Miranda* warnings; however, citing our holding in *State v. Taylor*, 436 S.C. 28, 870 S.E.2d 168 (2022), the court of appeals held dismissal of the DUI charge was not required. *Lowery*, 436 S.C. at 360-61, 872 S.E.2d at 203.

This Court is free to decide questions of statutory interpretation without deference to the courts below. *Taylor*, 436 S.C. at 34, 870 S.E.2d at 171 (citing *State v. Alexander*, 424 S.C. 270, 274-75, 818 S.E.2d 455, 457 (2018)).

Subsection 56-5-2953(A) requires a DUI suspect's conduct at the incident site to be video recorded. The video recording "must . . . include any field sobriety tests administered . . . and . . . show the person being advised of his Miranda rights." S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii)-(iii) (2018). Subsection (A) further provides the video recordings "are admissible pursuant to the South Carolina Rules of Evidence . . . ." § 56-5-2953(A)(3). Subsection 56-5-2953(B) provides, "[f]ailure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of" a DUI charge. § 56-5-2953(B).

Even if Trooper McNeely's corrupted video did not comply with subsection 56-5-2953(A), we agree with the court of appeals that dismissal was not required. First, we held in *Taylor* that "suppression of tainted evidence flowing from the failure to administer *Miranda* warnings in accordance with subsection 56-5-2953(A)—not per se dismissal of the DUI charge—is the proper remedy." 436 S.C. at 39, 870 S.E.2d at 174. Lowery has never argued for the suppression of any statements he made to Trooper McNeely (presumably because he told McNeely he was not driving). Thus, the absence of *Miranda* warnings on the corrupted video did not warrant dismissal of the charge.

Second, the absence of all three sobriety tests on the corrupted video did not warrant dismissal of the charge. In *Taylor*, we noted one of the primary reasons for the video requirements in subsection 56-5-2953(A) is that "seeing the defendant and officer on camera reduces 'swearing contests' in DUI trials . . . ." *Id.* at 35, 870 S.E.2d at 172; *see also State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("[T]he primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence."). Evidence of a DUI suspect's failure of field sobriety tests is probative of only one thing—that the suspect was impaired. Here, Lowery conceded that point, as defense counsel told the jury during his opening statement, "You're going to hear a wacky story from a guy who is inebriated. He is drunk. He is drunk as a skunk. And we're not in any way debating that, okay." Also, after the corrupted video was played for the jury and did not show all three tests, Lowery did not object when Trooper McNeely testified he administered the tests and that Lowery showed signs of impairment during all three. Furthermore, Lowery himself elicited testimony during his cross-examination of Trooper McNeely that Lowery was "stumbling around" and slurring his speech and showed "indicators of impairment" during all three tests.

Finally, Lowery argues he was entitled to dismissal because the State failed to "produce" to the jury any video showing Lowery being given *Miranda* warnings. *See* § 56-5-2953(B) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge . . . if the arresting officer submits a sworn affidavit . . . ."). We disagree. In *State v. Branham*, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011), the defendant was convicted of DUI. The defendant moved to dismiss the charge because the State did not physically produce to him a video of the breath test site. *Id.* at 227, 708 S.E.2d at 807-08. The trial court denied the motion and allowed the breath alcohol test report into evidence. *Id.* at 227, 708 S.E.2d at 808. The report contained a notice that the defendant could view the video on the internet and provided the defendant with an I.D. and password to access the video. *Id.*

The *Branham* court held the word "produce" as used in subsection 56-5-2953(B) means "to bring into existence; to create; to manufacture; or to cause to have existence or to bring forth by mental or physical effort." *Id.* at 232, 708 S.E.2d at 810. The court stated, "[q]uite simply, we find the legislature intended that a video of the breath test site be created." *Id.* We agree with the *Branham* court and hold the word "produce" does not require the video be played for the jury.[2]

The State also argues the court of appeals erred in holding—or suggesting—subsection 56-5-2953(A) requires the portion of the incident site video including field sobriety tests and showing *Miranda* warnings to be played for the jury. We do not read the court of appeals' opinion to suggest such a conclusion, but we address the issue nonetheless. As we observed in *State v. Sawyer*, section 56-5-2953 is a "statute which governs the admissibility of certain evidence." 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014). Subsection (A) provides a DUI suspect's conduct at the incident site must be recorded, and it requires the video to include the sobriety tests and show *Miranda* warnings being administered. The statute further provides the video is admissible pursuant to the South Carolina Rules of Evidence. However,

[2] Of course, if the State seeks to introduce testimony from a witness such as Trooper McNeely regarding the defendant's performance on field sobriety tests or a suspect's statement after *Miranda* warnings, the State runs the risk of the testimony being excluded if it does not offer into evidence the incident site video that includes the tests or warnings. This is in keeping with decisions holding that one of the purposes of the video requirements is to reduce swearing contests in DUI cases.

just because the video is admissible does not mean the State must offer it into evidence.

In *Taylor*, we interpreted the word "show" in subsection 56-5-2953(A) to mean the defendant and the officer must be visually seen and audibly heard on the recording when the officer is advising the defendant of his *Miranda* rights. 436 S.C. at 35, 870 S.E.2d at 172. We did not define "show" to require the video to be shown to the jury. We hold the legislature did not intend to dictate what evidence must be offered by a party during a DUI trial or how the parties must present their cases, but rather intended to ensure the creation of a recording of sobriety tests, the arrest, and *Miranda* warnings. The statute does not require the State to offer into evidence any portion of the video.

IV.

We reverse the court of appeals in part and affirm in part, and we reinstate Lowery's conviction. Even if Lowery's initial incriminating statements to Trooper Vallin were inadmissible, Lowery's subsequent volunteered incriminating statements were admissible and created a jury issue as to whether he was driving. We affirm the court of appeals' holding that the absence of the sobriety tests and *Miranda* warnings on Trooper McNeely's video did not warrant dismissal. Finally, subject to our warning in footnote two, we hold section 56-5-2953 does not require the State to offer into evidence any portion of the incident site video.

REVERSED IN PART AND AFFIRMED IN PART.

BEATTY, C.J., KITTREDGE, FEW and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Nyquan Tykie Brown, Petitioner.

Appellate Case No. 2023-000166

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 28218
Heard June 19, 2024 – Filed July 17, 2024

VACATED IN PART, AFFIRMED IN RESULT

Appellate Defender Lara Mary Caudy, of Columbia, 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, all of Columbia; and Solicitor William Walter Wilkins III, of Greenville, all for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *State v. Brown*, 438 S.C. 146, 881 S.E.2d 771 (Ct. App. 2022). We vacate the court of appeals' opinion insofar as the inferred malice instruction is concerned, for we conclude the trial court erred in charging the jury that "malice can be inferred if one kills another during the commission of a felony," as it amounts to an improper charge on the facts. We also vacate the court of appeals' discussion of the felony-murder rule. Nonetheless, as established by the court of appeals, the only dispute at trial was identity, not the presence or absence of malice. For that reason, we find the erroneous jury charge could not have affected the verdict and was, therefore, harmless beyond a reasonable doubt. Accordingly, we affirm in result and uphold Petitioner's convictions for murder, armed robbery, and possession of a weapon during the commission of a violent crime.

Following an apparent drug-related dispute, two masked men robbed and murdered Fred Anderson.[1] Law enforcement's investigation yielded evidence implicating Petitioner, who was indicted for the crimes.

At trial, the State requested that the trial court instruct the jury as to the murder charge that the element of malice "can be inferred if one kills another during the commission of a felony." Petitioner objected to the proposed charge, arguing it required the trial court to impermissibly comment on the facts.[2] In support of his argument, Petitioner pointed to the numerous recent decisions of this Court rejecting similar jury charges that allowed the jury to infer guilt or the satisfaction of a given element of the charged offense based upon the existence of a particular fact. The trial court acknowledged that Petitioner "could be correct with respect to the direction in which the Supreme Court's headed" but maintained this Court had not "gotten there yet" and this case "could give [the Court] the opportunity to get there." Today, we get there.

[1] We refer to the court of appeals' opinion for a more detailed presentation of the facts and evidence of the armed robbery and murder.

[2] Petitioner also contended the charge relieved the State from its burden to prove malice beyond a reasonable doubt. We do not disturb the court of appeals' conclusion as to this argument.

We hold the trial court erred in giving the inferred malice instruction, for, in doing so, the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony. *See State v. Burdette*, 427 S.C. 490, 502–03, 832 S.E.2d 575, 582 (2019) ("When the trial court tells the jury it may use evidence of [particular facts] to establish the existence of malice, a critical element of the charge of murder, *the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury*. Even telling the jury that it is to give evidence of [a particular fact] only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence. . . . *A jury instruction that malice may be inferred from [a particular fact] is an improper court-sponsored emphasis of a fact in evidence . . . and it should no longer be permitted*" (emphasis added)).

