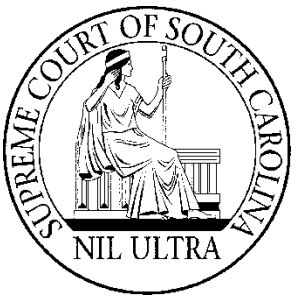

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 24, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Derrick Tyler Mills, Petitioner.

Appellate Case No. 2022-001254

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Calhoun County
Maite Murphy, Circuit Court Judge

Opinion No. 28220
Heard May 1, 2024 – Filed July 24, 2024

AFFIRMED IN RESULT

Tommy Arthur Thomas, of Irmo, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Michael Pascoe Jr., of Orangeburg, all for Respondent.

JUSTICE KITTREDGE: This criminal appeal arises out of the trial court's decision to recall the jury and accept a verdict after the court declared a mistrial and

discharged the jury. Under the particular facts of this case, we find no abuse of discretion in the trial court's decision to reassemble the jury and enter a verdict, for the recall served the limited purpose of confirming a verdict the jury reached prior to discharge. Accordingly, we affirm Derrick Mills's (Petitioner) conviction for armed robbery.

I.

In December 2014, Petitioner and his son, Quintin, met Charles Brown purportedly to sell a motorcycle. According to the State, after the transaction fell through, the men robbed Brown, allegedly shooting and killing him in the process. Following the incident, the State indicted Petitioner and Quintin each with murder and armed robbery. The father and son subsequently proceeded to a jury trial as joint defendants.

At the close of the joint trial, the trial court explained the role of the indictments and guided the jury on how to properly render its verdicts:

> [T]he indictments in this case allege two different offenses against both Defendants. Each indictment charges a separate and a distinct offense. You must decide each indictment separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other indictment.
>
> The Defendants may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each indictment. I charge you that our two Defendants in this case, both of whom are charged with murder and armed robbery -- the case of each Defendant, the evidence and the law concerning the Defendants, should be considered separately and individually. . . .
>
> Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other or you may acquit both or you may convict both. It will . . . depend upon your view of the testimony and the evidence. You must take each Defendant and consider the evidence as to that Defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty on each individual Defendant.

The trial court further explained the jury would receive two separate verdict forms—

one for each defendant—where it would enter its verdicts. As to the indictments, the trial court explained, "You will also have in the jury room . . . a copy of each of the indictments. On the front of the indictment there is a section for each [defendant] that says 'verdict.' If you would, *write the appropriate verdict, sign, and date the indictment*." (Emphasis added). Equipped with those instructions, the jury retired to deliberate.

Hours later, the jury asked the trial court, "What happens if we can't come to an agreement on one case?" In response, the trial court advised the jury that the court would receive its verdict "on one case" and would provide further instructions regarding "the other." The jury then returned to the courtroom, at which point its verdicts as to the charges against Quintin were announced, convicting him of armed robbery but acquitting him of murder.

Shortly thereafter, without objection, the trial court issued an *Allen*[1] charge. After further deliberations, the jury again wrote the trial court, stating, "We cannot reach an agreement and no one will change their mind." At that juncture, outside of the presence of the jury, the trial court notified the parties of its intent to declare a mistrial. The jury then returned to the courtroom where, after confirming the jury could not reach an agreement, the trial court declared a mistrial and excused the jury at 4:35 p.m.[2]

Moments after the jury's dismissal, a bailiff discovered three documents in the jury room, including Petitioner's (1) armed robbery indictment, (2) murder indictment, and (3) verdict form which, although covering *both* charges against him, contained only a *single* signature line. Significantly, the jury had written "guilty" on the "verdict" section of the armed robbery indictment, and the jury's foreperson had signed and dated it.[3] Similarly, on the verdict form, the jury had circled "guilty" in the space corresponding to the armed robbery charge; however, the jury did not circle an option for the murder charge, and the jury foreperson did not sign or date the verdict form.

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

[2] The parties do not contest the propriety of the mistrial on appeal.

[3] The verdict portion of the murder indictment was not similarly completed or signed.

Because it appeared from those documents that the jury had in fact reached a verdict on the armed robbery charge, the trial court ordered the immediate return of the jury. The jurors were promptly located on or in the immediate vicinity of the courthouse premises and returned to the jury room. The record reflects—and neither party disputes—all twelve jurors had returned to the jury room by 4:58 p.m. when the trial court went back on the record to inform the parties of what happened.

At that point, the trial court told the parties it intended to ask the jury "if they were able to reach a verdict on one of the two charges and if they were just deadlocked on the second charge." Petitioner objected, arguing the trial court did not have the authority to recall the jury after it granted a mistrial and discharged the jury. Petitioner requested that, in the event the trial court elected to question the jury, it "give them as little explanation [as possible] and . . . just ask them the simple question: Did you reach a verdict on one of the two charges?"

Ultimately, the trial court observed that the discovered documents tended to establish the jury had reached a verdict on the armed robbery charge prior to the mistrial and subsequent dismissal and that it would be a "miscarriage of justice" for the court to simply ignore that.[4] The trial court accepted Petitioner's request to ask only whether the jury was able to reach a verdict as to the armed robbery charge.

The jury returned to the courtroom at 5:12 p.m. at which point the trial court explained that the documents had been discovered and asked, "*Before you were released*, did you come to a verdict on one charge, but were deadlocked on the second charge?" (Emphasis added). Every member of the jury nodded their heads in affirmation. The trial court further inquired,

> [D]id you come to a verdict on the charge of armed robbery *prior to me releasing you* for the mistrial and were deadlocked as to the charge of murder? If that is what happened and *that is still what you believe*, if

[4] The trial court additionally ventured to explain what occurred prior to the grant of the mistrial, noting its question to the jury at that point was "were you able to reach a verdict?"—as opposed to a specific question to determine whether the jury was able to reach a verdict on each of the indictments. From that, the trial court reasoned, "It appears that they were putting the case of one defendant as a whole rather than on each separate and distinct offense."

you would please stand and raise your hand.

(Emphasis added). On the record, the trial court specified that all twelve jurors stood and acknowledged that they reached a verdict on the armed robbery charge but not the murder charge prior to their dismissal. At Petitioner's request, the trial court individually polled the jury, asking each juror whether the guilty verdict as to Petitioner's armed robbery charge was previously—and remained—their verdict. All twelve jurors independently confirmed they reached a guilty verdict as to the armed robbery charge before they were discharged and that this remained their verdict following their reassembly. As a result, the trial court announced the guilty verdict for the armed robbery charge and sentenced Petitioner accordingly.[5]

Petitioner appealed his conviction for armed robbery to the court of appeals, arguing the trial court erred when it recalled the jury following discharge and received the jury's guilty verdict on the armed robbery charge. The court of appeals affirmed Petitioner's conviction on a procedural bar. *State v. Mills*, Op. No. 2022-UP-309 (S.C. Ct. App. filed July 20, 2022). We granted a writ of certiorari to review the court of appeals' decision. We elect to resolve the appeal on its merits.

II.

A.

The law of our state recognizes the trial court's authority to recall the jury following discharge and, depending on the circumstances, receive the jury's verdict. *See State v. Myers*, 318 S.C. 549, 552, 459 S.E.2d 304, 305 (1995); *cf. State v. Dawkins*, 32 S.C. 17, 26, 10 S.E. 772, 772 (1890).

For example, in *Dawkins*, after the jury rendered a guilty verdict, the trial court discharged the jury and adjourned the proceedings. The following day, the trial court recalled the jury for the purpose of instructing it as to its ability to recommend mercy, which the court had inadvertently omitted from the initial jury charge. Subsequently, despite having already reached a verdict, the jury engaged in further substantive deliberations and, ultimately, altered its guilty verdict by recommending mercy. On appeal, we held the recall of the jury was improper under those circumstances, reasoning, "After a jury [has] rendered [its] verdict, and [has] been discharged, we

[5] Specifically, the trial court sentenced Petitioner to life imprisonment without the possibility of parole—the mandatory sentence based upon his prior criminal record.

know of no authority by which [it] can be reimpaneled, and, *under further instructions*, be called upon to render *a new and different verdict*." *Dawkins*, 32 S.C. at 26, 10 S.E. at 773 (emphasis added).

We reached a different result in *Myers*. There, a capital case, the jury initially recommended a sentence of life imprisonment rather than death and was discharged. However, just moments after discharge, the trial court learned that the jury had, in fact, found the existence of aggravating factors. The court recalled the jurors two minutes after discharge. During that two-minute interval, the jury did not disperse or mingle with the public and remained within the control of the clerk of court. Upon reassembly, after the trial court confirmed it mistakenly assumed the jury had not found the existence of any aggravating circumstances,[6] the jury was sent out to list any aggravating circumstances it had found prior to its discharge, returning several minutes later finding the existence of three aggravators. The trial court accordingly modified Myers's sentence.

On appeal, we first emphasized that during the two-minute interval between its discharge and reassembly, the jury remained in the clerk of court's custody as an essentially undispersed unit, not subjected to any outside influence. We reasoned those circumstances were in stark contrast to those in *Dawkins*, where the jury was discharged and dispersed overnight, "clearly presenting the opportunity for discussion of the case with others." *Myers*, 318 S.C. at 552, 459 S.E.2d at 305.

Next, we examined the function performed by the jury upon reassembly: the jury was not given any new information, nor was it required to make any additional or different findings than it had before. Rather, the jury foreperson merely confirmed the jury had in fact found the existence of aggravating circumstances *prior* to being discharged but had failed to write them down. We again distinguished *Dawkins* on the basis that the jury in that case was given a new option as to sentencing and engaged in further substantive deliberations, permitting the jury to alter the verdict it reached prior to discharge. Because "reassembly in [Myers's] case served *not to amend or alter the jury's verdict, but to reflect the actual verdict reached . . . [u]nder the limited factual circumstances presented*, we [found] no abuse of discretion in recalling the jury to permit it to accurately report its true verdict." *Id.* (emphasis

[6] The forewoman of the jury told the trial court the jury had indeed found the existence of aggravating circumstances but simply had not written them down as they had not recommended a sentence of death.

added).

