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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2023-001470

Logan Wood and Sarah Wood,…...………………………………………Respondents,

v.

Horry County School District, ……………………………………………....Petitioner.

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INTRODUCTION

In October 2016, fourteen-year-old Logan Wood suffered five-to-seven successive concussions while playing in a football game for a team in the Petitioner Horry County School District ("HCSD"). Because Logan's team played away at another school, HCSD did not provide an athletic trainer for each team. Instead, it provided one athletic trainer for over 100 players. One important responsibility of an athletic trainer is to monitor players for signs of a concussion and immediately remove from play an athlete suspected of suffering a concussion. Suffering another or multiple concussions before an existing concussion heals causes second impact syndrome and can lead to permanent brain injury. That is what happened to Logan Wood in this case when he remained in the game after suffering a concussion. He now suffers from permanent brain injury.

This is an appeal from a jury trial under the South Carolina Tort Claims Act in which the jury returned a verdict for Plaintiff-Respondents Logan Wood and his mother, Sarah Wood, for Logan's brain injuries. The jury awarded $825,000.00 to Logan and $25,000.00 to Sarah. HCSD made a post-trial motion for JNOV asking the court to apply the $300,000.00 SCTCA cap, and a motion to deposit the judgment amount into the court. The lower court denied both motions.

On June 21, 2023, the Court of Appeals issued unanimous opinion *Wood v. Horry County School District*, 2023 WL 4105395, 2023-UP-244 (S.C. Ct. App. June 21, 2023) (App. pp. 1-3), affirming the lower court's decision and the jury's verdict in favor of the Woods. The law and record fully support the Court's Opinion under the facts and procedure of this case, and this Court should affirm.

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the determination of the number of "occurrence[s]" under S.C. Code Ann. § 15-78-30(g) is purely a matter of law for the trial court?

II. Whether the lower court correctly entered judgment for Logan Wood for $600,000.00 based on the jury and the court's independent findings of two occurrences?

III. Whether the lower court properly exercised its discretion to deny HCSD's Rule 67, SCRCP, motion to pay the judgment amounts into the court?

COUNTER STATEMENT OF THE CASE

In the fall of 2016, Logan Wood played on the North Myrtle Beach High School B football team. (R. p. 219). B-team players are seventh and eighth grade students. (R. p. 176). An athletic trainer is required to be present for all sports. (R. p. 287). HCSD's athletic trainer staffing model provided that, in some instances, each team has its own athletic trainer. (R. pp. 174-75, 286-91). However, for a B-team away game, each team did not have its own athletic trainer. *Id.* Instead, the host school provided one athletic trainer for both teams, which could include over 100 players. (R. pp. 160, 174-75, 286-91).

An athletic trainer is responsible for injury prevention, care, and rehabilitation. (R. pp. 147, 193). An athletic trainer is responsible for monitoring football players for signs of a concussion.[1] (R. p. 147). Younger players, such as the B-team, have developing brains that are at greater risk for injury from a concussion than older players. (R. pp. 176-77, 196-97, 248). It is safer and lower risk for the student athletes to have an athletic trainer present for each team. (R. pp. 289, 185).

To effectively identify a possible concussion, an athletic trainer needs to watch the game and interact with the players on the sidelines. (R. pp. 194-95, 199-200, 203, 158, 161). Signs of a player with a concussion in a football game include laying on the ground longer than normal after a tackle, holding his helmet, not knowing what to do on a play, stumbling, balance, headache, nausea, dizziness, confusion, light sensitivity, and ringing in the ears (R. pp. 154-58, 202-03). Any one of these symptoms is treated as a concussion. (R. p. 155).

[1] S.C. Code Ann. § 59-63-75 (requiring school districts to develop guidelines and procedures for identification, management, and return to play decisions for concussions).

Concussion protocol starts with the principle that a player should be automatically taken out of a game if he is suspected of suffering a head injury. (R. pp. 144, 148). Second impact syndrome is caused when a player who suffers a concussion gets a second concussive hit before the first concussion heals. (R. pp. 145, 147-48). Second impact syndrome can lead to permanent injury and death. (R. pp. 148-49).

In the spring of 2016, before Logan's injuries, the head athletic trainer for North Myrtle Beach High School publicly stated in news articles that HCSD schools needed more athletic trainers to adequately protect and care for the student athletes. (R. pp. 179, 183, 185, 363-74). At the time, North Myrtle Beach High School employed two athletic trainers on salary and a third trainer on a stipend. (R. pp. 186-87). For the 2016-2017 school year, HCSD provided another athletic trainer salaried position. *Id.* North Myrtle Beach kept the three existing trainers and simply changed the stipend-paid trainer to a salaried position. *Id.*

On October 20, 2016, the B-team played an away game at Carolina Forest High School. (R. p. 221). North Myrtle Beach did not bring its own athletic trainer. One athletic trainer from Carolina Forest was responsible for approximately 120 athletes. (R. p. 160).

Logan Wood played the lineman position for offense and defense on the B-team. (R. p. 220). He played every play in a game except for special teams. *Id.* During the game against Carolina Forest, Logan took numerous helmet-to-helmet hits and head-to-ground hits. (R. p. 223). His mother and sister saw Logan continue chasing a player after the whistle blew, not knowing what to do in a play, wandering around the field, and lining up on the wrong side of the field. (R. pp. 223-24, 258). Ms. Wood tried to go down onto the field but a school resource officer stopped her. (R. pp. 224, 259). A partial game video taken by a coach's wife shows Logan exhibiting

concussion symptoms. (R. pp. 112, 195). It shows Logan clutching his helmet, not knowing a play, appearing dazed, and staggering. (R. pp. 205-06).