This holding invariably follows a lengthy line of cases in which we have invalidated virtually identical inferred malice jury instructions and other instructions involving the trial court's improper commentary on the facts of a case. *See id.* (holding the trial court may not instruct the jury that it may infer existence of malice when a deadly weapon was used regardless of the evidence presented); *State v. Stewart*, 433 S.C. 382, 391, 858 S.E.2d 808, 813 (2021) (disapproving an inference charge about knowledge or possession of drugs when the drugs are found on property under the defendant's control); *State v. Smith*, 430 S.C. 226, 230, 845 S.E.2d 495, 496 (2020) (confirming that trial courts may not give any implied malice charge when there has been evidence presented that the defendant acted in self-defense); *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (finding improper a charge that "good character" evidence may create reasonable doubt as to the commission of the crime charged); *State v. Cartwright*, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (precluding the trial court from providing a limiting instruction or otherwise commenting to the jury on suicide-attempt evidence); *State v. Stukes*, 416 S.C. 493, 499–500, 787 S.E.2d 480, 483 (2016) (invalidating a charge that the victim's testimony in a criminal sexual conduct case need not be corroborated); *State v. Cheeks*, 401 S.C. 322, 328–29, 737 S.E.2d 480, 484 (2013) (concluding, in a drug trafficking case, that the trial court may not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by Rosemond v.*

Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009); *State v. Grant*, 275 S.C. 404, 407–08, 272 S.E.2d 169, 171 (1980) (concluding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt).

Although the court of appeals noted it would "not reach the question" of the propriety of the inferred malice jury charge given in this case, it nevertheless opined that the charge here "is meaningfully different" from the inferred malice charges this Court has struck down in other contexts. We discern no meaningful difference between this jury charge—instructing malice "can be inferred if one kills another during the commission of a felony"—from those inferred malice charges we have found improper as involving the trial court's impermissible comments on the facts. That being the case, we vacate the court of appeals' opinion in this regard.

While improper, the inferred malice charge does not warrant reversal in this case. We adopt the reasoning of the court of appeals that the challenged charge did not contribute to the verdict and was, therefore, harmless beyond a reasonable doubt. In short, at trial, Petitioner argued the case was one of mistaken identity, attacking the direct and circumstantial evidence the State presented to link him to the crimes. Significantly, at no point did Petitioner dispute that the armed robbery and murder of the victim occurred or that the victim's death was the result of malice.[3]

Accordingly, we vacate that part of the court of appeals' opinion purporting to uphold the inferred malice instruction. We further affirm the court of appeals' decision in result on the basis of harmless error.

VACATED IN PART, AFFIRMED IN RESULT.

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

[3] We are in no manner suggesting the State is relieved of proving each element of the offense beyond a reasonable doubt. We are merely recognizing that in the context of this case, the erroneous charge was harmless error.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Montrelle Lamont Campbell, Respondent.

Appellate Case No. 2022-000349

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 28219
Heard November 15, 2023 – Filed July 17, 2024

REVERSED

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Joseph Maye, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Petitioner.

Appellate Defender Lara Mary Caudy and Appellate Defender David Alexander, both of Columbia, for Respondent.

JUSTICE JAMES: In 2018, Respondent Montrelle Campbell was convicted of one count of murder and two counts of attempted murder. The issues before us concern (1) the trial court's instruction that malice aforethought may be inferred when the deed is done with a deadly weapon; (2) whether, under *State v. King*,[1] the State must prove expressed malice to obtain an attempted murder conviction; and (3) whether the trial court erred in giving an accomplice liability instruction.

The court of appeals reversed Campbell's convictions and remanded for a new trial. Citing our decision in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the court of appeals held the trial court's deadly weapon inferred malice instruction was error and held the error was not harmless. *State v. Campbell*, 435 S.C. 528, 535-38, 868 S.E.2d 414, 418-19 (Ct. App. 2021). The court also held our holding in *King* requires proof of expressed malice to sustain an attempted murder conviction. *Id*. at 535, 868 S.E.2d at 418. The court also held the trial court erred in giving an accomplice liability instruction. *Id*. at 538-41, 868 S.E.2d at 419-21.

We reverse the court of appeals and hold (1) the trial court's erroneous instruction that malice may be inferred from the use of a deadly weapon was harmless, in light of the overwhelming evidence of malice in the record; (2) attempted murder can be proven by a showing of either expressed or implied malice, or both; and (3) there was sufficient circumstantial evidence in the record to support the accomplice liability instruction.

I. Background

On Thursday, September 17, 2015, Katrina Brown was at her Charleston apartment in a complex named Gadsden Green with her sister Kerri Brown and friend Tonya Mosely when a woman named Kadeshia arrived around 11:30 p.m. Kadeshia was an old friend of Kerri, and Katrina knew Kadeshia. Campbell, Kadeshia's brother, eventually arrived at the apartment.

Katrina did not know Campbell was Kadeshia's brother and asked him to leave. Campbell left without saying a word. Katrina later walked outside to smoke a cigarette, and Campbell walked up to her and knocked her to the ground. Campbell stood over Katrina and then walked to the middle of the street while Kerri and Tonya helped Katrina up. The women then "had a few words" with Campbell, but when Katrina saw Campbell reaching for something inside a car, the women went back to

[1] 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017).

Katrina's apartment.

Katrina hosted a party at her apartment the next night. The party ended on Saturday morning around 6:30 a.m.—before sunrise—when someone fired fourteen rifle rounds into the apartment. At the time, approximately twelve people were present. Kerri was struck in the head, Katrina's cousin Tierra Brown in the arm, and Katrina's friend Antwan Frost in the chest. Kerri and Tierra survived, but Frost died. Police asked Katrina if she knew of anyone who wanted to harm her. Katrina told police she did not have a conflict with anyone in the neighborhood, but she told the police of her encounter with Campbell.

Police obtained security camera footage from multiple locations showing the area at the time of the shooting. Much of the footage was played for the jury. Detective Eric Tuttle was the lead detective and identified a gold Buick Century parking on Nunan Street in the footage. He identified Trivell Richardson and Andrew "Ace" Rivers as the individuals exiting the gold Buick, walking down Nunan Street, and turning left on President Street toward Gadsden Green. The footage shows Richardson in a white tee shirt and Rivers in black clothing walking in the direction of Gadsden Green. Neither was carrying a long gun. Within a few minutes, the footage shows Richardson walking back to the gold car, still not carrying a long gun. Moments later, the footage shows a third individual, identified by Richardson as Campbell, wearing a blue shirt, a t-shirt on his head, and carrying an AR-15 rifle. This individual was walking the same route Richardson took back to the gold Buick.

Detective Tuttle testified Richardson's and Campbell's cellphone records showed calls between Campbell's and Richardson's cellphones at 6:13 a.m. and 6:15 a.m., minutes prior to the shooting, in addition to numerous calls between them on the days before and after the shooting. Fourteen rounds of high-caliber rifle ammunition were fired into the apartment, and police found fourteen rifle shell casings in the grass outside Katrina's apartment. Thirteen casings were of one brand and one was of another brand. Police also recovered two cellphones on the ground next to the shell casings. No guns were recovered, no ballistics evidence was presented, and no information was extracted from the cellphones.

The investigation soon led police to Tomeka President, Campbell's relatively new girlfriend. President testified she resided in an apartment on Austin Avenue in North Charleston at the time of the shooting and that she and Campbell went to bed around 11:45 p.m., roughly seven hours before the shooting. President testified Campbell was gone when she woke up early the next morning, her gold Buick Century was not parked where she had left it, and her car keys were missing. She

called a taxi so she could get to work. When she walked back out later when the taxi arrived, she saw her car parked in a different spot from where she had parked it. The car was unlocked and the keys were on the front seat. President testified the gold Buick Century in the video footage and still photos looked like hers.

Campbell was charged with the crimes about two weeks after the shooting. Richardson, who was also charged, testified during Campbell's trial that he left a North Charleston strip club around 4:00 a.m. the morning of the shooting. A friend dropped Richardson off near his home on Austin Avenue, and Richardson was walking the remaining distance when he encountered Campbell. Campbell asked Richardson if he would go with him to buy cigarettes, and they walked to a gold Buick Richardson recognized as Tomeka President's. As Campbell drove, Richardson had his head down rolling a joint, so he did not notice at first that Campbell had gotten onto I-26 toward Charleston instead of going to a nearby Kangaroo convenience store. Richardson testified he asked Campbell where he was going and that Campbell responded, "[J]ust chill. It'll be all right." Richardson testified Campbell parked President's car in a vacant lot at the corner of President Street and Kennedy Street, about one block away from Katrina's apartment. Richardson testified Campbell exited the vehicle and asked him to park the Buick on Nunan Street—about two blocks further away from Katrina's apartment—and wait. Campbell began walking in the direction of Katrina's apartment building, and Richardson drove toward Nunan Street in the Buick. He saw Ace Rivers walking on the street and asked him to ride with him. Richardson parked on Nunan and began walking with Rivers toward President Street. He testified he called Campbell so he could find him and give him the car keys so he—Richardson—could go home. As Richardson and Rivers were walking, Richardson heard at least five gunshots. Richardson testified he ran back to the Buick, and Rivers ran in the opposite direction. While Richardson was trying to crank the car, Campbell got in with a rifle and said "go." According to Richardson, the rifle "was smoking." Richardson testified he drove back to North Charleston to where he first encountered Campbell, got out of the car, and walked home. Richardson identified himself in video footage and still photos as the man in the white t-shirt wearing a Dallas Cowboys cap, Rivers as the man in dark clothing, and Campbell as the man in a blue shirt carrying a rifle. He also identified himself in still photos as the man in the white shirt parking the Buick on Nunan Street.