Overall, *Dawkins* and *Myers* tell us the facts surrounding the interval between the jury's discharge and reassembly and the functions performed by the jury upon its return are crucial in determining the propriety of the decision to recall the jury and enter a post-discharge verdict.[7] In short, a fact-intensive inquiry is required.

B.

We find that—under the particular facts of this case—the trial court properly exercised its discretion when it recalled the jury following discharge and entered the guilty verdict against Petitioner. Although not identical, the facts of this case are more akin to those in *Myers* than in *Dawkins* and, ultimately, support the trial court's decision to reassemble the jury.

The jury in this case only dispersed for a very brief interval between discharge and

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[7] This pragmatic approach—permitting post-discharge jury reassembly to ultimately enter a verdict in certain circumstances—mirrors that of other jurisdictions. *See, e.g.*, *Gov't of Virgin Islands v. Smith*, 558 F.2d 691, 693–94 (3d Cir. 1977) (permitting reassembly despite the fact that *the jury had returned home for over a day* because, when it returned, the jury merely confirmed the verdict it reached prior to discharge); *State v. Edwards*, 552 P.2d 1095, 1098 (Wash. Ct. App. 1976) (finding no error when the trial court recalled the jury after it declared a mistrial under a mistaken impression that the jurors' deadlock extended to all charges because no member of the jury had either the time or opportunity to separate and commingle with non-jurors, nor did the jurors renew their deliberations or discuss the merits of the case (citations omitted)); *James v. State*, 453 So. 2d 786, 792–93 (Fla. 1984) (permitting reassembly even though the jury was not recalled until a week later because "[t]he jury members when reconvened, merely had to say 'yes' or 'no,' [and] they did not have to hear or consider anything more relating to the case"); *Gardner v. Commonwealth*, 350 S.E.2d 229, 232–33 (Va. Ct. App. 1986) (permitting reassembly where the jury further deliberated and altered its verdict because, in the time between discharge and reassembly, the jury remained in the presence of the court); *People v. Rushin*, 194 N.W.2d 718, 721–22 (Mich. Ct. App. 1971) (invalidating reassembly even when the jury remained undispersed and had only left the courtroom for only two minutes because the jury conducted further deliberations and altered its verdict upon return).

recall—at most twenty-three minutes.[8] That interval pales in comparison to the one in *Dawkins* that spanned overnight. Further, in that brief interval, each juror remained on or immediately adjacent to the courthouse premises, again standing in sharp contrast to the *Dawkins* jurors who returned to their homes following their dismissal.

More importantly, the key feature supporting the trial court's decision to recall the jury is the undisputed fact that reassembly in this case served not to amend or alter the jury's verdict, but merely to reflect the actual verdict it reached *prior* to its dismissal. Significantly, upon its return, the jury was not asked to consider any additional instructions, to deliberate, or to alter or amend its verdict. *Cf. Dawkins*, 32 S.C. at 26, 10 S.E. at 773 ("After a jury [has] rendered [its] verdict, and [has] been discharged, we know of no authority by which [it] can be reimpaneled, and, *under further instructions*, be called upon to render *a new and different verdict*." (emphasis added)). Instead, the jury here simply confirmed that it reached a guilty verdict on the armed robbery charge prior to its discharge. *See Myers*, 318 S.C. at 552, 459 S.E.2d at 305 ("[R]eassembly in this case served *not to amend or alter the jury's verdict, but to reflect the actual verdict reached*." (emphasis added)).

The trial court thoroughly polled the jury, collectively and individually, to ensure that the guilty verdict on the armed robbery charge was reached prior to discharge and that it remained the jury's verdict. The jury merely ratified what it had already done prior to discharge. Under these circumstances, the trial court acted well within its discretion in recalling the jury and receiving the verdict the jury reached pre-discharge. Indeed, the trial court's deft handling of this situation was textbook.

C.

Going forward, before entering a verdict against a criminal defendant under these unusual circumstances, trial courts must be firmly convinced that (1) the verdict was reached prior to discharge *and* (2) the jury was not subjected to outside influences in the time between discharge and reassembly. If these facts are not firmly

[8] The jury was dismissed at 4:35 p.m., and the trial court went back on the record at 4:58 p.m. to report all twelve jurors had returned to the jury room. Of course, the jurors were located and brought back some time before 4:58 p.m., that is, before the trial court went back on the record.

established, the trial court shall honor the prior discharge and not proceed further.

D.

Here, in sum, the jury was dispersed for a very brief period between discharge and reassembly, and there was no evidence the jury was subject to outside influences. Upon reassembly, through careful scrutiny by the trial court and thorough polling, the jury simply ratified the guilty verdict it reached prior to discharge. Therefore, "*Under the limited factual circumstances presented*, we find no abuse of discretion in recalling the jury to permit it to accurately report its true verdict." *Id.* (emphasis added). Accordingly, we uphold Petitioner's conviction and sentence for armed robbery. The decision of the court of appeals is affirmed in result.

AFFIRMED IN RESULT.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Covil Corporation, by and through its Receiver, Peter D. Protopapas, Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company, Petitioner.

Appellate Case No. 2022-000366

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 28221
Heard January 9, 2024 – Filed July 24, 2024

AFFIRMED AS MODIFIED

David L. Brown, David Grant Harris, II, and Brady Allen Yntema, of Goldberg Segalla LLP, of Greensboro, NC, for Petitioner.

William Bradley Nes, of Washington, D.C.; Jonathan M. Robinson, Shanon N. Peake, and G. Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, LLC, of Sumter, all for Respondent.

JUSTICE FEW: This case involves a coverage dispute between an insurer and a South Carolina corporation that has been defunct since the early 1990s. Covil Corporation—through its appointed receiver—sued Penn National Mutual Insurance Company alleging Penn National breached their contract for insurance by failing to contribute to a settlement in an asbestos case against Covil and other defendants. In the underlying case, David Rollins alleged Covil and others negligently exposed him to asbestos, which caused his mesothelioma. Penn National insured Covil during part of the time Rollins alleges Covil caused his exposure.

The circuit court granted summary judgment in favor of Covil, concluding Penn National was required to "indemnify Covil against the settlement of the Rollins action." The circuit court rejected Penn National's argument that (1) the lack of timely notice of the lawsuit defeated coverage, (2) summary judgment was premature because Penn National did not have a full and fair opportunity to complete discovery, and (3) two policy exclusions barred coverage. The court of appeals affirmed. *Covil Corp. ex rel. Protopapas v. Pa. Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 870 S.E.2d 191 (Ct. App. 2022). We affirm the court of appeals as modified.

I. Facts and Procedural History

According to Covil's motion for summary judgment, Covil Corporation was formed in 1954 and was "engaged in the installation and removal of insulation in various industrial facilities across South Carolina, and elsewhere." In 1991, Covil's business failed, and it ceased operations. In 2018, the circuit court appointed attorney Peter Protopapas as Covil's receiver. The appointment order empowered Protopapas with the "right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." Since Protopapas was appointed as receiver, numerous plaintiffs have filed lawsuits against Covil alleging the company's operations caused their asbestos-related diseases.

On April 5, 2019, David Rollins filed a lawsuit in Hampton County against Covil and fifty-two other defendants alleging he was diagnosed with mesothelioma caused by asbestos exposure from his work. Rollins also alleged his mesothelioma was "caused by his exposure to asbestos brought home on the person and clothes of . . . his stepfather, Robert Ashworth," when Rollins was still a child.

Ashworth worked as a pipefitter for a company called Beta Construction from 1986 to 1988. All of his work for Beta Construction took place at the Bowater Paper Mill in Catawba, an unincorporated community in York County. Covil did all the piping insulation work at Bowater under a subcontract between March 16, 1986, and January 25, 1987. Rollins alleged Ashworth would come home from work covered in asbestos dust from Covil's insulation work, exposing Rollins. Penn National insured Covil while Ashworth worked at Bowater.

Penn National first received notice of the *Rollins* lawsuit on January 27, 2020, in an email from Protopapas. On February 3, counsel for Covil sent Penn National a copy of the *Rollins* complaint along with a letter requesting defense and indemnification in the lawsuit. One week later, on February 10, Protopapas sent an email informing Penn National that mediation was scheduled for the *Rollins* case on February 25. Protopapas attached an order from a different case granting sanctions for failure to participate in mediation. He wrote:

> The trial judge for this matter requires that insurance companies attend mediations with full settlement authority. This requirement is echoed in South Carolina's ADR rules. Attached is an order granting sanctions for failure to participate in a mediation in a non-asbestos case.

On February 14, Penn National responded with a letter informing Covil that it was able to contact defense counsel engaged by other Covil insurers and had requested copies of discovery. Penn National attached a separate document to the letter in which Penn National informed Covil that coverage had yet to be determined. The letter provided: "no action heretofore or hereafter taken by [Penn National] shall be construed as a waiver of the right of [Penn National], if in fact it has such right, to deny liability and withdraw from the case." We refer to this document as Penn National's "non-waiver letter."[1]

[1] The document is labeled "Non-Waiver Agreement" and is signed by Penn National, but it is not signed by Covil. Thus, although the document is labeled "Non-Waiver Agreement," it is not an "agreement" at all. We therefore refer to the document as the "non-waiver letter."

The mediation took place on February 25, 2020. A representative of Penn National attended the mediation and "expressed a willingness to contribute some amount to the settlement on behalf of Covil." Ultimately, Protopapas—on behalf of Covil—settled for an amount that is not disclosed in the record before us. Covil asked Penn National to contribute $50,000 to the settlement, but Penn National refused. Despite Penn National's refusal, Rollins was eventually paid the full amount of the settlement.