After the game, the team rode the bus back to North Myrtle Beach High School. Logan complained about his head hurting when he got off the bus and suffered light sensitivity in the locker room. (R. pp. 166-67). When his mother arrived, Logan was screaming and sobbing about his head pain. (R. p. 225). At the emergency room, Logan was diagnosed with concussion. (R. pp. 226, 129). When he finally got home that night, Logan did not know his mother or sister, where he was, how to shower or brush his teeth, or that he wore contact lenses. (R. p. 228). A pediatric neurologist at MUSC who evaluated Logan found that he suffered five-to-seven concussions, which Logan's neurology expert stated is consistent with a traumatic brain injury. (R. pp. 230, 134). One of Logan's treating physicians wrote: "In my 25 years of practice, I've never encountered a patient with such severe post-concussion symptoms." (R. p. 133). Logan's frontal lobe injury is permanent and affects his ability to process and learn. (R. pp. 248-50, 254, 236).

On October 11, 2017, Logan and his mother, Sarah Wood, filed an action against HCSD for gross negligence asking for an award of medical expenses and damages for Logan's injuries. (R. pp. 30-33). The action falls under the SCTCA, which limits a state entity's liability to $300,000.00 per person for "loss arising from a single occurrence." S.C. Code Ann. § 15-78-120(a)(1).

Judge William Seals tried the case before a jury from April 12-15, 2021. (R. p. 99). The Woods's expert in athletic training, Rodwell Walters, testified to three occurrences of HCSD's negligence—the decision by HCSD and North Myrtle Beach High School officials to require only one athletic trainer for both teams, the Carolina Forest High School athletic trainer's failure to identify Logan's concussion symptoms during the game, and failure of the officials at North Myrtle

Beach High School to train their coaches on post-concussive syndrome. (R. pp. 123, 207-08, 210-11). Mr. Walters testified that these acts are not part of the same unfolding problem but are separate areas of concern. (R. p. 208).

HCSD moved for a directed verdict on the issue of multiple occurrences. (R. pp. 266-69). It argued "that there was one occurrence and that was failure to recognize that Logan was injured and not removing him from the game." (R. p. 269). HCSD stated "[t]here could have been more than one proximate cause of that, but it was one single occurrence." *Id.* The lower court denied the motion. (R. p. 272).

The parties discussed how to draft the verdict form on the occurrence issue. (R. pp. 273-75). The Woods suggested asking the jury to write in the number of occurrences. (R. pp. 273-74). HCSD objected to that, and the lower court suggested writing out the occurrences that the Woods intended to argue. (R. p. 274). The parties then discussed what occurrences would be listed on the verdict form and agreed to ask the jury about three alleged occurrences. (R. pp. 274-75, 293-96). HCSD did not object to this verdict form. *Id.*

The lower court charged the jury on the definition of an occurrence:

> The plaintiff has alleged multiple occurrences of gross negligence. An occurrence is defined as an unfolding sequence of events which proximately flow from a single act of negligence.

(R. p. 347). It charged the jury on the standard for finding an occurrence and told it to decide whether any act of gross negligence was a separate occurrence.

> The plaintiff has the burden of proving that each act of gross negligence was separate and independent in order for you to find that more than one occurrence has occurred.

Id. The jury returned a verdict for the Woods. (R. pp. 358-60).

The jury found HCSD committed two separate acts of gross negligence: (1) "it allowed Logan Wood to play without an athletic trainer present for his team" and (2) "it failed to assess

Logan Wood for signs and symptoms associated with a concussion." (R. pp. 22-23). The jury awarded Logan $825,000.00 and Ms. Wood $25,000.00. *Id.*

HCSD filed a JNOV motion on the occurrence issue. (R. pp. 47-52). It acknowledged that the lower court correctly charged the jury on the "occurrence" definition and correctly instructed the jury to find whether each of the three acts constituted gross negligence. (R. p. 48). HCSD disputed that the jury's finding of two instances of gross negligence meant it found two occurrences. It argued for the first time that the lower court should have determined as a matter of law whether each act of gross negligence is a separate "occurrence." (R. p. 48). HCSD argued the two acts of gross negligence are not separate occurrences because the acts "combined or 'unfolded' to result in Logan's concussion not being recognized." (R. pp. 51-52).

The Woods submitted a memorandum in opposition. They argued that HCSD failed to object to the occurrence jury charge or the verdict form that listed the three alleged occurrences. (R. pp. 76-78). They cited to numerous state and federal court cases in which courts have asked the jury to determine the number of occurrences. (R. pp. 77-78). The Woods argued that there are multiple occurrences in this case because HCSD's separate negligent acts resulted in the Woods's injuries. (R. pp. 73-76).

The lower court ruled in the Woods's favor. It held that "the issue of occurrences is to be addressed in the Judge's charge and on the verdict form." (R. p. 8). The court found on its own analysis that "[t]he evidence supported a finding that Logan Wood's injury resulted from the independent, gross negligence of different sets of employees; taking place on different dates; and taking place at different locations." (R. pp. 7-9). The court reduced Logan's damages from

$825,000.00 to $600,000.00 (consistent with two occurrences) and entered judgment for Ms. Wood for $25,000.00.[2] (R. pp. 10, 13).