Campbell did not testify but presented testimony from Peggy Blake, who lived across the street from Katrina at the time of the shooting. Blake's testimony is critical to the accomplice liability issue. Blake testified she heard the gunshots, looked out a window, and saw a black man directly across the street in front of Katrina's

building wearing a gray hoodie and holding a "sporty rifle." She testified the man got into a lime green car and drove away. Detective Tuttle testified he did not see a lime green car in any of the camera footage. The video footage confirmed the gold Buick was parked several streets away, not in front of Katrina's apartment building.

Over Campbell's objections, the trial court instructed the jury that malice may be inferred from the use of a deadly weapon and instructed the jury on accomplice liability. The trial court also denied Campbell's request to charge the jury that attempted murder required proof of expressed malice.

II. Discussion

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. §16-3-10 (2015). "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. §16-3-29 (2015). Our and the court of appeals' decisions refer to "implied malice" and "inferred malice" interchangeably. *See, e.g., Burdette*, 427 S.C. at 498, 832 S.E.2d at 580 (reviewing jury instruction that malice aforethought may be expressed or inferred); *State v. Taylor*, 434 S.C. 365, 367, 862 S.E.2d 924, 925 (Ct. App. 2021) (using both "implied" and "inferred").

The trial court correctly defined malice for the jury:

> Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

The trial court correctly instructed the jury:

> Malice aforethought may be expressed or inferred. These terms express[ed] or infer[red] do not mean different kinds of malice but merely the manner in which malice may be shown to exist . . . . Malice may be inferred from conduct showing a total disregard for human life.

However, the trial court included the following sentence after this instruction: "Inferred malice may also arise when the deed is done with a deadly weapon." At the time of Campbell's 2018 trial, that sentence was a proper instruction. However, in *Burdette*, we held such an instruction is an "improper court-sponsored emphasis of a fact in evidence" and "[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is

done with a deadly weapon." 427 S.C. at 503-05, 832 S.E.2d at 582-83.

A. Malice Aforethought and Section 16-3-29

Citing *King*, the court of appeals held proof of expressed malice is required to sustain an attempted murder conviction. *Campbell*, 435 S.C at 535-36, 868 S.E.2d at 418. Citing the plain language of section 16-3-29, the State argues proof of either expressed or implied malice will sustain an attempted murder conviction. We agree with the State. Section 16-3-29 provides that "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." We cannot write the specific reference to implied malice out of the statute. As the trial court instructed the jury, expressed malice and implied malice do not mean different kinds of malice, but rather the manner in which malice may be shown to exist. It is settled law that whether malice is implied or expressed, "[t]he term, 'malice' conveys the meaning of hatred, ill-will, or hostility toward another . . . . [M]alice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse." *State v. Leach*, 282 S.C. 178, 180, 318 S.E.2d 267, 268 (1984) (quoting *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941)). The trial court's malice aforethought instruction was largely drawn from this language and was a correct statement of the law. Simply put, the "malice aforethought" specified in section 16-3-29 can be proven by direct evidence, circumstantial evidence, or by a combination of the two.

B. Inferred Malice and *Burdette*

As noted, the trial court instructed the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." In *State v. Belcher*, we held this instruction is error if evidence is presented that would "reduce, mitigate, excuse or justify the homicide." 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). There was no such evidence in this case, so the instruction was proper under *Belcher*. However, while Campbell's appeal was pending in the court of appeals, we held in *Burdette* that the trial court must never instruct the jury that malice can be inferred from the use of a deadly weapon. 427 S.C. at 504-05, 832 S.E.2d at 583. *Burdette* applies here because Campbell's appeal was pending when *Burdette* was decided and because Campbell preserved the issue. *See id.* ("Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved."). The State concedes *Burdette* renders the instruction erroneous, but the State argues the error was harmless in light of the overwhelming evidence of malice in the record. We agree with the State.

Erroneous jury instructions are subject to a harmless error analysis. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr,* 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218). It is a fact-intensive inquiry. *Id.* (citing *State v. Jeffries*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("[W]e must review the facts the jury actually heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.")).

The court of appeals compared the evidence of malice in this case with that in *State v. Brook*s[2] and concluded "the evidence of express malice is significantly less than the amount in *Brooks*." *Campbell*, 435 S.C. at 538, 868 S.E.2d at 419. We note the court of appeals chose to compare only the evidence of expressed malice in the two cases; in any event, we conclude that even if *Brooks* is an appropriate measuring stick for overwhelming evidence of malice, the evidence of malice in the instant case rivals or surpasses that in *Brooks*. In *Brooks*, the defendant fired a pistol at two men in the parking lot of a nightclub. 428 S.C. at 624, 837 S.E.2d at 239. One man was killed, and the defendant was tried for murder. *Id.* As was the case here, the trial court instructed the jury that malice may be inferred if the deed is done with a deadly weapon. *Id.* And as here, the charge was error in light of *Burdette*. *Id.* at 626, 837 S.E.2d at 240. In *Brooks*, the court of appeals determined that "aside from any inference of malice the jury may have drawn from Appellant's use of a deadly weapon, the evidence of Appellant's other conduct satisfied the definition of malice." *Id.* at 630, 837 S.E.2d at 242. Specifically, the *Brooks* court noted that "[a]side from his mere use of a deadly weapon, [the defendant's] reckless behavior began with a hail of gunfire" at the two men. *Id*. at 631, 837 S.E.2d at 242. Other indicia of malice noted by the *Brooks* court were the defendant's pacing back and forth in the parking lot, taunting his victim, ignoring his victim putting his hands up, ignoring his friend's plea that he not shoot, displaying his guns, and—after firing—running to a nearby vehicle and fleeing the scene. *Id*. at 630-31, 837 S.E.2d at 242-43. The court also noted the defendant lied to police about his whereabouts and lied about cutting his hair after the murder. *Id.* at 631-32, 837 S.E.2d at 243. Here, the court of appeals omitted any reference to Campbell stealing Tomeka President's vehicle to facilitate his attack and gave short shrift to the indiscriminate firing of a rifle

[2] 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019).

fourteen times into an apartment where a party was going on, holding only that "Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed." *Campbell*, 435 S.C. at 538, 868 S.E.2d at 419.

Apart from the use of a deadly weapon, there is overwhelming evidence of malice in the record. We hold the erroneous inferred malice instruction did not contribute to the verdict. We therefore reverse the court of appeals on this issue.

C. Accomplice Liability

Over Campbell's objection, the trial court instructed the jury:

> [I]f a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose . . . . If two or more people are acting together . . . assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.

"If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction." *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011) (citing *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)). Accomplice liability can be proven by circumstantial evidence. "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *State v. Condrey,* 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting *State v. Langley,* 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, *but rather can prove the same by circumstantial evidence and the conduct of the parties*." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) (emphasis added) (citing *Condrey,* 349 S.C. at 193, 562 S.E.2d at 324).

The court of appeals held that based on the evidence presented, only Richardson could have been Campbell's accomplice, citing testimony that Richardson rode with Campbell from North Charleston to a point near Katrina's apartment, parked the car for Campbell, and drove Campbell back to North

Charleston. *Campbell*, 435 S.C. at 540, 868 S.E.2d at 421. However, the court of appeals held there must also be evidence Richardson was the shooter for the accomplice liability instruction to be proper as to Campbell. *Id.* at 541, 868 S.E.2d at 421. The court concluded there was no evidence Richardson was a shooter, noting video footage showed Richardson without a rifle at the time of the shooting, wearing a white t-shirt and ball cap, not a gray hoodie, and driving a gold Buick blocks from the scene, not a lime green car parked at the scene. *Id*. We agree with the court of appeals that Richardson's involvement, whatever it may have been, did not warrant an accomplice liability instruction as to Campbell, because there was no evidence Richardson was a shooter.