On February 28, 2020, Covil filed a breach of contract action against Penn National for failing to contribute $50,000 to the *Rollins* settlement. On April 22—before any discovery was completed—Covil moved for summary judgment on the issue of whether Penn National was required to contribute to the settlement of the *Rollins* case. On May 8, Penn National responded to the motion, arguing summary judgment should be denied because (1) it did not receive timely notice of the Rollins action, (2) summary judgment was premature, and (3) two exclusions in the policy bar coverage.

On August 13, 2020, the circuit court granted Covil's motion for summary judgment. The court of appeals affirmed. *Covil Corp.*, 436 S.C. at 91-98, 870 S.E.2d at 194-98. We granted Penn National's petition for a writ of certiorari to review the court of appeals' opinion. We affirm the court of appeals as modified.

II. Insurance Policy Notice Provision

Penn National argues it is not obligated to indemnify Covil because Covil failed to comply with a provision in the policy requiring that it provide to Penn National immediate notice of a lawsuit filed against it. The provision states, "If a claim is made or suit brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons, or other process received by him or his representative." Although Rollins filed his complaint on April 5, 2019, and served the summons and complaint on Covil on April 25, Covil did not provide Penn National notice of the lawsuit until January 27, 2020. Thus, Penn National argues, Covil breached the notice provision by not providing timely notice of the *Rollins* lawsuit.

Covil argues, however, that Penn National must show it was prejudiced by the delay to defeat coverage. Penn National responds that this "notice-prejudice rule" is inapplicable in this case because it applies only where the rights of innocent third

parties are implicated.[2] It argues such rights are not implicated here because the plaintiff in the *Rollins* lawsuit was fully compensated by Covil. On this point, we agree with Penn National.

Historically, we have recognized that a notice provision in an insurance policy is a material term and that an insured's failure to provide the insurer with timely notice can lead to the forfeiture of coverage. *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 486-87, 186 S.E. 376, 381 (1936) ("No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover. And the Court has gone so far as to hold that the failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay."). At least as early as 1971, however, South Carolina adopted the "notice-prejudice rule" for cases in which the rights of innocent third parties are compromised by an insured's failure to provide his insurer notice of the lawsuit.

> Although there is a division in the cases from other jurisdictions upon the question, . . . we think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice . . . will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights.

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[2] Penn National also argues we should not consider Covil's notice-prejudice argument, as this issue was not accepted for review in our order granting Penn National's petition for a writ of certiorari. This is without merit. Covil—as the prevailing party in the lower courts—may properly argue that we should affirm based on a ground appearing in the record, even though it was not ruled upon by the lower courts. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); Rule 208(b)(2), SCACR ("Respondent's brief . . . may contain argument asking the court to affirm for any ground appearing in the record as provided by Rule 220(c).").

Factory Mut. Liab. Ins. Co. of Am. v. Kennedy, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971); *see also* 256 S.C. at 381, 182 S.E.2d at 730 ("We so stated the rule in *Squires v. National Grange Mutual Ins. Co.*, 247 S.C. 58, 145 S.E.2d 673 [(1965)]."); *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 267, 831 S.E.2d 406, 408-09 (2019) (tracing the "notice-prejudice rule" back to *Squires* in 1965).

Under the notice-prejudice rule, "Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights" in order to defeat coverage. *Vermont Mut. Ins. Co. v. Singleton ex rel. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994); *see also Neumayer*, 427 S.C. at 265-73, 831 S.E.2d at 408-12 (examining the history of the law regarding notice provisions in South Carolina). As we indicated in *Neumayer*, notice provisions in insurance policies "balance the insurer's important interests in receiving notice of a lawsuit" against an innocent third party's right to recovery for the insured's negligence. 427 S.C. at 272, 831 S.E.2d at 411. We stated, "The driving force behind the notice-prejudice rule is that there is 'no sound reason . . . to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled.'" *Id.* (quoting *Kennedy*, 256 S.C. at 381, 182 S.E.2d at 729).

In this case, the "driving force" has no force at all because no innocent third party's rights are implicated. The underlying plaintiff—Rollins—has already been paid the full amount of his settlement by Covil and other insurers. *See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991) (holding the notice-prejudice rule does not apply when there is no innocent third party and the underlying plaintiff has already been compensated). Because Rollins—the only potential innocent third party in this case—has been fully compensated, the "notice-prejudice rule" does not apply.[3]

[3] Covil argues the point in time for which the "rights of the innocent parties" should be evaluated is the time of the settlement agreement, not later when the funds were paid or not paid. We disagree. The fact Rollins was later paid the full settlement amount means his rights were not compromised and the notice-prejudice rule does not apply.

There is the possibility that we simply assume there are other asbestos plaintiffs out there whose potential settlement payments by Covil might be jeopardized if the receiver does not collect these funds. We certainly acknowledge this possibility, as it is clear Rollins is not the only victim of Covil's mishandling of asbestos. However, there is no evidence in the record that any such potential plaintiff is yet to be compensated or might someday make a claim against Covil. At oral argument, members of the Court pressed counsel for Covil as to whether any such plaintiff does or might exist, but counsel offered nothing to support the existence of any third party whose rights are jeopardized.

Covil argues this Court should expand the notice-prejudice rule to apply to all violations of notice provisions—regardless of whether innocent third party rights are implicated—on the basis of public policy. We disagree. This Court has consistently held, "Insurance companies and insureds are generally free to contract for exclusions or limitations on coverage." *E.g.*, *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021). In *Knight*, we emphasized that courts will enforce the terms of an automobile insurance policy unless a challenged provision violates a specific statute. We held "this Court has no authority to invalidate an automobile insurance policy provision simply because we believe it is inconsistent with our own notion of 'public policy.'" 433 S.C. at 376, 858 S.E.2d at 635.

The principle that courts have "no authority" to rewrite insurance policies based on "public policy" applies in other insurance contexts as well. *See S. S. Newell & Co. v. Am. Mut. Liab. Ins. Co.*, 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942) ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended."). Thus, our courts will enforce the terms of all insurance policies, even if they appear to be unfair or to work injustice, unless the provision being challenged violates a specific statute or is found unenforceable under a well-established provision of law.

The "notice-prejudice rule"—a judicially-created fiction that operates to invalidate a notice provision in an insurance policy—is somewhat of an exception to this principle. We will not, therefore, expand the rule beyond its original purpose, which is to protect innocent third parties by preventing an insurer from enforcing a notice provision in its liability policy unless the insurer can prove it was prejudiced by the

lack of notice. In *Neumayer*, as a recent instance, the trial court refused to enforce the notice provision in an automobile liability policy even though the insurer proved prejudice, thereby expanding the notice-prejudice rule to void all notice provisions in automobile insurance policies. *See* 427 S.C. at 263, 831 S.E.2d at 407 ("The trial court found the clause in this policy void and accordingly required the insurance company to pay the full default judgment entered against its insured."). This Court reversed, noting "the legislature's recognition of the role notice provisions play in insurance contracts," and stating, "Had the General Assembly intended to categorically prohibit the enforcement of notice clauses in all policies, it would have done so." 427 S.C. at 273, 831 S.E.2d at 412; *see also id.* ("We therefore refuse to read [the applicable statute] to abolish notice and cooperation clauses in insurance contracts."). In *Neumayer*, we refused to extend the notice-prejudice rule beyond its original confines and we decline to do so here.

Relying on more general principles of contract law, however, Covil alternatively argues its untimely notice was not a material breach of the insurance contract, and thus Penn National should not be relieved of its duty to indemnify Covil. *See Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366, 858 S.E.2d 407, 410 (2021) ("An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." (quoting *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014))). Under contract law, the party claiming a breach of contract must establish the breach was material. *See* 13 Sarah Howard Jenkins, *Corbin on Contracts* § 68.2, at 158-59 (Joseph M. Perillo ed., Revised ed. 2003) (stating as to contracts in general the "legal duty" of the non-breaching party is "suspended or discharged" "[o]nly if the effects of the breach are material"); *Evans v. Am. Home Assur. Co.*, 252 S.C. 417, 420, 166 S.E.2d 811, 813 (1969) (calling it "settled law" that "a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy only when the breach has been material . . ."); 14 Steven Plitt et al., *Couch on Insurance* § 199:25, at 81, 82 n.2 (Monique Leahy ed., 3rd ed. rev. 2020) (stating "to cause a breach of the policy condition sufficient to relieve the insurer from liability under the policy, many jurisdictions require that an insured's lack of cooperation be substantial and material" and collecting cases).

On this point, we agree with Covil. We begin our explanation by acknowledging there may be little practical difference between applying the "notice-prejudice rule" and analyzing whether Covil committed a material breach of the insurance contract. There is, however, an important philosophical difference. Under well-established

principles of contract law—"settled law" as we stated in *Evans*—to justify the forfeiture of Covil's contractual rights, Penn National must establish that Covil's failure to "immediately forward" notice constituted a "material breach."

To guide our courts in "determining whether the breach of a [contract] is . . . []material," this Court adopted the "standards" set forth in section 241 of the Restatement (Second) of Contracts. *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994); *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 461 n.5, 818 S.E.2d 724, 734 n.5 (2018). Section 241 provides,

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (Am. L. Inst. 1981).

As to subsection (a), the benefit Penn National reasonably expected from the notice provision in its policy was to be notified so it could adequately defend Covil. While Penn National certainly intended that by protecting Covil's interests it would protect its own, its contractual responsibility was to protect Covil. Thus, the point that is important to analyzing the "benefit . . . reasonably expected" under subsection (a) is not whether Penn National's interests were protected but whether Covil's interests

were. Penn National was not deprived of this benefit because Covil was represented by counsel hired by other insurers from the very beginning of the case. Those attorneys timely answered the complaint, conducted discovery, and handled other pretrial matters they deemed necessary to protect Covil. Thus, Covil's breach of the notice provision did not deprive Penn National from receiving the benefit it reasonably anticipated from requiring its insured to "immediately forward" the summons to it. Subsection (a) weighs heavily in favor of finding the breach was not material.