HCSD filed a motion to deposit the judgment amounts into the court and stop the accrual of post-judgment interest. (R. pp. 83-84). The Woods opposed the motion, and the lower court denied the motion. (R. pp. 24-25, 86-89).

HCSD appealed, and the Court of Appeals affirmed. *Wood v. Horry Cnty. Sch. Dist.*, 2023 WL 4105395, 2023-UP-244 (S.C. Ct. App. June 21, 2023); App. pp. 1-3. As to the occurrence issue, the Court of Appeals held that "applying the facts of a case to the statutory definition of 'occurrence' is a question of fact for the jury." (App. p. 2). It found "evidence in the record supported the trial court's determination that the jury found two occurrences of gross negligence." (App. p. 2). The Court also ruled that "HCSD may not now complain that the special verdict form lacked" a question of the number of occurrences because it asked the lower court to remove that question. (App. p. 2). The Court of Appeals held that the lower court "did not abuse its discretion in denying HCSD's motion to deposit the judgment amount with the court." (App. p. 3).

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "The trial court's ruling on a directed verdict or JNOV motion will be reversed only if the ruling is governed by an error of law or no evidence supports the ruling." *Dawkins v. Sell*, 865 S.E.2d 1, 5 (Ct. App. 2021).

[2] A parent and child's claims are "separately cognizable under the" SCTCA. *Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 289-90, 391 S.E.2d 564, 569 (1990).

As to whether the number of occurrences is a question which the jury may answer, "[d]etermining the proper interpretation of a statute is a question of law, which this Court reviews de novo." *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022).

Whether leave to stay the accrual of interest is granted under Rule 67, SCRCP, is in the discretion of the trial court "and will not be overturned absent an abuse of that discretion." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006).

ARGUMENT

The law stated by this Court is that the jury may decide the number of occurrences as instructed in either the jury charges or verdict form, or both. HCSD's argument is unpreserved because it did not argue in its directed verdict motion that the lower court must be the sole arbiter on the number of occurrences or object to the verdict form and jury charges. Regardless, the argument is legally incorrect.

The jury and the lower court correctly applied the law to the facts of this case to find two separate occurrences. Their analysis follows this Court's precedent.

Finally, the lower court has discretion to deny a motion under Rule 67, SCRCP, to deposit the judgment into the court and appropriately exercised it in this case.

I. The determination of the number of occurrences is a question for the jury.

The SCTCA defines "occurrence" as "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(g). The question HCSD presents is whether the court or the jury is to decide the number of occurrences. Its argument is unpreserved and incorrect on the merits.

HCSD argues that the number of occurrences is a legal issue for the court to decide. (Br. of Pet. pp. 11, 16-17). It states that the trial court—not the jury—"was required to apply th[e] definition of 'occurrence,' and analyze whether" the grossly negligent acts found by the jury "gave

rise to or proximately caused a different 'unfolding sequence of events.'" (Br. of Pet. p. 17). In other words, HCSD argues that the jury decides whether there are multiple acts of gross negligence and, if so, the court then decides if those acts of negligence each satisfy the definition of an "occurrence." The law does not support this assertion. There is no case that says, after a jury's findings of multiple acts of gross negligence, there is another analytical step that only the court may perform to determine the number of occurrences.

As an initial matter, HCSD overlooks and ignores that the lower court found separate occurrences on **its own analysis**. It found that "[t]he evidence supported a finding that Logan Wood's injury resulted from the independent, gross negligence of different sets of employees; taking place on different dates; and taking place at different locations." (R. pp. 7-9). Therefore, even if HCSD's legal argument is correct—which the Woods dispute below—the lower court did actually conduct its own analysis on the number of occurrences. Any alleged error is harmless because "whatever doesn't make any difference, doesn't matter." *Miller v. Dillon*, 432 S.C. 197, 211, 851 S.E.2d 462, 470 (Ct. App. 2020). The Court may affirm on this basis alone. Rule 220(c), SCACR.

If the Court addresses the merits of HCSD's legal argument, it should affirm the Court of Appeals' decision on this issue. HCSD cites to *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005), and *Campbell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020), as authority that requires the trial court to determine the number of occurrences as a matter of law. (Br. of Pet. pp. 7-9). HCSD refers to it as a "self-executing duty" according to *Parker*. Neither *Parker* nor *Campbell* supports HCSD's argument. On the contrary, they support the Woods's argument and the lower court and Court of Appeals' decisions.

In *Parker*, the issue was "whether the statutory cap is an affirmative defense which is waived if not pled." 362 S.C. at 282, 607 S.E.2d at 714. The plaintiff's complaint stated that she brought the action under the SCTCA, but the defendant did not plead the statutory cap as an affirmative defense. *Id.* at 279, 607 S.E.2d at 713. During trial, the defendant moved to amend the answer to assert the cap, and the judge denied the motion and entered judgment for $450,000.00 without applying the statutory cap. *Id.* at 279-80, 607 S.E.2d at 713. On appeal, the Court of Appeals reversed and held "that the monetary statutory cap is self-executing and the court is required to apply the monetary statutory cap" regardless of whether the defendant pleads it as an affirmative defense. *Id.* at 282-85, 289, 607 S.E.2d at 714-16, 718.