We turn to the man Peggy Blake saw immediately after the shooting in front of Katrina's apartment building holding "a sporty rifle" and leaving the scene in a lime green car. The court of appeals held that while there was evidence the man seen by Blake was the shooter, there was no evidence Campbell and the man seen by Blake were accomplices. *Id.* at 540-41, 868 S.E.2d at 420-21. We agree with the court of appeals there is sufficient evidence in the record to allow the jury to conclude that man was a shooter. Indeed, Campbell undoubtedly elicited Blake's testimony in the hope her testimony would lead the jury to completely discount Campbell's involvement and conclude the man in the lime green car was the *sole* shooter. However, we cannot ignore Richardson's identification of Campbell as the man seen in the video footage wearing a blue shirt, carrying an AR-15 rifle, and walking the same path as Richardson from the direction of Katrina's apartment back to the gold Buick parked on Nunan Street. That footage was captured within moments of the time his own witness, Blake, saw the other man outside Katrina's apartment carrying a rifle and getting into a lime green car. While Campbell argued at trial Richardson made up his story to escape criminal liability, Richardson's account—right up to his testimony of the proverbial "smoking gun"—allowed the jury to conclude Campbell was also a shooter.

Keeping in mind that accomplice liability can be proven by circumstantial evidence, we reach the critical question—whether there is sufficient circumstantial evidence in the record to allow the jury to reasonably conclude Campbell and the man seen by Blake were accomplices. The State's argument on this point is compelling. The State argues "the remarkable fact that two different individuals [one of whom was Campbell] were seen fleeing the same crime while carrying rifles, at the precise moment following a massive shooting committed by rifle fire, is undeniable circumstantial evidence" of two people acting as accomplices, and "[t]o suggest the jury could not infer such a scenario … is to disregard the maxim that 'it is always for the jury to determine the facts and the inferences that are to be drawn

from those facts.'" *See Burdette*, 427 S.C. at 502, 832 S.E.2d at 582 (quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). We agree. We simply cannot ignore evidence of the arrival of two men outside the same apartment building at the same moment before dawn, both armed with rifles and firing into the same apartment. Had it not been for Blake's testimony, an accomplice liability instruction could well have been error. However, considering the evidence as a whole, the instruction was proper.

The court of appeals found that because there was evidence that Campbell was the shooter, the question—as in *State v. Washington*[3]—is whether the record contains "equivocal" evidence that the man seen by Blake was Campbell's accomplice. *Campbell*, 435 S.C. at 540, 868 S.E.2d at 420-21. In *Washington*, we held an accomplice liability instruction was improper under the facts of that particular case. 431 S.C. at 403, 410, 848 S.E.2d at 784, 787. We noted there was evidence the defendant was the shooter and that one Larry Kinloch was the only person who could have been his accomplice; however, there was no evidence Kinloch was armed. *Id.* at 409-11, 848 S.E.2d at 787-88. Therefore, we held the accomplice liability instruction was improper as to the defendant. *Id*. Our holding in *Washington*, as it must in every case in which accomplice liability is an issue, depended upon a review of the evidence presented. *Washington* does not create a template all other fact patterns must match in order for accomplice liability to be properly charged to the jury.

We hold the evidence in the record allowed the jury to reasonably conclude the man Blake saw holding a rifle and getting into the lime green car at the scene of the shooting at the exact time of the shooting was Campbell's accomplice. *See Gibson*, 390 S.C. at 354, 701 S.E.2d at 770 ("In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties."). Therefore, we reverse the court of appeals and hold the trial court did not err in instructing the jury on accomplice liability.

III. Conclusion

We reverse the court of appeals. The erroneous instruction that malice could be inferred from the use of a deadly weapon was harmless in light of the overwhelming evidence of malice separate and apart from the mere use of a deadly

[3] 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020).

weapon. We hold proof of either expressed malice or implied malice will sustain an attempted murder conviction. Malice aforethought can be proven by direct evidence, circumstantial evidence, or some combination of the two. The trial court properly instructed the jury on accomplice liability because there is sufficient circumstantial evidence in the record that the man Peggy Blake saw holding a rifle and getting into the lime green car was both a shooter and Campbell's accomplice.

REVERSED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice Letitia H. Verdin, concur.

The Supreme Court of South Carolina

In the Matter of James H. Moss, Respondent.

Appellate Case Nos. 2024-001136 and 2024-001137

ORDER

The Office of Disciplinary Counsel has petitioned the Court to place Respondent on incapacity inactive status pursuant to Rule 28(a)(2) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent is hereby placed on incapacity inactive status. Based on the record, the Court finds Respondent is unable to practice law and further proceedings under Rule 28(b), RLDE, are unnecessary at this time.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s)

and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
July 10, 2024

cc: Deborah Stroud McKeown
William M. Blitch, Jr.
James H. Moss

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Hardeeville, Appellant,

v.

Jasper County, South Carolina; Jasper County Treasurer; and Jasper County Auditor, Respondents,

AND

Jasper County, South Carolina, Cross-Plaintiff,

Verna Garvin, in her official capacity as Jasper County Treasurer, Cross-Plaintiff,

and Monica Wilson, in her official capacity as Jasper County Auditor, Cross-Plaintiff

v.

City of Hardeeville, Nickel Plate Road, LLC, and Beaufort County, South Carolina, Cross-Defendants.

Appellate Case No. 2022-001266

Appeal from Jasper County
H. Steven DeBerry IV, Circuit Court Judge

Opinion No. 6071
Heard June 3, 2024 – Filed July 17, 2024

AFFIRMED

Michael Enrico Kozlarek and John Marshall Mosser, both of King Kozlarek Law LLC, of Greenville, for Appellant.

Thomas Allan Bendle, Jr., of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Jasper County Auditor.

Walter Hammond Cartin and Jeffrey Evan Phillips, both of Parker Poe Adams & Bernstein, LLP, of Columbia, for Respondent Jasper County.

GEATHERS, J.: This appeal arises out of a dispute related to levying taxes on a multi-county business park (MCBP) and the distribution of revenue pursuant to an MCBP agreement between Beaufort and Jasper counties. The City of Hardeeville appeals the circuit court's grant of partial summary judgment in favor of Jasper County, the Jasper County Auditor, and the Jasper County Treasurer (collectively, Jasper County Entities). The City of Hardeeville argues the circuit court erred in finding that: (1) the MCBP agreement between Beaufort and Jasper counties was valid and in compliance with constitutional and statutory law; (2) additional discovery was not necessary; (3) Hardeeville's consent to the agreement was not required; and (4) all property in the MCBP, including the annexed property, is exempt from all ad valorem taxation. We affirm.

FACTS/PROCEDURAL HISTORY

This dispute centers on the levying of ad valorem taxes and the distribution of revenue generated by Nickel Plate MCBP following Hardeeville's annexation of a portion of Nickel Plate MCBP property. In December 1999, Jasper and Beaufort counties drafted an agreement to jointly develop Nickel Plate MCBP (the Park Agreement). Nickel Plate MCBP consisted of three tracts of land covering 318.961 acres. At the time of the park's creation, none of the tracts were located in whole or in part in Hardeeville, a city located almost entirely in Jasper County.

The Park Agreement, in relevant part, provided that property located in Nickel Plate MCBP was exempt from ad valorem taxes for the duration of the agreement

and instead of ad valorem taxes, owners or lessees of park property would pay fee in lieu of tax (FILOT) payments. The Park Agreement also provided that all revenue generated by Nickel Plate MCBP through FILOT payments would be allocated between the two counties—99% to the Site Location County and 1% to the Partner County.[1] With regard to Jasper County, the Park Agreement provided the revenue generated from FILOT payments would be "distributed by Jasper County to the political subdivisions of Jasper County . . . in accordance with an ordinance adopted by Jasper County." Jasper County Council executed the Park Agreement on April 10, 2000.

When the Park Agreement was executed, Jasper County Council had already enacted an ordinance in February 2000 in which it authorized the development of Nickel Plate MCBP and incorporated the Park Agreement by reference. The February 2000 Ordinance provided:

> SECTION IX. Jasper County hereby designates that the distribution of the fee-in-lieu of ad valorem taxes pursuant to the [Park] Agreement actually received by Jasper County for [Nickel Plate MCBP] premises be paid to each of the taxing entities in Jasper County which [levies] an ad valorem property tax in any of the areas comprising [Nickel Plate MCBP] in the same percentage as is equal to that taxing entity's percentage of the millage rate being levied in the then current tax year for property tax purposes, provided that the County may, from time to time, by ordinance, amend the distribution of the fee-in-lieu of tax payments to all taxing entities. A portion of the fee-in-lieu of ad valorem taxes which Jasper County receives pursuant to the [Park] Agreement for [Nickel Plate MCBP] premises may be, from time to time and by ordinance of Jasper County Council or its successor, designated for the payment of special source revenue bonds.

[1] The Park Agreement did not specifically define which county was the Site Location County and which county was the Partner County; however, at the time of execution, Nickel Plate MCBP comprised three tracts located exclusively in Jasper County.

In April 2001, Jasper County Council enacted General Bond Ordinance No. 01–04 that authorized the issuance of one or more series of special source revenue bonds not to exceed $20,000,000 and authorized payment of the bonds secured by earmarking 40% of net fee payments[2] under the Park Agreement. The General Bond Ordinance expressly amended Section IX to read:

> Jasper County hereby directs that, of the fee-in-lieu of ad valorem taxes pursuant to the [Park] Agreement actually received by Jasper County for [Nickel Plate MCBP] premises, one (1%) percent of such fees be paid to Beaufort County. Of the remainder of such fees, forty (40%) percent shall be designated for the payment of special source revenue bonds, and the balance shall be paid to each of the taxing entities in Jasper County which [levies] an ad valorem property tax in any areas comprising [Nickel Plate MCBP] in the same percentage as is equal to that taxing entity's percentage of the millage rate being levied in the then current tax year for property tax purposes.