Subsection (b) weighs in favor of finding the breach was material. The subsection asks the court to analyze the extent to which the breaching party can make up for its failure to comply with the contract. Here, it is not possible for Covil to rectify its untimely notice.

Subsection (c) weighs in favor of finding the breach was not material because Covil would lose the benefit for which it bargained, indemnity coverage under the policy. However, Covil's forfeiture of insurance benefits in this case is not particularly significant because Covil is defunct, and thus *Covil* would lose nothing. Thus, subsection (c) weighs lightly in favor of an immaterial breach. As to subsection (d), the fact Covil's failure to provide timely notice is incurable weighs in favor the breach being material. However, because the breach had no impact on Penn National, the factor is insignificant on the facts of this case. Subsection (e) weighs marginally in favor of finding a material breach.

Evaluating all the factors set forth in section 241, the most significant one on the facts of this case is subsection (a), which weighs heavily against finding a material breach because Covil's attorneys protected all of Covil's interests. Penn National was deprived of no benefit for which it could be compensated, and there remains no harm for Covil to cure. Thus, we hold Covil's breach was not material, and Penn National cannot escape liability due to untimely notice.

Our ruling that Covil did not commit a material breach is dispositive of the notice question, but we nevertheless address the court of appeals' holding that by attending the mediation and expressing a willingness to contribute to a settlement, Penn National impliedly waived its right to timely notice. *Covil Corp.*, 436 S.C. at 94, 870 S.E.2d at 196. We respectfully disagree with the court of appeals.

"An insurance contract, like any other contract, may be altered by the contracting parties, and the insurer may, of course, waive any provision for forfeiture therein." *Gandy v. Orient Ins. Co.*, 52 S.C. 224, 229, 29 S.E. 655, 656 (1898). "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). "It may be stated in general that conduct which amounts to a waiver of a condition providing for the forwarding to the insurer of the summons or other process served upon the assured is that which lulls the insured into a feeling of security and renders it unconscionable for the insurer subsequently to raise the objection that such papers were not forwarded." *Boyle Rd. & Bridge Co. v. Am. Emps.' Ins. Co. of Bos., Mass.*, 195 S.C. 397, 402, 11 S.E.2d 438, 441 (1940).

First, and most importantly, there is nothing about an insurer attending a mediation or "express[ing] a willingness to contribute some amount to the settlement" that implies the insurer voluntarily and intentionally relinquished its right to contest sufficient notice under the policy provision. Second, Penn National's non-waiver letter specifically stated that Penn National "contends, or may later contend, that the Assured is not entitled to . . . coverage *in view of the fact that the claims were first tendered on January 27, 2020*," (emphasis added), or in other words, because Covil violated the notice provision. The letter continued: "no action heretofore or hereafter taken by the Company shall be construed as a waiver . . . ." Finally, Covil's February 10, 2020 email to Penn National threatened sanctions if Penn National did not attend the mediation. Attending and even participating in a mediation under these circumstances could not have "lull[ed Covil] into a feeling of security," *Boyle*, 195 S.C. at 402, 11 S.E.2d at 441, and Penn National's actions are clearly not "a voluntary . . . relinquishment of a known right," *Janasik*, 307 S.C. at 344, 415 S.E.2d at 387.

III. Summary Judgment

Penn National argues the court of appeals erred in holding summary judgment was not premature. We disagree. First, we are not concerned here with discovery as to Covil's liability in the *Rollins* action. Discovery on those issues became moot when the *Rollins* case was settled at the February 25 mediation. Our focus is on what discovery Penn National was entitled to conduct in the *Covil* lawsuit. In the *Covil* lawsuit, Penn National could have conducted discovery on whether Covil's failure to provide timely notice was a material breach and whether the policy exclusions apply. On those points, Penn National has not identified—either to the circuit court or on appeal—any significant inquiry it was denied the opportunity to make. Thus,

Penn National has not demonstrated a likelihood that further discovery in the *Covil* action will uncover additional, relevant evidence. Like the court of appeals, we see no basis for a finding the circuit court's summary judgment ruling was premature.

IV. Policy Exclusions

Penn National argues the court of appeals erred in finding the policy's "Products Hazard" and "Completed Operations Hazard" exclusions did not apply. We disagree. The policy states that coverage "does not apply to bodily injury . . . included within the Completed Operations Hazard or the Products Hazard."

"Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005).

i. Products Hazard Exclusion

The policy defines "products hazard" as follows:

> "**products hazard**" includes **bodily injury** . . . arising out of the named insured's products . . . but only if the **bodily injury** or property damage occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

Before turning to the parties' arguments about whether the Products Hazard exclusion applies to bar coverage, we point out that the Products Hazard exclusion applies only when the "bodily injury" arises out of the "named insured's products." By definition, the "named insured's products" are products "manufactured . . . or distributed by the named insured." The circuit court found that "no evidence in this case or in the underlying Rollins action suggests that Covil supplied asbestos insulation to the Bowater facility between 1986 and 1987." Covil's liability is therefore based on Covil *installing* rather than *supplying* the insulation that ultimately caused Rollins's injury. Thus, the Products Hazard exclusion is not applicable at all. We address the parties' arguments anyway.

Penn National argues Rollins's injury arose from Covil's products because Rollins sued Covil as a "Product Defendant." Penn National argues labeling Covil as a "Product Defendant" means Rollins's alleged liability is based on Covil's products. Penn National also argues Covil's products were "relinquished to others" when Rollins was exposed to asbestos, and therefore the exclusion applies to bar coverage.

1. Covil as a "Product Defendant"

Penn National argues "other jurisdictions have held that when the claims asserted in the underlying lawsuit allege liability against the insured based solely on the defective nature of the insured's product, the 'products hazard' applies." Penn National points to the *Rollins* complaint which identified Covil as a "Product Defendant." The complaint generally alleged "Products Defendants" were liable as follows:

> Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

As to Covil specifically, the complaint alleged:

> At all times material hereto, COVIL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation. COVIL CORPORATION is sued as a Product Defendant.

Penn National argues the Products Hazard exclusion applies because Covil was labeled as a "Product Defendant" and only products liability causes of action were brought against Covil. We disagree.

In *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 666 S.E.2d 897 (2008), we held:

> [T]he obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint. If the facts alleged in the complaint fail to bring a claim within the policy's coverage, the insurer has no duty to defend. In examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer.

379 S.C. at 577, 666 S.E.2d at 899 (citations omitted). Here, the complaint was not limited to allegations of products liability. In the same paragraph of the complaint that labels Covil as a "Product Defendant," Rollins alleged liability based on Covil's "installation and removal of asbestos-containing thermal insulation." By examining the specific actions described in Rollins's complaint rather than focusing solely on the labels he assigned, it is clear that Rollins alleged—at least in part—that his injuries resulted from Covil's activities related to the installation and removal of insulation, actions not excluded as a "products hazard."

2. Relinquishment

Penn National also argues the exclusion applies because the exposure to Rollins is alleged to be "take-home" exposure, and thus physical possession of Covil's products had necessarily been "relinquished" as required by the terms of the exclusion. The very necessity of Penn National making this argument demonstrates the exclusion does not apply.

The definition of "products hazard" describes an injury that "occurs away from the premises owned by or rented to the named insured." The exclusion thus contemplates a situation where the insured manufactures or distributes products at a facility it owns or rents and the injury occurs away from that facility. A product is then "relinquished" when the insured places its products into the stream of commerce. However, Covil did not own or rent the Bowater facility. The bodily injury occurred after Covil's work at the Bowater facility led to asbestos dust covering Rollins's stepfather, who then exposed Rollins in their home. It is

impossible to apply the "products hazard" definition to this case, as the facts here deviate significantly from the scenario contemplated in the definition. For this reason, the Products Hazard exclusion does not apply.

ii. Completed Operations Hazard Exclusion

Covil argues the Completed Operations Hazard exclusion "may" apply to bar coverage. The policy excludes liability from a "completed operations hazard," defined as:

> "**completed operations hazard**" includes **bodily injury** . . . arising out of operations . . . but only if the **bodily injury** . . . occurs after such operations have been completed or abandoned and occurs away from the premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
>
> (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
>
> (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

Thus, the Completed Operations Hazard exclusion applies to claims (1) arising out of the insured's operations, (2) when the alleged bodily injury occurs after the insured's operations are completed, and (3) where the alleged bodily injury occurs away from the premises owned by or rented by the named insured. Unlike the

Products Hazard exclusion, the Completed Operations Hazard exclusion does not require the "bodily injury" arise out of the "named insured's products."
Penn National argues that if the take-home exposure occurred because a portion of Covil's operations had already been put to its intended use, the Completed Operations Hazard exclusion bars coverage. Penn National argues this question "is a genuine issue of disputed fact, which has not been established . . . by any 'evidence' submitted by Covil" and summary judgment was thus improper. We disagree.

Covil did work at the Bowater facility from March 16, 1986, to January 25, 1987. Rollins was exposed to asbestos through take-home exposure during the period in which Covil performed under the subcontract. Therefore, the exposure occurred (1) before all performance under Covil's contract was complete, (2) before operations at the Bowater facility were complete, and (3) before Covil's work at the Bowater facility was put to its intended use. Thus, the Completed Operations Hazard exclusion does not apply, and the court of appeals correctly affirmed summary judgment on its application.

V. Conclusion

For these reasons, the decision of the court of appeals is

AFFIRMED AS MODIFIED.

