



A REPORT TO MEMBERS OF
THE SOUTH CAROLINA BAR
YOUNG LAWYERS DIVISION

Review Redux: Navigating New (and old) Standards in Criminal Law and Summary Judgment



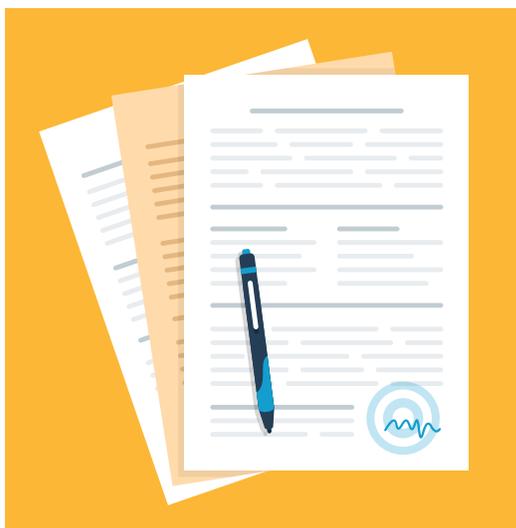
By Taylor D. Gilliam, Pro Bono
Director, University of South
Carolina School of Law

Regardless of your practice
area, and whether you typi-
cally handle trial-level cases

or appeals, recently published opinions from our appellate courts offer guidance on the shifting landscape of important standards that can often be outcome-determinative. This article briefly examines some changes to the standard of review on appeal in criminal cases as well as the recent reversion to a rules-based summary judgment standard under Rule 56(c), SCRPC.

On May 1, 2018, the South Carolina Supreme Court amended Rule 208(b) to require a Standard of Review section in appellate briefs. According to Black's Law Dictionary, the standard of review is "[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court." Prior to that change, standards of review were not required in these briefs. This change appears to align with a concerted effort to focus on the standard of review by both of our state appellate courts. In line with that focus, last year our Supreme Court clarified the standard of review on appeal in Fourth Amendment cases. *State v. Frasier*, 437 S.C. 625, 879 S.E.2d 762 (2022).

Historically, our appellate courts analyzed an appeal from a motion to suppress based on Fourth Amendment violations under the deferential "any evidence standard." *State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015). Before the oral argument in *State v. Frasier*, our Supreme Court



sent counsel a one-page order which stated:

In addition to the issues set forth in the briefs, please be prepared to discuss this Court's standard of review in light of *Ornelas v. United States*, *State v. Brockman*, and case law from across the country standing for the proposition that appellate review of a motion to suppress based on an alleged Fourth Amendment violation presents a mixed question of fact and law, whereby the trial court's factual findings are entitled to deference but the ultimate question of whether the Fourth Amendment was violated consists of a question of law reviewed de novo.

Order dated March 7, 2022. (internal citations omitted).

In South Carolina, oral arguments are live-streamed, recorded, archived and available for viewing. At the oral argument in *Frasier*, the standard of review was discussed at length. The oral argument oc-

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curred on March 15, 2022; the opinion was released six months later.

Noting the “dawn of the technological age” and “the advent of body and dashcam footage,” our Supreme Court refined the standard of review “to better align with the federal standard, which has been adopted in nearly every state.” Writing for a unanimous Court, Justice Kaye Hearn set forth how “appellate review of a motion to



Constitution Day

Constitution Day 2023 was celebrated on September 15. More than 50 YLD representatives visited 45 classrooms between 28 schools.

suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court’s factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.” *Frasier* at 633–34, 879 S.E.2d at 766.

For appellate attorneys, particularly those representing appellants or petitioners, de novo review is a more favorable standard of review. The practical takeaway for those of you who are not nerdy appellate attorneys like me is twofold: 1) review case law when working on any appellate briefs you are drafting, particularly when it comes to the standard of review, and 2) be cognizant of shifting standards across the country. For the latter point, you can submit supplemental authority even *after* the filing of your brief under Rule 208(b)(7). You may want to search for case law that may benefit your position, particularly if it entails a Constitutional issue; after all, our Supreme Court’s order before the oral argument in *Frasier* referenced a South Carolina case, a United States Supreme Court case, and “case law from across the country.” Additionally, you may be able to distinguish any questions of fact that may be owed substantial deference from questions of law which allow additional room for argument.