At the time the General Bond Ordinance was passed, the only taxing entities in the areas comprising Nickel Plate MCBP were Jasper County and the Jasper County School District. The ordinances and Park Agreement were recorded with the Jasper County Register of Deeds shortly after their respective enactment and execution.

Jasper County subsequently authorized the issuance of $14,000,000 in special source revenue bonds. Nickel Plate Road, LLC is the holder of those special source revenue bonds.

In August 2006, more than six years after the Park Agreement was executed, the owner of a portion of Nickel Plate MCBP property—specifically tract III, covering 106.75 acres—petitioned Hardeeville to annex the property. Hardeeville

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[2] The General Bond Ordinance defined net fee payments as the revenues Jasper County received and retained pursuant to the Park Agreement from FILOT payments remaining after payment of Beaufort County's allocation of 1% of revenues from FILOT payments Jasper County received.

granted the petition and annexed the property into its jurisdictional limits. Since annexation, the total millage levy—an ad valorem tax—on the annexed property has been assessed and paid in its entirety to Hardeeville. Two years after annexation, Jasper County Entities agreed to collect Hardeeville's taxes and fees, including for the annexed property, and to distribute all the revenues generated to Hardeeville.

However, on November 9, 2020, Jasper County sent a letter to Hardeeville stating that it had discovered Hardeeville's collection and retention of the total millage levy with no portion going to Beaufort County or payment of the special source revenue bonds. Jasper County sought to reconcile the error but sought reimbursement for only the portion of overpayments that accumulated during the immediately preceding three years. Hardeeville responded to the November 2020 letter stating it was not a party to any agreement related to Nickel Plate MCBP and was not bound by any of Jasper County's obligations.

Hardeeville commenced the underlying action against Jasper County Entities, seeking (1) a declaratory judgment with respect to its authority to levy and collect taxes and retain tax revenue without regard to the Park Agreement and (2) injunctive relief preventing Jasper County Entities from collecting the alleged overpayment or negatively impacting Hardeeville's ability to impose a tax levy on the annexed property. Jasper County Entities answered and filed a cross-complaint seeking a declaratory judgment that all park property was subject to the Park Agreement and alleging unjust enrichment from Hardeeville's collection and retention of the total millage levy.[3] In their cross-complaint, Jasper County Entities alleged Hardeeville had received an overpayment for current and prior years amounting to $463,226.13.

Jasper County Entities subsequently sought partial summary judgment on the following declaratory issues: (1) the rights of the parties with regard to the revenue generated from park property; (2) whether Nickel Plate MCBP is exempt from ad valorem taxes; (3) whether the ad valorem taxes on Nickel Plate MCBP were converted to FILOT payments as a matter of law; and (4) whether the revenue generated by the park must be distributed in the manner specified in the Park Agreement. Hardeeville filed a motion for summary judgment in which it asserted

[3] Nickel Plate Road joined the action as a cross-defendant due to its interest in the litigation as the holder of the special source revenue bonds. Nickel Plate Road did not file any briefs with this court and is not involved in the appeal.

the circuit court could find as a matter of law that the Park Agreement was invalid and not binding on Hardeeville.

The circuit court granted partial summary judgment in favor of Jasper County Entities and denied Hardeeville's motion for summary judgment. The circuit court determined the Park Agreement was valid under article VIII, section 13(D) of the South Carolina Constitution and satisfied subsection 4-1-170(A)(3) of the South Carolina Code (2021), which requires the inclusion of certain provisions in an agreement between multiple counties for the development of an MCBP. The circuit court found that the Park Agreement satisfied subsection 4-1-170(A)(3) through its reference to the ordinances and that no legal authority suggested any impropriety in an incorporation by reference in an MCBP agreement. Further, the circuit court determined Hardeeville's consent to the Park Agreement was not required because section 4-1-170(C) of the South Carolina Code (2021) requires consent of a municipality only if an MCBP would encompass all or part of the municipality *at the time the MCBP is created*. Lastly, the circuit court found that because the Park Agreement is valid and Hardeeville's consent was not required, all Nickel Plate MCBP property, including the annexed property, is exempt from ad valorem taxation and the revenue from FILOT payments must be distributed in accordance with the Park Agreement.

Hardeeville filed a Rule 59(e), SCRCP, motion, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in finding the Park Agreement satisfied subsection 4-1-170(A)(3) and was valid under article VIII, section 13(D)?

II. Did the circuit court err in finding that discovery was not necessary for determining that the Park Agreement was valid as a matter of law?

III. Did the circuit court err in finding that Hardeeville's consent to the Park Agreement was not required?

IV. Did the circuit court err in finding that *all* property in the park, including the annexed property, is exempt from all ad valorem taxation?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether there are any genuine issues of material fact, the court must view all ambiguities and reasonable inferences from the evidence "in the light most favorable to the non-moving party." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Further, "[w]hen a circuit court grants summary judgment on a question of law, [appellate courts] will review the ruling de novo." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

LAW/ANALYSIS

I. Constitutional and Statutory Compliance

Hardeeville argues the circuit court erred in finding that the Park Agreement was valid and satisfied constitutional and statutory requirements because (1) the constitution did not require any governmental entity other than the participating counties to be bound by the Park Agreement and (2) the Park Agreement did not comply with the statutory requirement to specify the manner in which revenues received by Jasper County would be distributed. We disagree.

Article VIII, section 13(D) of the South Carolina Constitution provides:

> *Counties* may jointly develop an industrial or business park *with other counties* within the geographical boundaries of one or more of the member counties. The area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation. The owners or lessees of any property situated in the park shall pay an amount equivalent to the property taxes or other in-lieu-of payments that would have been due and payable except for the exemption herein provided. The

> participating counties shall reduce the agreement to develop and share expenses and revenues of the park to a written instrument *which is binding on all participating counties*. Included within expenses are the costs to provide public services such as sewage, water, fire, and police protection. Notwithstanding the above provisions of this subsection, before a group of member counties may establish an industrial or business park as authorized herein, the General Assembly must first provide by law for the manner in which the value of the property in the park will be considered for purposes of bonded indebtedness of political subdivisions and school districts and for purposes of computing the index of taxpaying ability pursuant to any provision of law which measures the relative fiscal capacity of a school district to support its schools based on the assessed valuation of taxable property in the district as compared to the assessed valuation of the taxable property in all school districts of this State.

(emphases added). As required by article VIII, section 13(D), the legislature adopted the correlating statute that provides: "The written agreement entered into by the participating counties must include provisions [that]:

> (1) address sharing expenses of the park;
>
> (2) specify by percentage the revenue to be allocated to each county;
>
> (3) *specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.*

S.C. Code Ann. § 4-1-170(A) (2021) (emphasis added). Hardeeville concedes the Park Agreement met the requirements of the first and second subsections but asserts the agreement failed to comply with the third.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581

(2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454–55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous, a court must construe its provisions according to the terms the parties used as understood in their plain, ordinary, and popular sense." *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 280, 648 S.E.2d 295, 299 (Ct. App. 2007) (citation omitted). "[O]ne contract may incorporate another by reference . . . ." *Shaw v. E. Coast Builders of Columbia, Inc.*, 291 S.C. 482, 484, 354 S.E.2d 392, 392 (1987). "[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole." *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial." *Id*.

The plain language of article VIII, section 13(D) provides that to develop an MCBP, the participating counties must execute a written agreement "[that] is binding on all participating counties." The section is silent on the binding effect of an MCBP agreement on municipalities with territory encompassed in an MCBP. However, section 4-1-170(C) clarifies the role of municipalities, providing that, "If the industrial or business park encompasses all or a portion of a municipality, the counties must obtain the consent of the municipality prior to the creation of the multi-county industrial park." Section 4-1-170(C) and article VIII, section 13(D), read together, evince that a municipality encompassed in an MCBP is bound by the park agreement if the municipality consents *prior* to the agreement's execution. If a municipality is not encompassed within the situs of the MCBP, then it stands to reason that no such consent is required to execute a park agreement. Further, the limitation of when municipal consent is necessary—prior to an MCBP's creation—demonstrates the legislature's intent that once a park agreement is executed, the MCBP property become exempt from all ad valorem taxes and that the park

agreement control the levying, collection, and distribution of revenue generated by the MCBP, regardless of any future annexation of park property into municipalities. *See Tilley v. Pacesetter*, 333 S.C. 33, 40, 508 S.E.2d 16, 20 (1998) (per curiam) (stating that if the "legislature had intended [a] certain result in a statute, it would have said so").