BEATTY, C.J., HILL, J., and Acting Justice James Edward Lockemy, concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur in part and dissent in part. I concur with the majority insofar as the policy exclusions are concerned—the policy exclusions asserted by Petitioner Pennsylvania National Mutual Casualty Insurance Company are not applicable. I further agree with the majority's rejection of the entry of summary judgment based on Penn National's purported waiver of its right to timely notice. In my judgment, the evidence relied upon by Respondent Covil Corporation to establish Penn National's waiver of the notice provision falls short of the summary judgment standard. I respectfully disagree, however, with the majority's finding that Covil's breach of the notice provision was immaterial, for I view the majority's immaterial-breach approach as indistinguishable from the application of the notice-prejudice rule. As a result, I would reverse the court of appeals' decision and remand the matter to the trial court for further proceedings on the enforceability of the notice provision.

The Supreme Court of South Carolina

In the Matter of G. Thomas Hill, Respondent.

Appellate Case Nos. 2024-001146 and 2024-001147

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 until further order of this Court. Rule 28(d), RLDE, Rule 413, SCACR.

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 19, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In RE: Estate of Stephen Day Ward, Jr.,

Ann Noble-Kiley as Personal Representative of the Estate of Mary K. Ward a/k/a Mary Kimberly Ward, Respondent

v.

Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward, Personal Representatives, Appellants.

Appellate Case No. 2019-002124

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge
Irvin G. Condon, Probate Judge

Opinion No. 6073
Heard December 6, 2022 – Filed July 24, 2024

AFFIRMED

George Edmondston Morrison, of Burr & Forman, LLP, of Charleston, for Appellants.

Jane A. McFaddin, of Charleston, for Respondent.

MCDONALD, J.: In this dispute over the estate of the late Stephen Day Ward, Jr., Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward (collectively,

Appellants) challenge the finding that their father's surviving wife, Mary K. Ward, was entitled to an omitted spouse's share.[1] We affirm the orders of the probate and circuit courts.

Facts and Procedural History

In 1998, Stephen Ward, a retired grain trader, married his third wife, Nancy Diemer. On April 21, 2005, Stephen and Nancy executed a series of documents with interlocking provisions intended to guide the disposal of their assets upon their deaths. The couple generally intended that the death of one would cause their assets to "pour over" into a trust controlled by the other. After the death of the surviving spouse, any remaining assets would be dispersed among each spouse's children and heirs as detailed in their wills and trust documents. Of the documents the couple executed in 2005, the Last Will and Testament of Stephen D. Ward (the Will) and an Agreement for Mutual Wills and Trusts (the Agreement) are most relevant here. It is undisputed that the Will is Stephen's validly executed final will and that the Agreement is incorporated by reference into the Will.

The Agreement includes the following relevant provisions:

> 2.5 The Wills and Trusts of the Parties have been made as they are on the condition that the disposition of the Property be made according to their Wills and Trusts, unless this Agreement is altered, amended or revoked as provided for hereinafter.
>
> 2.6 This Agreement is made to insure that the mutual plan of the Parties shall not be altered by acts subsequent to [the] date hereof, except as agreed upon between the Parties.
>
> . . . .
>
> 3.2 Upon the Predecessor's death, this Agreement and the Survivor's Will and Trust shall become irrevocable and the Survivor shall have no right or power to

[1] Appellants are Stephen's three children from his first marriage.

thereafter alter, amend or revoke this Agreement or his or her Will or Trust.

SURVIVOR'S AFFIRMATIVE COVENANTS. The parties mutually covenant with each other and agree that if he or she is the Survivor of them:

4.1 He or she will take such measures as may be necessary or required to maintain his or her Will and Trust in full force until his or her death and as will maintain title to the Property in a form that shall cause the same, at the Survivor's death, to be disposed of according to the terms and provisions of his or her Will and Trust annexed hereto.

4.2 If he or she remarries after the death of the Predecessor, he or she will:

4.2.1 Thereafter ratify his or her Will and Trust in the form and with the provisions contained in his or her Will and Trust annexed hereto; and

4.2.2 As a condition of such re-marriage, require any person he or she re-marries to legally and unconditionally waive his or her right to an Elective Share in the Property provided to them under S.C. Code Ann. Section 62-2-201 (1976, as amended from time to time).[2]

V. NEGATIVE COVENANTS. The Parties mutually covenant with each other and agree that if he or she is the

[2] The question of whether Mary had a right to an elective share is not before us; Mary petitioned for an omitted spouse's share.

> survivor of them, he or she will not create, commit, permit, or suffer to exist:
>
> 5.1 Any condition that would alter the plan of distribution contained in his or her Will or Trust annexed hereto;
>
> 5.2 Any condition that would cause the alteration, amendment or revocation of his or her Will or Trust annexed hereto;
>
> . . . .
>
> VII. MISCELLANEOUS.
>
> 7.1 Governing Law. This Agreement is made and shall be construed under and in accordance with the laws of the State of South Carolina.

Nancy died in June 2011. Later that year, Stephen began dating Mary, and the two married in 2013.[3] Mary moved into Stephen's home but retained ownership of her own house. There is no evidence that Stephen took any action regarding his trust or the Will during this marriage or that he completed the acts required by sections 4.2.1 and 4.2.2 of the Agreement.

Stephen died on September 16, 2016. Later that month, Appellants, acting as their father's co-personal representatives, sought to probate his estate. In January 2017, Mary filed a petition through Ann Noble-Kiley, her conservator and daughter, seeking a declaration that Mary was an omitted spouse under Stephen's Will. Appellants denied Mary's claim and asserted "it appears from the will and other evidence that [Mary's] omission was intentional and/or that [Mary] was provided for outside of the will."

Appellants moved for summary judgment as to Mary's petition, but the probate court denied this motion and Appellants' subsequent motion to reconsider. At a

[3] Stephen was sixty-nine at the time of this marriage; Mary was eighty-eight.

later hearing on the merits of the petition, Mary's counsel explained the couple's marriage license had been submitted and Stephen's filed Will made no mention of Mary K. Ward, his surviving spouse. Appellants argued in opposition to the petition that two statutory factors applied to defeat Mary's omitted spouse claim: Stephen's omission was intentional, and Mary had been provided for outside of the Will. Mary challenged both assertions.

Noble-Kiley testified in support of Mary's claim; she noted the date of the parties' marriage, date of Stephen's death, and her subsequent appointment as Mary's conservator. Appellants then moved for an involuntary nonsuit, asserting Mary failed to meet her burden of proof under the omitted spouse statute. The probate court referenced Stephen's Will and its omission of Mary, and Appellants' counsel asserted the incorporation of the Agreement further served to defeat Mary's claim. The probate court denied Appellants' motion for a nonsuit.

Appellants then presented a series of witnesses seeking to defeat Mary's claim under the omitted spouse statute.[4] Their first witness was Brett Bluestein, the attorney who drafted the Agreement, Stephen and Nancy's wills, and other related estate planning documents. Bluestein identified the various documents, and the probate court admitted them into evidence. Bluestein also discussed the use and purpose of an instrument like the Agreement, explaining:

> As a general theme, the only time [such an agreement] was used was in a situation where there's a husband and wife, often times, an older couple, and always a couple with children from a prior marriage—prior marriage and so forth, where the ultimate concern was what was going to happen after the death of the first spouse, in respect to [the] individual husband and wife's collective assets . . . . they would protect their assets with the ultimate distribution based on what was provided in their last will and testament of mutual trust.

When asked about Stephen's intent related to his estate planning, Bluestein responded that he "would not have drafted [a] mutual will and trust agreement, nor offered it up to [his] clients, unless it was crystal clear that their intent was to have

[4] S.C. Code Ann. § 62-2-301 (2022).

that be enforced, and the wills that handled both trust agreements, enforced." Bluestein agreed Stephen's Will "provides that the [Agreement] was incorporated by reference into this Last Will and Testament." He also confirmed Stephen never came back "to amend, modify, or alter any of these estate planning documents," and he was unaware of any attempt by Stephen to change the testamentary instruments.

On cross-examination, Bluestein admitted the terms of the Agreement required Stephen to ratify his Will upon any remarriage. When asked whether such ratification was "a mandatory thing," he responded, over objection, "Yes. It says that the survivor will, 'ratify his or her Will and Trust.' 4.2.1." Bluestein then clarified on redirect that his ratification response "had nothing to do with the effectiveness of the document based on whether or not it was ratified."

Appellants also called Stephen's friend, real estate agent Trisha Ernstrom. Ernstrom testified she had discussed with Stephen and Nancy the plans for their respective estates, and both "reiterated that they had an attorney and they had made proper preparations so the children would inherit the house and all their assets." Ernstrom recalled that after Nancy's death, she asked Stephen whether a potential marriage to Mary would alter his estate plan. Stephen responded: "That's a non-issue. That's—nothing's changing that. It's—it's staying the way it is. It's locked in."

On cross-examination, Ernstrom admitted she was the listing agent for Stephen's home and that she had discussed the listing with Stephen's children. At the conclusion of her testimony, the probate court asked whether Ernstrom knew "if Mr. Ward provided for Mary Ward outside of his Will?" Ernstrom responded, "I never really asked about how he provided for Mary or anything of that nature."

Stephen's son and co-personal representative Brian Ward testified that the parties filed joint tax returns but generally maintained separate finances. Although Mary lived with Stephen following their marriage, she did not sell her premarital home. Based on his review of certain financial information after his father's death, Brian was able to deduce that Mary received, either before or after Stephen's death: (1) approximately $4,000 remaining in a joint account the couple used for household expenses; (2) payment of a $1,600 delinquent property tax bill for the house Mary owned; (3) about $7,500 for medical expenses related to Mary's broken leg; (4) a

timeshare in Las Vegas held in both spouses' names; (5) a leased Toyota Camry; and (6) the $17,000 capital percentage from a local club membership.[5]

The probate court found Mary was entitled to an omitted spouse's share. The court reasoned that the Will did not specifically mention Mary; that allowing "blanket" provisions to overcome the statutory omitted spouse's share violated public policy; that Stephen failed to follow the steps required in the Agreement to secure his estate plans; and the evidence did not demonstrate that the non-testamentary items Brian identified were intended by Stephen to provide for Mary in lieu of a bequest.