A recent decision offers clarity on the summary judgment standard at the trial court level in civil cases. If you practice any type of civil litigation, you are probably aware of the recent August 2023 opinion from our Supreme Court, *The Kitchen Planners v. Samuel E. Friedman*, Op. No. 28173 (S.C. Sup. Ct. filed August 23, 2023) (Howard Adv. Sh. No. 33 at 11). In that case, the Petitioners appealed after the South Carolina Court of Appeals affirmed the circuit court’s order granting summary judgment to the Friedmans and dissolving their mechanic’s lien. In an opinion that ultimately affirmed as modified, Justice John Cannon Few discussed the history of Rule 56, SCRCP, and clarified the summary judgment moving forward in South Carolina.

As you likely know, Rule 56(c) contains the standard for summary judgment: “if ... there is no genuine issue as to any material fact ... the moving party

is entitled to a judgment as a matter of law.” Justice Few correctly noted in the *Kitchen Planners* opinion that Rule 56(c) became effective in 1985. In 2009, however, our Supreme Court held “that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In the *Kitchen Planners* opinion, our Court “acknowledge[s] there may be a disagreement as to whether the ‘mere scintilla’ standard is inconsistent with the Rule 56(c) ‘genuine issue [of] material fact’ standard.” Justice Few sagely suggests how “[t]he position that the two standards are the same would explain this Court’s recitation of both at various times since 1985.” Ultimately, however, our Court offered finality on the topic:

We now clarify that the “mere scintilla” standard does not apply under Rule 56(c). Rather, the proper standard is the “genuine issue of material fact” standard set forth in the text of the Rule.

The Court overruled *Hancock* to the extent it is inconsistent with the instant opinion. Under the standard set forth within the Rule, the Court held *Kitchen Planners* failed to establish a genuine issue of material fact such that the Friedmans were entitled to summary judgment as a matter of law.

Perhaps one question, albeit temporary, lingers: does this “new” standard apply retroactively or prospectively to any cases currently pending on appeal? Chances are, you can find an enthusiastic appellate attorney to discuss this matter with you.

Reading the Advance Sheets (published Wednesday mornings at 10 a.m.) can greatly improve your practice. Through sccourts.org, you can set up email notifications for these opinions. Consider suggesting that attorneys in your office alternate summarizing these opinions. New law is made week in and week out at our appellate courts. You make yourself a better attorney by being apprised of these pertinent changes in the law.

What's Been Happening?



The Fifth Circuit hosted a summer gathering at Craft & Draft for young lawyers and their law clerks.



The Ninth Circuit hosted a gathering for attorneys and summer law clerks at the Charleston Riverdogs stadium.



The Fourth Circuit and the Twelfth Circuit hosted a joint event at Seminar Brewing in Florence to close out the Bar Year. There was food, drinks, fellowship, and ax throwing—which led to friendly(ish) competition among colleagues!



Representatives from the South Carolina YLD—Taylor Gilliam (President), La'Jessica Stringfellow (Secretary Treasurer), Paige Ornduff (Immediate Past President), and Mike Burch (President-elect)—attended the 2023 ABA Annual Meeting in Denver. They brought numerous awards back to South Carolina, including awards for the SC Young Lawyer Newsletter and for the Wellness CLE.



The YLD hosted its annual Backpack Drive to prepare for the 2023-2024 school year, which was a massive success! Backpacks, school supplies and cash donations were made throughout the state. The donations made in the Lowcountry this year were triple of that collected in 2022, thanks to the great turnout from all YLD committee members and lawyers throughout the region. The Upstate region donated approximately 60 backpacks, as well as enough school supplies to fill each and every one, coordinating with social workers from the Greenville County School District to provide supplies.