No part of Hardeeville's territory was encompassed in any portion of Nickel Plate MCBP at the time the Park Agreement was executed. In fact, it was not until approximately six years after the execution of the Park Agreement that Hardeeville annexed a portion of Nickel Plate MCBP. Thus, there was no obligation at any point for Jasper County to consult Hardeeville and gain its consent with regard to the Park Agreement. Nickel Plate MCBP property is subject to the Park Agreement for the duration of the agreement, regardless of annexation.

Further, the Park Agreement complies with the requirement to specify distribution of revenue under subsection 4-1-170(A)(3) because the Park Agreement properly incorporated by reference the February 2000 and General Bond ordinances. *See Shaw*, 291 S.C. at 484, 354 S.E.2d at 392 ("[O]ne contract may incorporate another by reference . . . ."); *Klutts Resort Realty, Inc.*, 268 S.C. at 88, 232 S.E.2d at 24 ("[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole."); *cf. Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 493 (Ct. App. 2004) ("Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." (quoting *Edward Pinckney Assocs., Ltd. v. Carver,* 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct. App. 1987))); *Ellie, Inc*., 358 S.C. at 93, 594 S.E.2d at 493 ("This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered [at] the same time to accomplish an agreed purpose."). The February 2000 Ordinance and the General Bond Ordinance specifically tied revenue distribution to the millage rate formulated in the current tax year. Moreover, the General Bond Ordinance provided a clear order for distribution of revenues—first 1% of revenues paid to Beaufort County and then the remainder of revenues split into 40% for payment of special source revenue bonds and the balance for taxing entities in Jasper County.

Accordingly, we affirm the circuit court's finding that the Park Agreement was valid and complied with article VIII, section 13(D) and subsection 4-1-170(A)(3).

II. Discovery

Hardeeville contends the circuit court erred in finding additional discovery was not necessary to render partial summary judgment. Hardeeville's argument centers around Jasper County Entities' failure to challenge the annexation and subsequent tax collection for more than a decade. We disagree.

The issue before the circuit court was the partial summary judgment regarding the validity of the Park Agreement and whether the annexed property can be subject to ad valorem tax. Hardeeville offered no examples of additional discovery that would offer guidance on the contractual and statutory interpretation questions at play in the partial summary judgment motion. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (noting that a party opposing a summary judgment motion on the ground it has not had "a full and fair opportunity to complete discovery. . . . must demonstrate the likelihood that further discovery will uncover additional relevant evidence"). Further, Hardeeville cannot credibly argue additional discovery was necessary when it simultaneously filed a motion for summary judgment arguing the circuit court could find as a matter of law the Park Agreement was invalid. *See Buonaiuto v. Town of Hilton Head Island*, 440 S.C. 144, 150, 889 S.E.2d 625, 628–29 (Ct. App. 2023) ("Where cross[-]motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." (quoting *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011))).

Accordingly, we affirm the circuit court's finding that additional discovery was unnecessary to determine the issues in the partial summary judgment motion.

III. Consent

Hardeeville argues the circuit court erred in finding Hardeeville's consent to the Park Agreement was not required because (1) neither the constitution nor section 4-1-170(A) contemplates binding municipalities to a multi-county park agreement and (2) Jasper County failed to raise any concerns about Hardeeville's ability to levy and collect taxes during annexation. We disagree.

As discussed above, section 4-1-170 of South Carolina Code (2021) and article VIII, section 13(D), read together, require counties to gain the consent of municipalities encompassed in the park *prior* to execution of the Park Agreement. After execution of the Park Agreement, the county is not required to gain the consent of a municipality that annexes a portion of park property, and the park agreement in place continues to govern the collection and distribution of revenue generated by the MCBP. *See Horry Cnty. Sch. Dist. v. Horry County*, 346 S.C. 621, 630–31, 552 S.E.2d 737, 741–42 (2001) ("Article VIII, [section] 13(D) and [section] 4-1-170 exempt property in MCBPs from *ad valorem* taxation and permit the county to enter agreements specifying how MCBP revenue will be distributed. . . . [Section] 4-1-170[(A)](2) specifically allocates that revenue to the county, not to any another taxing entity."); S.C. Code Ann. § 4-1-170(C) ("If the industrial or business park encompasses all or a portion of a municipality, the counties must obtain the consent of the municipality *prior* to the creation of the multi-county industrial park." (emphasis added)).

As discussed above, no part of Hardeeville's territory was encompassed in whole or in part in Nickel Plate MCBP at the time of its creation; thus, its consent was not required to execute the Park Agreement. After Nickel Plate MCBP's creation, the Park Agreement continues to control regardless of annexation.

Accordingly, we affirm the circuit court's finding that Hardeeville's consent to the Park Agreement was not required.

IV. Exemption from the Ad Valorem Taxation

Hardeeville argues the circuit court erred in failing to find that article VIII, section 13(D) and section 4-1-170, read with South Carolina's statute regarding annexation by petition, reflect the legislature's intent to allow a municipality to levy and collect ad valorem taxes and fees on annexed property even if the property is located in a pre-existing MCBP. Hardeeville asserts it would violate public policy to allow a municipality to annex property and provide services to the annexed property, yet not allow it to collect any tax revenue from the property—in contradiction to the plain language of the annexation statute. We disagree.

Section 5-3-150(1) of the South Carolina Code (2004) provides that:

> Any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by seventy-five percent or more of the freeholders . . . owning at least seventy-five percent of the assessed valuation of the real property in the area requesting annexation.

Under this method of annexation,

> [P]roperty owned by a governmental entity and leased to any other entity pursuant to a fee in lieu of taxes transaction . . . is considered to have an assessed valuation equal to the original cost of the real property . . . . For purposes of this section, the lessee of real property *pursuant to a fee in lieu of taxes transaction* . . . is the freeholder with respect to the property.

S.C. Code Ann. § 5-3-150(4) (2004) (emphasis added). Finally,

> For purposes of [annexation by petition signed by all or seventy-five percent of the freeholders], *any real property included within a multicounty park under Section 4-1-170 is considered to have the same assessed valuation that it would have if the multicounty park did not exist.* Notwithstanding any other provision of law, any real property which is or has been included within a multicounty park under Section 4-1-170 and title to which is held by the State of South Carolina, only may be annexed with prior written consent of the State of South Carolina, and when title to real property in the park is held by a political subdivision of the State, the property may be annexed only with prior written consent of the governing body of the political subdivision holding title.

S.C. Code Ann. § 5-3-150(5) (2004) (emphasis added).

The annexation by petition statute—section 5-3-150—clearly contemplates a municipality annexing property subject to an MCBP agreement, yet it does not allow a municipality's annexation to disturb a preexisting MCBP agreement's distribution of revenue scheme. Sections 5-3-150(4) and (5) consider only whether the lessee of a property within an MCBP constitutes a freeholder for annexation purposes and how to calculate the assessed valuation of MCBP property to satisfy the statutory requirement that the petition be signed "by seventy-five percent or more of the freeholders . . . *owning at least seventy-five percent of the assessed valuation of the real property in the area requesting annexation*." (emphasis added). Reading the annexation statute, article VIII, section 13(D), and section 4-1-170 together, we conclude the legislature clearly was aware that property in MCBPs could be annexed into a municipality's jurisdiction subsequent to creation of a park agreement and yet chose not to disturb existing park agreements when property in the park was annexed. *See Tilley*, 333 S.C. at 40, 508 S.E.2d at 20 (stating that if the "legislature had intended [a] certain result in a statute, it would have said so").

Here, the existing Park Agreement controls the distribution of revenue generated by Nickel Plate MCBP following Hardeeville's annexation, and the participating counties, not other taxing entities, retained the authority to allocate revenue generated from the MCBP. *Horry Cnty. Sch. Dist.*, 346 S.C. at 630–31, 552 S.E.2d at 741–42 ("Article VIII, [section] 13(D) and [section] 4-1-170 exempt property in MCBPs from *ad valorem* taxation and permit the county to enter agreements specifying how MCBP revenue will be distributed. . . . [Section] 4-1-170[(A)](2) specifically allocates that revenue to the county, not to any another taxing entity."). Accordingly, we hold the circuit court did not err in finding Nickel Plate MCBP property, regardless of whether the property was subsequently annexed by a municipality, was exempt from ad valorem taxes and the Park Agreement controlled the collection and distribution of revenue generated by Nickel Plate MCBP.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

HEWITT and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Colonial Pipeline Company, Respondent,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County, Appellants.

Appellate Case No. 2021-000219

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 6072
Heard March 5, 2024 – Filed July 17, 2024

REVERSED

Walter Hammond Cartin and Jeffrey Evan Phillips, both of Parker Poe Adams & Bernstein, LLP, of Columbia, and Joshua Madison Tyler Felder, of Parker Poe Adams & Bernstein, LLP, of Greenville, all for Appellants Aiken County and Laurens County. Michael Enrico Kozlarek, of Kozlarek Law, LLC, and Kimila Lynn Wooten, of Kenison Dudley & Crawford, LLC, both of Greenville, for Appellants Abbeville County, Anderson County, Greenville County, and York County. Marcus Dawson Antley, III, and Jason Phillip Luther, both of Columbia, for Appellant South Carolina Department of Revenue.