Parker held the trial court must apply the cap regardless of whether it is pled. That is not at issue in this case. In this case, the lower court did apply the cap to reduce the damages award to Logan from $825,000.00 to $600,000.00. *Parker* is irrelevant to this appeal.

Parker's "self-executing" language simply means that the Court must apply the cap whether or not a defendant asks for the reduction. Stated differently, "self-executing" means that the cap is not an affirmative defense that must be pled but, instead, is to be automatically applied by the Court. *See, e.g.*, *United States v. Linville*, 60 F.4th 890, 893 (4th Cir. 2023) (stating Fifth Amendment rights are "self-executing—meaning they apply whether or not expressly invoked"). It does not mean that the Court determines the number of occurrences as a matter of law.

Campbell also ruled that the cap is applied regardless of whether it is pled as an affirmative defense. In *Campbell*, the defendant went into default and was not able to file an answer. 431 S.C. at 458-59, 848 S.E.2d at 790-91. The plaintiff argued the cap "did not apply because it was an affirmative defense which was waived or lost upon an entry of default." *Id.* at 459, 848 S.E.2d at 791. The Court of Appeals, relying on *Parker*, disagreed. "We reiterate our holding in *Parker*

that the plain meaning of the statute indicates this cap must be executed regardless of whether a defendant has filed a responsive pleading raising this cap as a defense." *Id.* at 463-64, 848 S.E.2d at 793. *Campbell*, like *Parker*, has nothing to do with whether a trial judge or a jury decides the number of occurrences. Occurrences were not at issue in *Campbell*.

In *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Supreme Court addressed whether the lower court properly reduced a verdict to the $300,000.00 cap for one occurrence where the jury entered a general verdict. The Court affirmed because "the jury was never instructed on the definition of occurrence nor was it asked to determine whether there was more than one occurrence, either in the instructions or in its verdict." *Id.* at 174, 694 S.E.2d at 544. This statement plainly shows that it is legally and procedurally proper for the jury to determine occurrences and that the issue is not a matter of law solely for the court. It also provides a procedure for the lower court to follow in a case with evidence of multiple occurrences—instruct the jury on the definition of occurrence and ask it to determine the number of occurrences "either in the instructions or in its verdict." *Id.*

Chastain shows HCSD is incorrect to assert that trial courts "are repeatedly erring in charging a jury with the definition of 'occurrence'" and asking them to decide that issue. (Br. of Pet. p. 8 n.2). On the contrary, that is the procedure this Court noted in *Chastain*.

The lower court in this case followed *Chastain* by charging the jury on the definition of occurrence and asking it to find the number of occurrences.

It was plain to the lower court, all parties, their counsel, and the jury that the verdict form asked about separate instances of gross negligence for the purpose of determining the number of occurrences. In other words, the jury understood that, in order to check "yes" on the verdict form, it must find that the act was grossly negligent and an occurrence.

The lower court specifically discussed the alleged separate "occurrences" so that counsel for both parties could agree on which ones to include on the verdict form and how to charge the jury. (R. pp. 293-96). In closing argument, the Woods asked the jury to "return a verdict for $300,000 for each of the three occurrences of gross negligence for a total of $900,000." (R. p. 341). In the jury charge, the lower court told the jury:

> The plaintiff has alleged multiple occurrences of gross negligence. An occurrence is defined as an unfolding sequence of events which proximately flow from a single act of negligence. The plaintiff has the burden of proving that each act of gross negligence was separate and independent in order for **you** to find that more than one occurrence has occurred.

(R. p. 347) (emphasis added). HCSD did not object to the charge to the jurors that "you" are finding the number of occurrences. In its order on post-trial motions, the lower court explained:

> [I]t was determined that the jury was to make a separate finding as to each occurrence as detailed in separate interrogatories and based on the jury charges. After much argument between the parties on the record regarding the number of occurrences which were supported by the evidence and the wording of the interrogatories, and after concessions by each party, this Court prepared a verdict form which was disseminated to the parties for review and given to the jury.
>
> In completing the verdict form, the jury found for the Plaintiff that the first and second independent occurrences were supported by the evidence, and rejected the Plaintiffs' allegations as to the third occurrence. As such, there was a finding of fact by the jury of two occurrences in accordance with the South Carolina Supreme Court's guidance in Chastain.

(R. p. 8). The lower court followed the statutory and case law on the determination of the number of occurrences. The Court of Appeals correctly affirmed its decision, and this Court should deny the petition on this issue.

HCSD cites to *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 712 S.E.2d 401 (2011), as support for its argument that only the trial court can decide the number of occurrences. (Br. of Pet. p. 8 n.3). But nowhere in *Boiter* did this Court say that. There is a difference in an appellate court reviewing a decision of the number of occurrences from a legal or factual standpoint versus a

holding that only the court—not the jury—may ever decide the issue. *Boiter* is discussed in detail below.[3]

HCSD complains about the Court of Appeals' statement that, because HCSD asked the lower court to remove a question that would ask the jury to determine the number of occurrences, it "may not now complain that the special verdict form lacked such an interrogatory." (App. p. 2; Br. of Pet. pp. 10-12). In its briefing to the Court of Appeals, HCSD argued the lower court "erred in its conclusion that the jury in this case found two separate and independent 'occurrences'" when the verdict form asked about "gross negligence." (Br. of App. in Ct. of App. p. 6). This alleged error is what the Court of Appeals addressed when it held that HCSD cannot complain that the verdict form did not ask about the number of occurrences when it objected to that question. The Court of Appeals is correct in that holding, and HCSD's argument to the contrary misconstrues the Court's ruling.