Appellants filed a Rule 59(e), SCRCP, motion to alter or amend, arguing the probate court conflated the laws applicable to a claimed elective share and those governing an omitted spouse. The probate court then issued an amended order that differed rather substantially from its first ruling, but again found Stephen's failure to follow the Agreement's enforcement procedure demonstrated he "did not intentionally omit [Mary] from his Estate." The probate court further found the non-testamentary gifts were not intended to supplant the need for a bequest.

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[5] Brian and his two siblings also testified that Stephen assured them his estate plan would not be altered by his fourth marriage. However, the probate court sustained Mary's objections to some of this testimony based on the Dead Man's statute, *see* section 19-11-20 of the South Carolina Code (2014), and much of the testimony was proffered. Appellants contend Stephen's daughter, Stephanie Ward Cibinic, was allowed to testify without having that portion of her testimony proffered, but the record is unclear on this point. After Mary's objection at the beginning of Stephanie's testimony about a conversation with Stephen, the court responded: "I think this is just background right now. Let's see where it goes. Or do you want to proffer this? Go ahead." The record does not reflect whether or how Appellants' counsel responded to the court's question. Additionally, there are places in the record where some testimony from Appellants' conversations with their father appears to have been elicited outside the proffer. Because we decide this case based on Stephen's inaction with respect to the conditions within the 2005 documents and the operation of the omitted spouse statute, it is unnecessary to further detail which testimony was proffered versus which was admitted.

Appellants then filed another Rule 59(e) motion. Upon the probate court's denial of this motion, Appellants appealed to the circuit court. Following a hearing, the circuit court affirmed the probate court's decision.

Standard of Review

"An action concerning the application of the omitted spouse statute is an action at law. In an action at law, this court and the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *In re Timmerman*, 331 S.C. 455, 458–59, 502 S.E.2d 920, 921 (Ct. App. 1998) (citations omitted). However, on appeal from an action at law tried without a jury, the appellate court will correct errors of law. *Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011).

Analysis

Appellants argue the circuit court erred in affirming the probate court's ruling that Mary was entitled to an omitted spouse's share. We disagree.[6]

South Carolina treats with great deference a testator's intent in disposing of his or her property. As our supreme court has explained:

> It is elementary that a testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy and intent is to be ascertained

[6] We reject Mary's argument that Appellants failed to notice their appeal from the order of the probate court granting Mary's petition as an omitted spouse. Appellants' counsel have ably challenged Mary's petition at every stage of this litigation and correctly note section 62-1-308 of the South Carolina Code (2022) governs appeals from the probate court. Appellants' notice identifies the final order from which they appeal, they filed the statement of issues required by § 62-1-308(b) for their appeal to circuit court, and they received the required rulings from both the probate and circuit courts. Moreover, "[w]e are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 705, 869 S.E.2d 859, 867 (Ct. App. 2022) (quoting *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011)).

> upon consideration of the entire will. In construing the provisions of a will, every effort must be made to determine the intentions of the testator and carry out such intentions. Further, the court must always first look to the language of the will itself.

In re Est. of Prioleau, 361 S.C. 627, 631-32, 606 S.E.2d 769, 772 (2004) (citations omitted). In interpreting testamentary documents, "[w]e can neither 'redraft the [w]ill, nor may we doctor a crucial part.'" *In re Est. of Fabian*, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997) (quoting *Limehouse v. Limehouse,* 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971)).

In some instances, a testator's intent may conflict with South Carolina law or public policy. The General Assembly has provided for surviving spouses omitted from a will executed before the parties married:

> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:
>
> > (1) it appears from the will that the omission was intentional; or
> >
> > (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.
>
> (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902.

> (c) The spouse may claim a share as provided by this section by filing in the court and serving upon the personal representative, if any, a summons and petition for such share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after the omitted spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will. The spouse shall give notice of the time and place set for the hearing on the omitted spouse claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

§ 62-2-301.

In recognizing the tension between the weight afforded a testator's intent and the provisions of the probate code, our courts have articulated a framework for considering an omitted spouse claim. In *Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell*, this court applied a four-part test addressing a surviving spouse's qualification as an "omitted spouse":

> A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate:
>
> > (1) the decedent spouse executed the will in question prior to the marriage;
> >
> > (2) the will does not provide for her as the surviving spouse;
> >
> > (3) the omission was unintentional; and [sic]

> (4) the decedent did not provide for the spouse with transfers outside of the will.[7]

346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001) (quoting Wagner, *supra* note 7, at 983)).

It is undisputed that Mary satisfied the two qualifying requirements by establishing that Stephen executed the Will prior to their marriage and that it does not provide for her. It is likewise undisputed that the Agreement makes no mention of Mary.

The two exclusionary requirements are hotly disputed. Appellants assert Mary's claim must be denied because any argument that her omission was unintentional is defeated by the testimony and exhibits. Obviously, there is no mention of Mary in the Will—Stephen and Mary did not even know each other when Stephen and Nancy executed their documents in 2005. Thus, the Agreement and Will could not have been prepared to intentionally omit Mary (as opposed to some unnamed potential future spouse), as our case law appears to require. *See*, *e.g.*, *Miles v. Miles*, 312 S.C. 408, 411, 440 S.E.2d 882, 883-84 (1994) (holding "a spouse has not been 'provided for' within the meaning of section 62-2-301 unless the decedent considered the surviving spouse *in that capacity* at the time the will was executed").

Had Stephen simply executed the documents required by section 4.2 of the Agreement, Appellants would be in a better position to challenge this outcome. As it stands, evidence supports the probate court's findings as to this factor, and we see no error of law.

The alternate exclusionary factor allows omission of a surviving spouse where "the testator provided for the spouse by transfer outside the will" and "the intent that the transfer be in lieu of a testamentary provision is shown by statements of the

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[7] *Green* explains that the "first two criteria are described as 'qualifying' conditions and the latter two as 'exclusionary' conditions." *Green*, 346 S.C. at 62 n.5, 550 S.E.2d at 329 n.5 (quoting David E. Wagner, *The South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman,* 50 S.C. L. REV. 979, 984 (1999)). Somewhere along the way, the statutory "or" found between § 62-2-301(a)'s two exclusionary factors was miscast as "and" by the case law. We yield to the statute.

testator or from the amount of the transfer or other evidence." § 62-2-301(a)(2). Here, Appellants cannot establish Stephen "provided for" Mary by any transfer outside the will. We find meritless the argument that Stephen's financial contributions to Mary during their life together negate her ability to satisfy the omitted spouse test.

Appellants claim the assets referenced in Brian's testimony serve as a substitute for the support Mary would receive through a spousal share of Stephen's estate. But the nature of two of the listed items actually contravenes Appellants' position that Stephan intended them to provide for Mary in lieu of a bequest. For example, a leased Toyota Camry has little benefit to a nonagenarian under a conservatorship; it is similarly difficult for us to understand the value of a Las Vegas timeshare. And, we do not find the value of the listed non-testamentary transfers sufficient to deem them de facto bequests "in lieu of a testamentary provision" to a spouse from an estate valued in excess of $900,000. *Cf. Timmerman*, 331 S.C. at 459, 502 S.E.2d at 922 (finding transfers of nearly $1.2 million met statutory allowance that "intent can be measured by the amount of the transfers"); *see also Miles*, 312 S.C. at 410-11, 440 S.E.2d at 883 (noting its agreement with those jurisdictions holding "absent specific language in the [w]ill, or sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage,' a spouse has not been 'provided for' under the 'omitted spouse's statute'").

As the record supports the probate court's finding that the evidence did not demonstrate the non-testamentary items Brian identified were intended by Stephen to provide for Mary in lieu of a bequest, we affirm the courts' rulings as to this exclusionary factor as well.

Conclusion

For the foregoing reasons, the rulings of the probate court and circuit court are

AFFIRMED.

HILL, A.J., concurs.

GEATHERS, J., dissenting:

I agree with the majority that there is nothing to indicate Stephen intended for any financial support of his fourth wife, Mary, during their life together to be a replacement for a potential bequest. Therefore, Appellants did not show that Stephen provided for Mary by transfer outside the Will. However, I respectfully depart from the majority's conclusion that any evidence supported the probate court's finding that Stephen did not intend to omit Mary from the Will.

Our analysis must be guided by Stephen's intent for the disposition of his estate. We are not here to decide the wisdom or fairness of his wishes—only to discern them. *See Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013) ("The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make [the will] according to the testator's pleasure and in his absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed.").

Honoring the testator's intent is consistent with the omitted spouse statute. "The omitted spouse statute 'attempts to accomplish two ends—carrying out the decedent's probable intent and protecting the still-surviving spouse.'" *Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell*, 346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001) (quoting David E. Wagner, *The South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman,* 50 S.C. L. REV. 979, 979 (1999)). The omitted spouse statute is meant to ensure that a decedent—who did not update a pre-marriage will to include a new spouse—can have what society believes to be his or her likely intent honored. *See* Wagner, 50 S.C. L. REV. at 994. Importantly, the statute is not meant to supplant the testator's intent; hence, the legislature included in the statute a provision excluding the new spouse from the estate when the omission is intentional. S.C. Code Ann. § 62-2-301(a)(1) (providing that an intentional omission of a surviving spouse from a will bars the surviving spouse from receiving any share of the estate). The statute's assumption is that a person *who has shown no contrary intent* likely means to leave their new spouse *something*. Here, the only probative evidence in the record shows a contrary intent—to omit a subsequent spouse.