Burnet Rhett Maybank, III, of Adams and Reese, LLP, of Columbia, for Respondent.

THOMAS, J.: The South Carolina Department of Revenue (DOR) and Aiken, Laurens, Abbeville, Anderson, Greenville, and York Counties (the Counties[1]) (collectively, Appellants) appeal the order of the Administrative Law Court (ALC) granting a pollution control property tax exemption to Respondent Colonial Pipeline Company (Colonial), arguing the ALC erred in (1) granting the exemption to a transportation company that is not a production plant; (2) failing to appropriately discount the exemption based on the dual purpose provision; (3) limiting the scope of the contested case hearing; and (4) finding Colonial was entitled to the exemption despite the failure of the South Carolina Department of Health and Environmental Control (DHEC) to determine the issue. We reverse.

FACTS

This matter involves the interpretation of a property tax exemption for pollution control devices claimed by Colonial under the South Carolina Constitution and Section 12-37-220 of the South Carolina Code (2014). The constitutional provision exempts from property tax "all facilities or equipment of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air[,] or noise pollution." S.C. Const. art. X, § 3(h) (emphasis added). The statutory provision exempts from property tax "all facilities or equipment of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business." S.C. Code Ann. § 12-37-220(A)(8) (2014) (emphasis added). The primary issue is whether Colonial, a company that transports petroleum products via more than 500 miles of pipeline[2] across South Carolina, is an industrial plant, which would entitle it to the exemption.

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[1] Aiken County and Laurens County successfully moved to intervene and filed briefs. Abbeville County, Anderson County, Greenville County, and York County, also intervenors, filed separate briefs. We refer to all counties as "the Counties" unless specified.

[2] Of the 515 miles of pipeline Colonial has in South Carolina, 203 are mainline miles while others are abandoned, delivery line, or stub line miles.

The parties stipulated to the majority of the facts. Colonial is a pipeline company that transports refined petroleum, jet fuel, gasoline, diesel, heating oil, kerosene, and blend stocks through underground pipes in South Carolina. These products can interface with one another and create a fluid called "Transmix." Transmix is a fluid that does not meet the specifications for a fuel that can be used or sold for use. Each product that combines to create Transmix can be separated into a once again saleable product. At least 90% of each product transported by Colonial is of the same specification and quantity when it enters the pipeline as it is when it leaves the pipeline. Colonial does not own the products it transports.

Although Colonial has property throughout the state, the property at issue in this matter is located in the Counties. Colonial also has tank farms, delivery facilities, and booster stations in South Carolina. Its two tank farms in South Carolina—one in Belton and the other in Spartanburg—receive and store product from the transmission pipeline and pump the product to individual truck terminals. Colonial's delivery stations in South Carolina are located at the tank farms and deliver product on a transmission line to a truck terminal. Colonial has three booster stations in South Carolina—one in Anderson, one in Simpsonville, and another in Gaffney. The booster stations push the product through the pipeline.

DOR received Colonial's 2017 application for an ad valorem tax exemption based on section 12-37-220(A)(8). In its letter and accompanying application, Colonial reported a pollution control exemption on pipe coatings, cathodic protection, automatic shut-off valves, wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs. Based on its evaluation, DOR granted the exemption application as to wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs for property tax year 2017 but denied Colonial's exemption application as to pipe coatings, cathodic protection, and automatic shut-off valves.[3]

[3] DOR initially approved the exemption for the first four items (wastewater control, stormwater control, secondary containment, and floating roofs) in both 2017 and 2018. DOR's initial rejection of the exemption of the last three items (pipe coatings, cathodic protection, automatic shutoff valves) was on the basis that Colonial was not an industrial plant.

Colonial protested the proposed assessment for 2017. DOR notified the Counties of Colonial's appeal of the 2017 assessment. DOR forwarded the 2017 exemption application information to DHEC for investigation into whether Colonial's claimed property, specifically, pipe coatings, cathodic protection, and automatic shut-off valves, qualified as pollution control property, pursuant to section 12-37-220(A)(8). DHEC responded that federal agencies, like the United States Department of Transportation ("USDOT"), regulate pipelines, and DHEC lacked the authority to permit, inspect, or enforce pipeline operations.

In its 2018 application for an ad valorem tax exemption based on section 12-37-220(A)(8), Colonial claimed the same property as pollution control property on its 2017 and 2018 property tax returns. DOR requested DHEC investigate Colonial's property to determine the portion of the property that qualified as pollution control property pursuant to section 12-37-220(A)(8). DOR denied Colonial's exemption application as to pipe coatings, cathodic protection, and automatic shut-off valves but granted the exemption application as to wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs for the 2018 property tax year. Colonial again protested.

DOR forwarded the 2018 exemption application for all seven claimed items to DHEC for investigation into whether Colonial's claimed property qualified as pollution control property, pursuant to section 12-37-220(A)(8). DHEC submitted a letter to DOR clarifying that the pipe coatings, cathodic protection, and automatic shut-off valves for property tax years 2017 and 2018 can be described as pollution control equipment. DHEC again noted that federal agencies, like USDOT, regulate pipelines, and DHEC lacks authority to permit, inspect, or enforce pipeline operations.

In November 19, 2018, DOR issued its Determination, denying the exemptions for all of the categories of equipment. Colonial timely requested a contested case hearing on December 5, 2018. On September 4, 2019, DOR clarified through its Second Amended Prehearing Statement that Colonial does not qualify for an ad valorem property tax exemption pursuant to section 12-37-220(A)(8) (2014) for *any* of its claimed property—including property for which it initially granted the exemption.

DOR's denial of Colonial's 2017 and 2018 applications for pollution control tax exemptions found Colonial was "not a facility or equipment of an industrial plant" and was "more similar to railroads and delivery companies and not a manufacturer whose plants would qualify as industrial plants." Colonial filed a request for a contested case hearing with the ALC. The Counties moved to intervene, which the ALC granted. The parties filed prehearing statements and stipulated to the operative facts. All parties filed motions for summary judgment, which were denied after a hearing. The ALC also denied DOR's motion to amend its prehearing statement as well as DOR's and the Counties' motions to alter or amend.

At the contested case hearing, Colonial maintained its system of pipelines, tank farms, delivery facilities, and booster stations constituted an industrial plant for purposes of the pollution control tax exemption. It also argued numerous of the claimed exemptions qualified as pollution control equipment. Colonial provided testimony that all of the items claimed for exemption were used primarily for business purposes, were designed for pollution control by abating or eliminating water or air pollution, and were required by federal law.

Taylor Ingram, the Utility Assessment Coordinator for DOR, testified he had appraised utilities for property tax purposes. He explained that pipelines and railroads, including Colonial, were assessed at 9.5 percent tax rate rather than the 10.5 percent rate for utilities. He testified he initially denied Colonial the exemption in part to get guidance from DHEC. DHEC then concluded it was not its "area of expertise" and suggested DOR "reach out to DOT" for classification. Ingram acknowledged DHEC also stated, "the listed technologies, corrosion protection, pipeline coatings, [and] shear valve[s,] can be fairly described as pollution control equipment." He admitted the utility companies in South Carolina, including SCE&G, annually claimed hundreds of millions of dollars of pollution control exemptions. He opined the qualifier to obtain the exemption was whether the device claimed was "a facility or equipment of an industrial plant." He acknowledged that Colonial met the statutory requirements that claimed devices be "used in the conduct of [Colonial's] business" and "required by the state or federal government." *See* S.C. Code Ann. $ 12-37-220(A)(8) (2014).

At the close of the evidence, Colonial argued its pipelines, substations, tank farms, and other auxiliaries constituted an "industrial plant." DOR argued it used unit valuation to view the pipeline as a whole without "zoom[ing] in on th[o]se booster stations or tank farms" to find Colonial was not an industrial plant. DOR

maintained if it looked separately at the tank farms, for instance, then Colonial would not receive the lower, 9.5 percent assessment rating. The Counties argued the ALC should apply a narrow construction of the term "industrial plant," and under a narrow interpretation, Colonial did not meet the requirements needed for the exemption; the federal government defined Colonial as a transportation company and a federal regulation required industrial production or output; and the exemption statute predicated DOR approval of an exemption on an affirmative determination by DHEC, which did not occur here.

The ALC issued its first final order, finding it necessary to view Colonial as a whole. The ALC determined the tank farms, pipelines, and pump stations, working as a whole, constituted an industrial plant. It found this approach similar to DOR's unit valuation method for pipeline companies, which values the business as a whole rather than considering individual pieces. The ALC further concluded the disputed cathodic protection equipment, pipeline coatings, and automatic shut-off valves met the remaining elements required to satisfy the statute as they were designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; required by state and federal government; and used in the conduct of Colonial's business. However, "applying the dual use provision of the exemption," the ALC concluded the exemption was "not justified for the pipeline coatings because the coatings serve a dual business use without a calculable value differential, . . . [whereas] the preponderance of the evidence did not show the cathodic protection and automatic shutoff valve have a use other than pollution control and the full value of this equipment qualifies for the exemption."