During a discussion about the jury charges and verdict form, the Woods asked for the form to have a "line for occurrences. Having been charged with a number of occurrences, how many occurrences are there." (R. p. 274). HCSD objected, stating:

> That does not suit me. I think the definition of occurrences is very confusing. The jury is going to hear it and it's going to be very, very confusing for them to get back there. I don't understand exactly, I'm no genius, don't get me wrong, but I don't understand. It really has the potential if you just say determine the number of occurrences, it has the potential to distract them from the true issues in this case.

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[3] HCSD cites to two insurance cases as supporting its position that the number of occurrences—under the SCTCA—is solely an issue of law for the court. (Br. of Pet. p. 8 n.3). Neither of these cases are applicable. *Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 622 S.E.2d 525 (2005), involved the interpretation of a commercial general liability policy's definition of "occurrence"—a definition which is wholly different from the SCTCA. *Beaufort Cnty. School District v. United National Ins. Co.*, 392 S.C. 506, 709 S.E.2d 85 (Ct. App. 2011), involved the determination of whether sexual molestation of different children was a separate occurrence or if they were only one occurrence because each was molested by the same perpetrator. These cases have nothing to do with the issues before the Court in this case.

(R. p. 274). Saying that the definition of occurrence is "very confusing" and "has the potential to distract from the true issues" is not the same thing as arguing that only the court may determine the number of occurrences as a matter of law, which is what HCSD now argues on appeal. (Br. of Pet. pp. 6-17). HCSD moved for a directed verdict asking the Court to rule as matter of law that there is only one occurrence. (R. pp. 266-69). It did not say that the Court—and not a jury—must decide the issue. *Id.* HCSD did not make at trial the same argument that it now makes on appeal. Indeed, that belated argument is now the crux of its appeal. A party should not be allowed to make arguments and ask for rulings on appeal that it did not properly raise at trial. "[A]n appellant cannot change or add to the arguments he made at trial on appeal." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 243, 734 S.E.2d 148, 160 (2012). Making an argument for the first time in a post-trial motion is too late. (R. pp. 47-48). The argument is unpreserved, and the Court should affirm for this reason alone.

Finally, for the first time in this case, HCSD suggests to the Court a new "bifurcated process" for determining the number of occurrences.[4] (Br. of Pet. pp. 9-10, n.4). This argument is unpreserved. HCSD never asked for bifurcation below, got no ruling on it from the trial court, and cannot now ask for it on appeal. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 660, 661 S.E.2d 791, 800 (2008) ("Because these issues were neither raised to nor ruled upon by the circuit court, we find they were not properly preserved for our review.").

[4] HCSD also states that a plaintiff in a SCTCA case must prove a specific amount of damages caused by each occurrence. (Br. of Pet. p. 9 n.4). There is no such requirement in the SCTCA or case law. On the contrary, in *Campbell*, the Court of Appeals held that the SCTCA's "damages cap does not require any special findings that would affect the proof at trial." 431 S.C. at 464, 848 S.E.2d at 794. Furthermore, this Court already rejected the argument that the number of occurrences equates to the number of injuries. *Boiter*, 393 S.C. at 134, 712 S.E.2d at 406.

Even so, its proposed process shows how far afield its argument is from the statutory language of the SCTCA. HCSD advocates for the following: First, the jury will decide if negligence occurred and award an amount of damages; second, the trial court will decide if there was more than one occurrence; third, if there is more than one occurrence, the court will resubmit the case to the jury for it to allocate the prior damages award among the occurrences found by the court. (Br. of Pet. p. 10 n.4).

This process is not found in the SCTCA. Within the SCTCA, the General Assembly specified "the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined"—clearly indicating that it is capable of requiring a special verdict form if necessary under the SCTCA. S.C. Code Ann. § 15-78-100(c). It specified no such procedure or specific decisionmaker for the occurrence issue. While HCSD notes that the SCTCA specifies a liberal construction in the State's favor, that principle of construction cannot be used to write in factfinders and procedures where none are specified. In the absence of such specification, there is no basis for this Court to write words into the statute.

Further, HCSD gives no reason why a jury is not capable of determining the number of occurrences. Juries are regularly instructed to interpret statutes and decide complex legal issues. *See, e.g.*, S.C. Code Ann. §§ 36-2-313 to -315 (breach of express and implied warranties); S.C. Code Ann. §§ 39-5-10 to -20 (Unfair Trade Practices Act). Nothing distinguishes the "occurrence" definition from any other statute for special treatment.

HCSD's argument that the trial court must decide the number of occurrences as a matter of law is unpreserved and without any legal support in statutory or case law. This Court should affirm the lower court's decision to charge the jury to apply the occurrence definition.

II. **<u>The law and evidence support the jury and lower court's findings of two occurrences.</u>**

The law on "occurrence" and the evidence in this case support the jury and the lower court's findings of two separate occurrences.

HCSD argues that the court equated the acts of gross negligence to the number of occurrences and, based on the evidence, there is only one occurrence because the negligent acts combined into one occurrence. (Br. of Pet. pp. 13-21). It is wrong on both.