The only evidence in the present case shows that years before he met Mary, Stephen made it clear that he meant to leave a subsequent spouse *nothing*. The significance of the Agreement between Stephen and his third wife, Nancy—and what it says about Stephen's testamentary intent—is that anyone in the role of subsequent spouse was to be excluded from the estate. It matters little that Mary is

not *specifically* named in the Will because Stephen contemplated and explicitly omitted any subsequent spouse from receiving anything from the estate. *See Green*, 346 S.C. at 63, 550 S.E.2d at 330 (finding omission was intentional when "[t]he face of the will refers to [the testator's] possible future marriage to [wife,] and the [testator's] Trust Agreement specifically refers to [wife] in her potential capacity as [the testator's] wife"); *see also Wilson*, 403 S.C. at 440–42, 743 S.E.2d at 762–63 (expressing skepticism about an omitted spouse claim because, among other reasons, the decedent's "testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, *including a future spouse* or heirs, based on his desire to leave most of his estate to charity after providing for the education of his grandchildren" (emphasis added)); *cf. Miles*, 312 S.C. at 410–11, 440 S.E.2d at 883 (agreeing with courts in other states that "absent specific language in the [w]ill, or sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage,' a spouse has not been 'provided for' under the 'omitted spouse's statute'" (footnote omitted)).

The evidence also shows that Stephen's intention to omit a subsequent spouse did not change following Stephen's marriage to Mary. As the majority notes, Mary called one witness, Noble-Kiley, whose testimony consisted only of the date of the parties' marriage, the date of Stephen's death, and her appointment as Mary's conservator. None of this testimony speaks to Stephen's intent for his estate plan. Mary presented no evidence that Stephen contemplated or made any effort to alter his estate plan after their marriage. In contrast, Appellants presented the testimony of Bluestein—the attorney who drafted Stephen and Nancy's wills and the Agreement—and of Stephen's friend, who had conversations with Stephen about the impact marrying Mary would have on his estate plan. Bluestein testified that he would not have drafted a mutual will and trust agreement unless the couple's intent to have it enforced was "crystal clear" and that the effectiveness of the Will is not based on whether it is ratified. The probate court relied on Stephen's failure to ratify the Will and to have Mary waive her rights under the elective share statute. However, this carries no probative value as to Stephen's intent and, thus, does not negate the overwhelming evidence that Stephen intended to omit Mary from his Will and uphold the Agreement.

Lastly, it is clear from the record that Nancy and Stephen executed a mutual will and intended that Nancy and Stephen's children and heirs receive all remaining assets after their deaths, regardless of which spouse died first. South Carolina law respects mutual wills, which are generally upheld as testamentary instruments

demonstrating the intent of the testator. *See generally Pruitt v. Moss*, 271 S.C. 305, 247 S.E.2d 324 (1978) (holding that a mutual will "was the product of a testamentary compact, which became contractually binding on the husband at the time he received benefits under the wife's will"); *see also Looper v. Whitaker*, 231 S.C. 219, 225–28, 98 S.E.2d 266, 269–71 (1957) (reviewing South Carolina cases involving joint mutual wills). Stephen's intent to omit a subsequent spouse is clear from his Will that incorporated by reference the Agreement and was designed as a mutual will with Nancy's. Mary as a subsequent spouse was intentionally omitted from the Will and could not receive any assets from Stephen's estate.

Accordingly, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives, as set forth herein,
Respondents/Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners, LLC; John Does 1-25, Appellants/Respondents.

Appellate Case No. 2022-001587

Appeal From Beaufort County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 6074
Heard June 4, 2024 – Filed July 24, 2024

AFFIRMED

Val S. Stieglitz, III, of Columbia, Robert Bruce Wallace, of Charleston, Kirsten Elena Small, of Greenville, and Alexandra Harrington Austin, of Charleston, all of Maynard Nexsen PC; and Donald Falk, admitted pro hac vice, of Schaerr Jaffe, LLP, of San Francisco, California, all for Appellants/Respondents.

Ian S. Ford, Ainsley Fisher Tillman, and Hunter H. James, all of Ford Wallace Thomson LLC, of Charleston, for Respondents/Appellants.

GEATHERS, J.: In these cross-appeals, Appellants/Respondents Developers (the Defendants) appeal the circuit court's order refusing to compel arbitration in a dispute arising from several contracts underlying the Defendants' sale of real estate in the Palmetto Bluff Development to Respondents/Appellants Homeowners (the Plaintiffs). The Plaintiffs cross-appeal the circuit court's order denying summary judgment for their declaratory judgment action. We affirm the circuit court's order denying the Defendants' motion to compel arbitration and dismiss the Plaintiffs' cross-appeal.

FACTS

The Palmetto Bluff Development (Palmetto Bluff) is a planned residential community located in Beaufort. Purchasers of real estate in Palmetto Bluff are required to join the Palmetto Bluff Club (the Club) as a condition of purchasing property in the development; membership in the Club is purportedly automatic upon acceptance of a deed. Club membership is then further memorialized by the execution of a Club Membership Agreement, and the governing terms of the Club are set forth in the Club Membership Plan (collectively, the Club Documents). The Club is for-profit, is managed by the Defendants, and retains the power, according to the parties, to unilaterally change its fees and policies with no input from the Club's members.

The Club Membership Agreement includes the following arbitration clause:

> [A]ny and all controversies, disputes[,] or claims relating directly or indirectly to, or arising directly or indirectly

> from[,] this Membership Agreement, including, but not limited to, the breach or alleged breach of this Membership Agreement, shall be resolved by mandatory arbitration in accordance with the [rules of the American Arbitration Association (AAA) then in effect], applying the substantive laws of South Carolina.

This provision was added on June 19, 2017, and the Club Membership Plan acknowledges that the provision consequently applies only to those who became Club members on or after this date. The arbitration clause is mirrored in the Club Membership Plan and forms the foundation for this appeal.

In July 2020, several of the Plaintiffs complained to the Defendants about changes the Club was planning to make that the Plaintiffs understood would, in some capacity, limit the ability of their short-term tenants to access and use the Club's facilities. Later, in October 2021, following failed mediation attempts, a larger group that included more of the Plaintiffs in the present action sent a letter disagreeing with the Defendants' assertion that the Defendants possessed the ability to implement such restrictions. After further mediation attempts, the Plaintiffs commenced this suit on April 12, 2022, asserting sixteen causes of action. Two days later, the Plaintiffs sent a demand for arbitration to the AAA that included their complaint.

On May 10, 2022, the Plaintiffs asked the circuit court to stay arbitration and sought summary judgment on the alleged invalidity of the arbitration clause. On May 16, 2022, the Defendants answered the demand and filed a counterdemand with the AAA. The Defendants then asked the court to dismiss the action pursuant to Rule 12(b)(8), SCRCP, or, alternatively, to compel arbitration and stay the action.

Following several hearings, the circuit court issued an order on September 15, 2022, (1) granting the Plaintiffs' motion to stay arbitration, (2) denying the Defendants' motion to compel arbitration—in part because the arbitration agreement was unconscionable—and (3) denying, without prejudice, the Plaintiffs' motion for partial summary judgment. These appeals followed.

THE DEFENDANTS' ISSUES ON APPEAL

1. Did the circuit court err in ruling on the arbitrability of the claims rather than reserving this determination for an arbitrator?

2. Did the circuit court err in determining that an agreement to arbitrate does not exist between many of the parties?

3. Did the circuit court err in finding that any agreements to arbitrate that do exist are invalid, unlawful, and unconscionable?

4. Did the circuit court err in determining that the South Carolina Uniform Arbitration Act applies?

THE PLAINTIFFS' ISSUE ON APPEAL

1. Did the circuit court err in refusing to grant partial summary judgment to the Plaintiffs on their declaratory judgment claim?

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff'd as modified on other grounds*, 373 S.C. 168, 644 S.E.2d 718 (2007). Nonetheless, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019); *see also Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999) ("[South Carolina] now join[s] the majority of jurisdictions granting deference to a circuit [court]'s factual findings made when deciding a motion to stay an action pending arbitration.").

LAW/ANALYSIS

I. THE DEFENDANTS' APPEAL

The Defendants appeal the circuit court's refusal to compel arbitration and argue that the arbitration agreement contained in the Club Documents requires all of the claims in this case to be arbitrated. We hold that (1) the circuit court was the proper adjudicator to determine whether an agreement to arbitrate existed and (2) the arbitration clause contained in the Club Documents is unconscionable and unenforceable.

A. Federal Arbitration Act or the South Carolina Uniform Arbitration Act

As a threshold matter, the Defendants contend that the Federal Arbitration Act (FAA)[1] governs this dispute rather than the South Carolina Uniform Arbitration Act (SCUAA).[2] Because the arbitration agreement explicitly requires application of South Carolina law, we need not address any requirements for FAA coverage; instead, we hold that the SCUAA applies. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . ."); *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172 ("The FAA applies . . . to any arbitration agreement involving interstate commerce, *unless the parties contract otherwise*." (emphasis added)).

B. Gateway Questions

The parties disagree as to the question of who should resolve their claims—an arbitrator or a court. The Defendants argue that parties can agree to give the determination of an arbitration agreement's existence to an arbitrator and that the incorporation of the AAA rules in the arbitration agreement here did exactly that. We hold that the question of the arbitration agreement's existence was properly before the circuit court because disputes about *contract formation* (such as unconscionability) are reserved for the courts.

It is true that parties can delegate questions of arbitrability—such as the question of whether an arbitration agreement is valid—to an arbitrator. *See Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 874 (Ct. App. 2005) ("The question whether a claim is subject to arbitration is a matter [for] judicial determination, unless the parties have provided otherwise." (quoting *Chassereau*, 363 S.C. at 631, 611 S.E.2d at 307)); *see also Carson v. Giant Foods, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999) ("[T]he parties can agree to let an arbitrator determine the scope of his own jurisdiction."); *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1195 (2024) (Gorsuch, J., concurring) ("[P]arties can agree to send arbitrability questions to an arbitrator . . . .").

Further, Rule 7(a) of the AAA's Commercial Arbitration Rules—which, again, the parties incorporated into their agreement here—purports to do exactly

[1] 14 U.S.C. §§ 1–16.