The Counties and Colonial filed motions to reconsider. The ALC rescinded its order and issued an amended final order. In its amended final order, the ALC found all three disputed components met the statutory requirements for the exemption as they were (1) facilities and equipment of an industrial plant; (2) designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; (3) required by state or federal government; and (4) used in the conduct of Colonial's business. Contrary to the prior order, the ALC found the dual-purpose provision of the exemption did not apply; therefore, the exemption was justified for the pipeline coatings in addition to the cathodic protection equipment and automatic shut-off valves. This appeal followed.

STANDARD OF REVIEW

"Upon exhaustion of his prehearing remedy, a taxpayer may seek relief from [DOR's] determination by requesting a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-460 (2014). "In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). The standard of review provided in the Act is as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § l-23-610(B) (Supp. 2023).

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676. This court "may reverse or modify

the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

LAW/ANALYSIS

A. Exemption - Industrial Plant

DOR argues the ALC erred by granting the exemption for facilities and equipment of an industrial plant, which must engage in production, to a transportation company that does not have a plant or produce anything. We agree.

DOR first argues Colonial acknowledges that it does not engage in production and the exemption applies only to manufacturers or other entities engaged in production. DOR next argues the plain meaning of the exemption is read in the first line of the statutory and constitutional provisions: it applies to "facilities or equipment of industrial plants" and Colonial has no industrial plant; therefore, there are no facilities or equipment to which the exemption would apply. DOR maintains that South Carolina law treats companies engaged in production differently than those not engaged in production by utilizing different tax rates and because Colonial is not taxed as a manufacturer, it should not receive an exemption for manufacturers. Furthermore, DOR argues Colonial is not a utility providing a product such as electricity; thus, it is not entitled to an exemption as a utility. DOR argues the exemption instructs DHEC to investigate "the property of any **manufacturer** or company" and every manufacturer would be a company; thus, the Legislature must have meant to limit the exemption to manufacturers because it used more specific terminology including transportation companies in other tax statutes. Finally, DOR argues the ALC erred in not strictly construing the exemption against Colonial.

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 8, 809 S.E.2d 223, 226 (2018) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "In interpreting a statute, the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction that would limit or expand the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516,

520 (Ct. App. 2011). "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009). "Th[e] rule of strict construction [of a tax exemption statute] simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). "It does not mean that [the appellate court] will search for an interpretation in [DOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* at 74-75, 716 S.E.2d at 881 (alteration in original).

We are cognizant of the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ––, 2024 WL 3208360 (June 28, 2024), which overruled precedent requiring a reviewing court "to defer to 'permissible' agency [interpretations of the statutes those agencies administered,]" even when a reviewing court might read the statute differently, if "'the statute [was] silent or ambiguous with respect to the specific issue' at hand." *Id.* at *2, *22 (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The Court in *Loper* concluded that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at *22. The Court explained independent judicial judgment is part of the "solemn duty" of courts to declare what the law is. *Id.* at *9. The Court reminded us that "[t]he Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear, but envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* at *1 (quoting The Federalist No. 78, at 525 (A. Hamilton)). The Court overruled *Chevron*, which "demand[ed] that courts mechanically afford *binding* deference to agency interpretations" while leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which endorses "exercising independent judgment . . . consistent with the 'respect' historically given to Executive Branch interpretations." *Id.* at *15, *22.

Mindful of these rules governing statutory construction, we first review section 12-37-210 of the South Carolina Code (2014), which taxes "[a]ll real and personal property in this State" subject to exemptions. The exemption at issue, the Pollution Control Exemption, provided statutorily by section 12-37-220(A)(8)(2014) of the South Carolina Code, exempts from taxation:

> all facilities or equipment of industrial plants which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business.

Our South Carolina Constitution also provides an exemption for "all facilities or equipment of industrial plants which are designed for the elimination, mitigation, prevention, treatment, abatement or control of water, air[,] or noise pollution." S.C. Const. art. X, § 3(h).

DOR's final determination states:

> To qualify for the pollution control exemption, the claimed property must be: 1) facilities or equipment of industrial plants; 2) designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; 3) required by state or federal government; and 4) used in the conduct of their business. Here, the claimed property fails the first element because the claimed property is not a facility or equipment of an industrial plant.

DOR and the Counties do not contest that Colonial meets the second, third, and fourth requirements; rather, they argue Colonial does not meet the definition of "industrial plant."

The parties raise numerous dictionary definitions, regulatory references, and tax statutes in arguing the meaning of the term, "industrial plant," which is not defined in South Carolina's Revenue Procedures Act. Merriam-Webster's Online Dictionary does not include the term, "industrial plant," and the ALC looked to the definition of the term "plant," which is defined as:

> a: the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business;

> b: a factory or workshop for the manufacture of a particular product also: POWER PLANT;
> c: the total facilities available for production or services;
> d: the buildings and other physical equipment of an institution.

https://www.merriam-webster.com/dictionary/plant (last visited July 2, 2024). The ALC found Merriam Webster's multiple definitions "illustrate[d] the difficulty of interpreting the meaning" and it was required to determine which definition our Legislature most likely intended to apply. The ALC found the definition in section (a) was the most likely in part because it incorporated the adjective "industrial."

The ALC next turned to the definition in Merriam-Webster of "industry"[4], which is defined as:

> a: manufacturing activity as a whole | the nation's *industry*;
> b: a distinct group of productive or profit-making enterprises | the banking *industry*;
> c: a department or branch of a craft, art, business, or manufacture *especially* : one that employs a large personnel and capital especially in manufacturing;
> d: systematic labor especially for some useful purpose or the creation of something of value[.]

https://www.merriam-webster.com/dictionary/industry (last visited July 2, 2024). The ALC found the terms in sections (a) and (b) were too broad; section (c) was too narrow; and section (d), although broad, was the most likely to apply to the statute at issue. We find the ALC strained to find a definition of the meaning, "industrial plant" beyond what the Legislature intended.

Title 42 of the United States Code defines "industrial plant" as "any fixed equipment or facility which is used in connection with, or as part of, any process or system for industrial production or output." 42 U.S.C. § 6326(5) (2012). In our

[4] The ALC looked to the first definition of "industrial," which is defined as "of or relating to industry." https://www.merriam-webster.com/dictionary/industrial (last visited July 2, 2024).

view, this statutory definition provides a plain and ordinary meaning for the term "industrial plant" in that it contemplates some production or output. *See Home Med. Sys., Inc.*, 382 S.C. at 564, 677 S.E.2d at 587 ("The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption."); *Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). We find support for our interpretation in the broader constitutional and regulatory scheme. Article X, Section 1 of the South Carolina Constitution distinguishes, for tax assessment purposes, transportation companies from manufacturing and utility companies by providing the lower assessment ratio, 9.5 percent for transportation companies compared to 10.5 percent for manufacturers. In addition, Regulation 117-1700.4 of the South Carolina Code of Regulations (2012) defines "transportation companies" to include "pipeline companies."[5] The ALC rejected these factors, finding "the disparate assessment ratios [did] not capture the legislative purpose of the pollution control exemption." We agree the legislative purpose of the pollution control exemption is presumably to compensate those who are required to install equipment to prevent or minimize pollution. However, we find the ALC did not apply the plain and ordinary meaning of the term industrial plant. Thus, we reverse.[6]

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[5] We agree with the ALC that Colonial's reliance on the fact that it would qualify for "industrial" bonds under the statutory scheme has no application here.

[6] We also find the ALC erred in denying DOR's motion to amend and in limiting the scope of the contested case hearing to only three types of Colonial's property. *See* SCALC Rule 18 ("Any document filed with the Court may be amended at any time upon motion and for good cause shown, unless the amendment would prejudice any other party in the presentation of its case."). In finding the ALC erred in denying DOR's motion to file the Second Amended Prehearing Statement, we note DOR's position of denying the exemption to all claimed property was known to Colonial prior to Colonial filing its request for a contested case hearing. Essentially, Colonial was contesting preliminary findings after learning what the final findings were. We disagree with the ALC that Colonial would be prejudiced by allowing the amendment. Based on this and our finding that Colonial is not entitled to the exemption because it cannot satisfy the predicate requirement that its devices are "facilities or equipment of industrial plants," we find it unnecessary to separately address the seven claimed property types.

B. Remaining Issues

DOR also argues the ALC erred in failing to reduce the value of the exemption based on the dual use of the property if Colonial is entitled to the exemption. Aiken and Laurens Counties additionally argue the ALC erred in finding Colonial qualified for the exemption when DHEC did not determine the issue. In light of our disposition of the exemption issue, we decline 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) (declining to address the remaining issues because its resolution of a prior issue was dispositive).

CONCLUSION

For the foregoing reasons, the order on appeal is

REVERSED.

MCDONALD and VERDIN, JJ., concur.