HSCD relies on *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 712 S.E.2d 401 (2011), for its assertion that the lower court improperly equated gross negligence with occurrences. But *Boiter* does not support this assertion.

The Boiters were injured when their motorcycle collided with a car at an intersection. *Id.* at 126, 712 S.E.2d at 402. The red-light bulbs for the road the car traveled on burned out earlier that day. *Id.* The Boiters filed an action against (1) SCDOT for failing to implement a policy to replace traffic signal bulbs before they burned out and (2) SCDPS for failing to send an officer to direct traffic at the light when someone reported the outage over an hour before the collision. *Id.* The jury returned a verdict for the Boiters against both entities for $1.875 million dollars. *Id.* at 126, 712 S.E.2d at 402-03. The trial court found only one occurrence and reduced the verdict. *Id.* at 126-27, 712 S.E.2d at 403.

On appeal, the Supreme Court reversed, finding two occurrences. The plaintiff argued that the Court should equate occurrence to the number of negligent acts, and the defendants argued it should equate occurrence to the number of injuries. 393 S.C. at 133, 712 S.E.2d at 406. The Supreme Court outright rejected the defendants' argument based on injuries by finding the trial court "erred" in using that analysis. *Id.* at 134, 712 S.E.2d at 406. It did not outright reject the notion that, in certain circumstances, the number of negligent acts may equal the number of

occurrences. Instead, it simply chose not to "adopt a bright-line test based on the existence of multiple acts of negligence." *Id.* at 133-34, 712 S.E.2d at 406. The Court decided the occurrence issue "based solely on the peculiar facts of this case." *Id.* at 133, 712 S.E.2d at 406.

The Court found two occurrences because the evidence did not show that SCDOT's negligent act could have unfolded into SCDPS's negligent act. That *Boiter* involved two entities was relevant to the Court's occurrence decision but not dispositive in and of itself. The following passage is the heart of the Court's decision in *Boiter* and the reason why the Court of Appeals correctly affirmed the finding of two occurrences in this case.

> Based on the facts presented here, we cannot see how SCDOT's negligent act "unfolded" into SCDPS' negligent act. SCDPS only became involved due to a citizen call regarding the burned-out light bulb; SCDOT never called SCDPS regarding the light, and SCDPS never informed SCDOT about the citizen call. We can find no causal connection between the actions of SCDOT and SCDPS; had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true. Therefore, we do not believe that these two separate and independent acts of negligence constituted an unfolding sequence of events which injured the Boiters.

Boiter, 393 S.C. at 134, 712 S.E.2d at 407.

This reasoning applies to the particular procedure and facts of this case. Procedurally, the jury found two acts of gross negligence that were separate occurrences. (R. pp. 8, 22, 347). The lower court did not equate gross negligence to occurrence but, instead, instructed the jury to find the number of occurrences and then implemented the jury's decision. (R. pp. 8, 22, 347).

Viewing the evidence and all reasonable inferences in the light most favorable to the Woods, the evidence supports the lower court's denial of HCSD's JNOV motion and the jury and lower court's findings of two occurrences. Kary-Anne Cyr was the athletic trainer present for both teams at the game where Logan was injured. (R. pp. 158-59). The evidence is not that she was so busy monitoring all of the players that she did not have time to assess Logan. The evidence is that she sat on the sidelines and did not do her job. (R. pp. 161, 168-69, 199-200, 279). HCSD's

decision to staff only one athletic trainer did not unfold into the one athletic trainer present failing to perform her job. There is no causal connection in this case between the policy-level action of permitting one trainer to cover both teams and the employee-level action of failing to properly perform her job. Had the jury not found HCSD negligent for allowing one trainer to cover both teams, the verdict for Kary-Anne Cyr's failure to properly perform her job could still stand, and the converse is also true. Applying this law and reasoning to the facts of this case, the Court should affirm the finding of two occurrences and entry of a $600,000.00 judgment for Logan.

Notably, HCSD's brief barely discusses the evidence in this case. It argues that the failure to have more than one trainer and the trainer-on-site's failure to do her job combined to proximately cause Logan to not be removed from the game. (Br. of Pet. pp. 18-20). This is the wrong analysis. That they caused the brain injury does not mean they are one occurrence. *Boiter*, 393 S.C. at 133-34, 712 S.E.2d at 406 (rejecting argument that the number of occurrences is tied to the number of injuries). Instead, in *Boiter*, this Court focused on the "causal connection" between the negligence and the injuries, and whether a verdict could still stand with the removal of the other negligent act. *Id.* at 134, 712 S.E.2d at 407. As explained above, that analysis applies to the facts of this case and supports the jury, lower court, and Court of Appeals' findings of two occurrences.

HCSD argues that "there is no causal connection between the number of trainers and whether Logan could suffer a concussion." (Br. of Pet. p. 18). That argument is barred by the law of the case. The jury plainly found that HCSD "acted with gross negligence when it allowed Logan Wood to play without an athletic trainer present for his team." (R. p. 22). HCSD did not dispute the findings of negligence on appeal and cannot now argue that there is no proximate cause.