[2] S.C. Code Ann. § 15-48-10 to -240 (2005).

that: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the *existence*, scope, or *validity* of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." AAA, *R-7. Jurisdiction*, Commercial Arbitration Rules and Mediation Procedures, 14 (2022) (emphases added) www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

However, in South Carolina, "where one party denies the *existence* of an arbitration agreement[,] . . . *a court* must immediately determine whether [an] agreement exists in the first place." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (emphases added). The court in *Simpson* relied heavily on section 15-48-20(a) of the South Carolina Code (2005), which provides, "If [a] party denies the *existence* of the agreement to arbitrate, *the court* shall proceed summarily to the determination of the issue so raised . . . ." (emphases added). Furthermore, because questions of contract formation are separate from questions of arbitrability (such as validity), the Fourth Circuit Court of Appeals has suggested that courts can still decide whether an agreement to arbitrate exists at all, notwithstanding an arbitration provision's incorporation of the AAA's rules:

> There is a difference between disputes over arbitrability and disputes over contract formation. While "parties may agree to have an arbitrator decide . . . gateway questions of arbitrability," such an agreement does not "preclude a court from deciding that a party never made an agreement to arbitrate *any* issue." That is, it does not erase the court's obligation to determine whether a contract was formed . . . . *Thus*[,] *the incorporation of the rules of the* [*AAA*]*, which allow the arbitrator to rule on questions of arbitrability, does not obviate the need for courts to decide the threshold issue of contract formation.*

Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC, 993 F.3d 253, 258 (4th Cir. 2021) (second emphasis added) (citations omitted) (quoting *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 n.9 (4th Cir. 2019)); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) ("The issue of [a] contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded."); *cf. Coinbase, Inc.*, 144 S. Ct. at 1193 ("[T]he question is whether the parties agreed to send the given dispute to arbitration—and, per usual, *that* question must be answered by a court.").

In the case at hand, the Plaintiffs' attack on the arbitration agreement as unconscionable challenges formation of the agreement rather than its validity because challenges to an arbitration provision on grounds of unconscionability "bring[] into question whether an arbitration agreement even existed in the first place." *Simpson*, 373 S.C. at 23, 644 S.E.2d at 668. Consequently, the parties here are disputing whether any agreement to arbitrate ever existed—a dispute over contract formation rather than the validity of the arbitration agreement. The matter was therefore properly before the circuit court rather than an arbitrator.

C. Unconscionability

The circuit court concluded that the arbitration agreement in the Club Documents was unenforceable because it is unconscionable. We agree because the Plaintiffs lacked a meaningful choice in entering the agreement and the agreement—which can be unilaterally modified by the Defendants—improperly limits statutorily-mandated damages.

An arbitration agreement is unconscionable if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016).

1. Absence of Meaningful Choice

"Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Id.* To this end, courts consider, among other things, "the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether 'the plaintiff is a substantial business concern.'" *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). Contracts of adhesion are "standard form contract[s] offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). However, "[a]dhesion contracts . . . are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Instead, "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). In *Simpson*, our supreme court further stated that "[t]he general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution." 373 S.C. at 29–30, 644 S.E.2d at 671.

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Id. at 25, 644 S.E.2d at 669 (citation omitted) (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). Our supreme court has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989)). Here, the Defendants' reliance on the sophistication of the Plaintiffs as wealthy purchasers of secondary homes is misplaced in light of our supreme court's analysis in *Damico*:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar[, a real estate developer]. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

437 S.C. at 614–15, 879 S.E.2d at 756. The contract here is one of adhesion. Agreement to the terms of the Club Documents is automatic and mandatory when purchasing a home in Palmetto Bluff. As the circuit court aptly put it, "there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind." We hold that agreement to the arbitration clause in this case is characterized by an absence of meaningful choice on the Plaintiffs' part.

2. Oppressive and One-Sided Terms

Turning to the second prong of unconscionability, terms are unconscionably oppressive and one-sided when they are such that "no reasonable person would make them and no fair and honest person would accept them." *Id.* at 612, 879 S.E.2d at 755. The Club Documents in this case provide, "[The Defendants] reserve[] the right

in [their] sole and absolute discretion, from time to time, to modify the Membership Plan and Rules and Regulations . . . and to make any other changes to the Membership Documents . . . ." We are not satisfied with the Defendants' contention that the circuit court was forbidden from considering this provision because it is in the container contract rather than the arbitration clause itself. *Cf. Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543–44 (4th Cir. 2005) (applying Maryland law and refusing to invalidate an arbitration agreement for lack of consideration when language permitting one party to unilaterally amend the contract was not contained within the arbitration clause); *id.* at 544 ("[T]he district court simply was not at liberty to go beyond the language of the [a]rbitration [a]greement in determining whether the agreement contained an illusory promise."). Here, although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a separate policy. Furthermore, it specifically states that the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes. Therefore, it is part of the arbitration agreement. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable *specifically relates to the arbitration provision*." (emphasis added) (quoting *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003))); *see also Hicks v. Brookdale Senior Living Cmtys, Inc.*, No. 617-cv-2462-DCC-KFM, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018) (noting that in other cases before the United States District Court for the District of South Carolina, arbitration agreements were upheld when reservations of the power to unilaterally modify a contract were "contained in a *separate policy* and [were] not *directed specifically to the arbitration agreement*" (emphases added)); *cf. Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (concluding that, under Maryland Law, an acknowledgment receipt containing a clause permitting unilateral modification of the contract was part of the arbitration agreement because the agreement's language incorporated the receipt and the receipt served as the signature page for the agreement); *see generally Marcrum v. Embry*, 282 So.2d 49, 52 (Ala. 1973) ("It is quite true that where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent."). As the circuit court recognized, this unilateral ability to modify any part of the contract—including as to the terms of existing contracts—speaks to the one-sidedness of the arbitration agreement.

Furthermore, the arbitration clause provides, "No consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or

punitive damages may be awarded in said arbitration." In *Simpson*, our supreme court struck down an arbitration agreement that prohibited the "award [of] punitive, exemplary, double, or treble damages (or any other damages [that] are punitive in nature or effect)" because the South Carolina Unfair Trade Practices Act (SCUTPA) "requires a court to award treble damages for violations of the statute."[3] 373 S.C. at 28–29, 644 S.E.2d at 670; *see also* S.C. Code Ann. § 39-5-140(a) (2023) (stating that on finding that a violation of the SCUTPA was "willful or knowing[,] . . . [a] court shall award three times the actual damages sustained."). Like in *Simpson*, the arbitration agreement in the Club Documents would deprive the Plaintiffs of their statutory right to treble damages for the SCUTPA claim that they bring. *See also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 88, 749 S.E.2d 139, 150 (Ct. App. 2013) (holding that an arbitration provision identical to the one in *Simpson* precluding treble damages was unconscionable).

The Defendants' reliance on *Rowe v. AT&T, Inc.*, a federal District Court case, is misplaced. No. 6:13–cv–01206–GRA, 2014 WL 172510 (D.S.C. Jan. 15, 2014). Citing to the U.S. Supreme Court in *PacifiCare Health System, Inc. v. Book*, the *Rowe* court wrote, "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, 'the proper course is to compel arbitration.'" *Id.* at *11 (quoting *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003)). In *PacifiCare*, the Supreme Court refused to invalidate an arbitration clause that potentially restricted the right to treble damages under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. 538 U.S. at 407. The arbitration agreement in *PacifiCare* provided that (1) "punitive damages shall not be awarded [in arbitration]," (2) "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," and (3) "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *Id.* at 405 (alterations in original). The Supreme Court held the issue on appeal was unripe because it was speculative whether an arbitrator would construe treble damages as compensatory or punitive. *Id.* at 406–07.

[3] The court also noted this clause improperly limited the mandatory award of double damages for violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act. 373 S.C. at 28–30, 644 S.E.2d at 670–71; *see also* S.C. Code Ann. § 56-15-110 (2018) (providing a person injured by a violation of the statute "shall recover double the actual damages by him sustained").

Here, there is no such uncertainty. The contract in the instant case specifically prohibits the award of treble damages, regardless of whether they are construed as compensatory or punitive.[4]

In light of this limitation on damages and the Defendants' unilateral ability to modify the arbitration agreement, no reasonable person would make the present terms in this arbitration agreement, nor would any reasonable person accept them. Consequently, we hold that the arbitration agreement in the Club Documents is unconscionable.[5] As a result, we need not address the Defendants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[An] appellate court need not address remaining issues when [resolution] of [a] prior issue is dispositive.").

II. THE PLAINTIFFS' APPEAL

We dismiss the Plaintiffs' appeal of the circuit court's denial of its motion for summary judgment because, in South Carolina, "it is well-settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter County*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010); *see also Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary

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[4] In a similar vein, the Defendants also cite a case from our supreme court, *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, wherein the court enforced an arbitration agreement that prohibited the award of punitive damages even though the plaintiffs advanced the argument that the agreement improperly limited their right to treble damages under the SCUTPA. 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004). This case is not persuasive for the same reason we stated as to *PacifiCare* (to which *Carolina Care Plan* also cites): regardless of whether an arbitrator were to find that treble damages in the instant case are compensatory or punitive, the arbitration clause specifically purports to prohibit the award of treble damages *altogether*.

[5] We decline to analyze whether the unconscionable terms are severable because the parties did not include a severability clause in the arbitration agreement. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 ("Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.").

judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Holloman v. McAllister*, 289 S.C. 183, 185–86, 345 S.E.2d 728, 729 (1986) ("Appellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion.").

Although appellate courts have discretion to consider an order that is not immediately appealable if an immediately appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation,[6] the supreme court did not intend for this exception to apply to orders denying summary judgment motions. *See Skywaves I Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 460, 814 S.E.2d 643, 658 (Ct. App. 2018).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the circuit court's order denying the motion to compel arbitration. We also **DISMISS** the Plaintiffs' cross-appeal because the order denying summary judgment is not reviewable.

HEWITT and VINSON, JJ., concur.

[6] *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978).