Letter from the President



I hope this letter finds each of you in good health and high spirits, with cooler weather than we are experiencing at the time I'm writing this. At the

outset, I would like to share with you how thankful I am to serve in this capacity; this is an incredible privilege and responsibility to represent a group of talented and passionate young legal professionals. In fact, our division was recently recognized on the national level, receiving multiple awards from the American Bar Association.

The South Carolina Bar Young Lawyers Division received Awards of Achievement (AOA) in four out of the five categories, including Service to the Public, Diversity, (this) Newsletter, and Comprehensive Programming. In addition to the AOA's, the SC Bar YLD won an award for the CLE "Empathy: A Necessary Conversation," planned and hosted by our Wellness Committee in conjunction with the SC Black Lawyers Association and the SC Women Lawyers Association. The SC Bar YLD also won the Outstanding Affiliate Award, which was awarded to only one ABA YLD Affiliate Organization out of 300+ other affiliate organizations for the 2022-2023 year!

These awards were earned by individuals who serve on and chair

various YLD committees plus the circuit representatives. People like Haley Saxby and Tiffney Love who chaired the Publications Committee last year; Jeanmarie Tankersley, Shelby Herbkersman and Ryan Pasquini who helped with the Prince Charming Project; Emily Bridges, Meredith Ross and Julia Bradshaw of the Annual Bar Convention Committee – all of them contribute to the YLD's success, and you can too. Feel free to email me if you would like to get involved in any way. I remain committed to supporting all of you throughout your journeys in the legal profession.

While I have the floor, so to speak, I would like to emphasize the values that I believe are of importance in 2023. Our legal profession is a remarkable tapestry woven from myriad experiences, personalities and diverse perspectives. As we navigate the complexities of our work, two key principles come to mind – civility and self-care.

Civility, often described as the cornerstone of our profession, embodies the respect and courtesy we extend to our peers, clients and all those we encounter. In a world where disagreements can sometimes escalate into acrimony, let us remember that our strength lies in our ability to maintain a level of professionalism that transcends disputes. Every interaction is an opportunity to elevate the discourse and contribute to a legal community that values collaboration over conflict.

As young lawyers, the demands of our chosen path can be both exhilarating and exhausting. The pursuit of excellence often entails long hours, tight deadlines and a dedication that can take a toll on our mental and emotional well-being. I encourage each of you to prioritize self-care as an integral part of your practice. Just as we advocate for our clients, let us also advocate for ourselves – seeking the support and balance that enable us to thrive personally and professionally.

Our Young Lawyers Division is not merely an organization; it's a collective force for positive change. As future leaders, you have the power to shape the legal landscape of South Carolina. Each decision you make, each action you take, has the potential to create a ripple effect that transforms our pro-



The YLD teamed up with the SC Bar Pro Bono Program to present a free in-person CLE for all Bar members on the topic of disaster legal services. The course offered three hours of MCLE credit, and equipped lawyers with information and tools to help South Carolinians in need following a disaster, including instruction on the FEMA application/appeals process and how to address common legal issues disaster survivors face, like employment and housing.

fession into one defined by inclusivity, support and compassion.

Please remember that I am here to serve you, to listen to your ideas, concerns and aspirations. Feel free to reach out to me through calls, texts or emails – I am eager to connect and build a stronger YLD together. Thank you for your dedication, your passion and your commitment to the South Carolina Bar Young Lawyers Division.

Warmest regards,

Taylor D. Gilliam
YLD President
USC School of Law
gilliatd@mailbox.sc.edu

Stars of the Quarter

David Nasrollahi

Will Yarborough

Beth Bowen

TJ Twehues

Caitlin Lee

Rebekah Hiatt

Adrian Peguese

Samantha Albrecht

Destini Pratt

Nicole Given

Rachel Lee

Whit McGreevy