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

HCSD tortures the statutory definition of "occurrence." (Br. of Pet. pp. 16-17). The SCTCA defines an "occurrence" as "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(g). HCSD discounts the entire second half of the definition by arguing that "an 'occurrence' is an 'unfolding sequence of events.'" (Br. of Pet. p. 16). It argues "the failure to remove Logan Wood from the middle school football game to have him assessed for a concussion" is a "singular event" and the acts of gross negligence found by the jury "combined and concurred to proximately cause that single occurrence." (Br. of Pet. p. 18). This is legally and factually incorrect.

Legally, the General Assembly's deliberate use of the words "single act of negligence" forecloses the combination argument made by HCSD. Factually, the combination argument ignores the evidence. A pediatric neurologist at MUSC found that Logan suffered five-to-seven concussions. (R. pp. 230, 134). The jury and court found HCSD "allowed Logan Wood to play without an athletic trainer present for his team" and "failed to assess Logan Wood for signs and symptoms associated with a concussion." (R. pp. 22-23, 7). The evidence of at least five concussions shows that these separate occurrences of gross negligence caused separate concussions and second impact syndrome, and did not "combine" into anything.

HCSD urges this Court to interpret *Boiter* as "address[ing]"[5] how the Supreme Court would decide a case that "involves a single governmental entity . . . that committed multiple acts of gross negligence." (Br. of Pet. p. 18). It relies on this Court's statement that cases from other

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[5] HCSD changed the language from "forecasted" in its Petition for Writ of Certiorari to "addressed" in its Brief of Petitioner. *Comp.* Pet. for Cert. p. 14 *with* Br. of Pet. p. 19.

jurisdictions are "inapposite because they involve a single government entity which committed multiple acts of negligence, a completely different situation than the one before us" and its citation to out-of-state opinions where courts found one occurrence. *Boiter*, 393 S.C. at 133, 712 S.E.2d at 406; Br. of Pet. p. 19. HCSD's reliance on this passage is misplaced. The Court merely said that it did not find a factually on-point decision from another jurisdiction. It did not address how it would decide a case not before it. *State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 476 (2021) ("Courts do not give advisory opinions or answer questions that are not asked."). In fact, the Court expressly rejected that notion by specifying that it decided "the issue before us based solely on the particular facts of this case." *Id.* at 133, 712 S.E.2d at 406.

The *Boiter* Court decided the number of occurrences using an analysis of whether one negligent act unfolded into another. Applying that analysis to the evidence in this case, the lower court correctly entered judgment for Logan for $600,000.00 for two occurrences.

HCSD urges this Court to give "guidance" on "the issue of 'multiple occurrences'" because such cases are allegedly becoming "increasingly prevalent." (Br. of Pet. p. 16 n.6). The current statutory and case law explains the procedures for an occurrence issue. Regardless of how HCSD frames its complaints about multiple occurrences, this Court cannot change the "occurrence" definition or that recovery is allowed for multiple occurrences. Those decisions are left solely to the General Assembly.

The lower court and Court of Appeals correctly applied the law as it exists, and this Court should affirm.

III. The Court of Appeals correctly affirmed the lower court's decision to deny HCSD's Rule 67, SCRCP, motion to deposit the judgment into the court.

The lower court correctly exercised its discretion to deny HCSD's Rule 67, SCRCP, motion to deposit the judgment amounts into the court and stop the accrual of interest. The Court of

Appeals, relying on this Court's express precedent in *S.C. Dep't of Transportation v. First Carolina Corp. of S.C.*, 369 S.C. 150, 631 S.E.2d 533 (2006), correctly affirmed that exercise of discretion applying an abuse of discretion standard of review.

HCSD filed a motion under Rule 67, SCRCP, to deposit the judgment amounts into the court and stop the running of post-judgment interest. (R. p. 83). The Woods opposed the motion, noting that Rule 67 is discretionary, not mandatory. (R. pp. 86-89). They argued that the Insurance Reserve Fund is a solvent debtor that will be able to pay the judgment at a later date, and allowing HCSD to deposit the funds will prejudice them by allowing HCSD to pursue a frivolous appeal and delay the resolution of the case for years all while the Woods cannot accrue any interest. *Id.*

At a hearing on the motion, HCSD argued that it has an absolute "right to pay the money into the court under Rule 67 . . . to stop the accrual of interest pending an appeal." (R. p. 379). The Woods argued that "Rule 67 is a discretionary rule" and there can be no "automatic right" where a party must request a court order to do something. (R. p. 384).

The lower court denied the motion. (R. pp. 24-25). It held that Rule 67 is discretionary and it should consider "factors specific to an individual case." (R. pp. 24-25). The court found that, given the nature of the case and the jury's award, "it would be unconscionable and/or fundamentally unfair to allow the Defendant to avoid interest during the pendency of an appeal." (R. p. 25).

The Court of Appeals affirmed, holding that "the trial court did not abuse its discretion in denying HCSD's motion." (App. p. 3).

A. A Rule 67, SCRCP, motion is within the trial court's discretion.

The Court of Appeals correctly followed this Court's express precedent stating that a Rule 67, SCRCP, motion is a matter within the trial court's discretion.

Under Rule 67, "a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing." In *First Carolina*, this Court stated "[t]he granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion." 369 S.C. at 153, 631 S.E.2d at 535. Despite this express statement, HCSD asks this Court to overturn *First Carolina* in favor of an alleged "*Manning/Russo* rule" that supposedly requires the trial court to grant a Rule 67 motion any time the moving party gives notice and asks to deposit the judgment amount.

Rule 67 requires notice to every party **and** leave of court. The phrase "leave of court" means by permission of the court and necessarily involves an exercise of discretion and not simply a rubber-stamping of the relief requested. *See* Ballantine's Law Dictionary (defining "leave of court" as "[p]ermission of court; an order of court granting permission to take a certain step in an action, usually, where it is discretionary with the court to give or refuse the permission.").

Consider other places in the Rules of Civil Procedure in which the words "leave of court" are used. For example, Rule 13(f), SCRCP, states: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he **may by leave of court** set up the counterclaim by amendment." (emphasis added). It is well established that "[t]rial courts have wide discretion to grant or deny motions to amend." *Wachovia Bank Nat'l Ass'n v. Beane*, 397 S.C. 612, 619, 725 S.E.2d 715, 719 (Ct. App. 2012). Under HCSD's interpretation of the language of Rule 67, an amendment under Rule 13 would be mandatory and not discretionary.[6] *See also* Rule 217, SCACR (using "permission" and "leave" interchangeably);

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[6] Rule 30, SCRCP, addresses when depositions may be taken and states: "The deposition of a person confined in prison may be taken only by leave of court on such terms as the court

https://www.merriam-webster.com/dictionary/leave (defining "leave" the noun as "permission to do something").

This Court's statement of discretion in *First Carolina* is binding. There is no basis to overturn it, and it is not dicta.

HCSD attacks *First Carolina* for citing to a federal case and Fed. R. Civ. P. 67, which it argues is "diametrically different" from South Carolina law. (Br. of Pet. 22-23). The notes to Rule 67, SCRCP, state that "[t]his Rule 67 is substantially the Federal Rule." Although one difference in the rules actually supports the trial court's exercise of discretion in South Carolina. The Federal rule requires the court to place the judgment deposit into an interest-bearing account. Fed. R. Civ. P. 67(b). South Carolina's Rule 67 omits that requirement. The absence of this safeguard on the judgment creditor's right to the accrual of interest during appeal is not in place in South Carolina, and instead, the right must be safeguarded by the discretion of the trial court. *See* S.C. Code Ann. § 34-31-20 (2020); *Hunting v. Elders*, 359 S.C. 217, 229, 597 S.E.2d 803, 809 (Ct. App. 2004) ("[A] claimant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course.").

HCSD argues that the discretion statement in *First Carolina* is dicta because there was a matter of law—not discretion—before this Court in that case. (Pet. for Cert. p. 19). That does not make the law dicta because, as this Court explained, abuse of discretion encompasses errors of law. *First Carolina*, 369 S.C. at 153, 631 S.E.2d at 535 ("An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support."). Further, the Court made clear in its ultimate ruling that it actually applied an abuse of discretion standard.

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prescribes." Rule 30(a)(1), SCRCP. Under HCSD's interpretation, this provision would also be mandatory and not a matter of discretion with the court.

It held, "we find that the trial court abused its discretion by allowing SCDOT to deposit the judgment funds and stop the accrual of post-judgment interest." *Id.* at 156, 631 S.E.2d at 537.

Finally, HCSD argues that, if Rule 67 was discretionary, then there must be "factors for courts to consider in exercising that discretion." (Br. of Pet. p. 23). There is no law that requires a list of factors for a court to consider any time it exercises discretion. For example, the imposition of sanctions under Rule 11, SCRCP, is a matter of discretion but there are no specific factors to guide a court's discretionary decision. The decision whether to grant a remittitur motion is a matter of discretion but there are no specific factors to guide that decision.

The Court of Appeals correctly followed and applied the law as stated by this Court that a Rule 67 motion "is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion." *First Carolina*, 369 S.C. at 153, 631 S.E.2d at 535.

B. The lower court properly exercised its discretion under Rule 67.

The lower court properly exercised its discretion to deny HCSD's motion. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006). HCSD does not make an argument that, if discretion is the standard as this Court stated, then the lower court abused its discretion. Therefore, if this Court upholds its precedent in *First Carolina*, then the lower court's decision must be affirmed.

HCSD argues for an absolute right to deposit under an alleged "*Manning/Russo* rule" that does not exist in the law. It defines the "rule" as a holding "that a debtor may prevent accrual of interest by depositing the funds under an order of the court" and lists a string of cases supposedly consistent with this "rule." (Br. of Pet. pp. 25-26) (internal quotation marks omitted). Rule 67 and not *Manning/Russo* is what governs the issue on appeal.

Regardless, the law that HCSD discusses for its "rule" says nothing more than that the accrual of interest does stop with a proper deposit. That is not in dispute. The dispute is whether a movant is **entitled as a matter of right** to deposit the money simply because he gives notice to the other party and asks the court for it. HCSD does not cite to a single case that says it is entitled to a court order allowing it to deposit money. This Court directly held to the contrary when it stated Rule 67 is a matter of discretion in *First Carolina*.

This Court expressly stated that a motion under Rule 67 "is a matter within the discretion of the trial court." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006). A discretionary rule allows a trial court to deny relief sought under that rule. The lower court properly exercised its discretion in this case.

The Court should affirm the lower court's discretionary decision to deny HCSD's motion.

CONCLUSION

Respondents Logan and Sarah Wood request the Court affirm the decisions of the lower court and the Court of Appeals, and remand for enforcement of the judgment with interest.

Respectfully submitted,

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