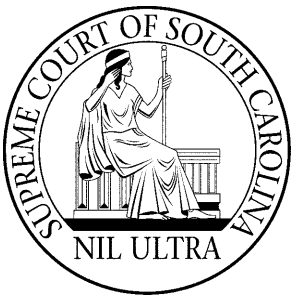

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 7, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stepheno Jemain Alston, Petitioner.

Appellate Case No. 2015-002134

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27774
Heard December 14, 2016 – Filed March 7, 2018

AFFIRMED AS MODIFIED

Appellate Defender Lara Mary Caudy, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, all for Respondent.

CHIEF JUSTICE BEATTY: Stepheno Jemain Alston was tried *in absentia* and convicted by a jury of trafficking in cocaine. The trial judge sentenced Alston to twenty-five years' imprisonment. On appeal, the Court of Appeals affirmed Alston's conviction and sentence. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). In so ruling, the Court of Appeals upheld the trial judge's denial of Alston's motion to suppress evidence found in his vehicle following a traffic stop. Specifically, the Court of Appeals agreed with the trial judge that: (1) the arresting officer had (a) probable cause to stop Alston's vehicle for a violation of South Carolina's failure to maintain a lane statute[1] and (b) reasonable suspicion to support a brief investigatory detention; (2) the officer had reasonable suspicion that illegal activity was occurring to justify extending the duration of the traffic stop; and (3) Alston voluntarily gave his consent to the officer to search his vehicle. This Court granted Alston's petition for a writ of certiorari to review the decision of the Court of Appeals. We affirm as modified.

I. Factual / Procedural History

On March 28, 2011, Deputy Donnie Gilbert, employed with the Interstate Criminal Enforcement Team of the Spartanburg County Sheriff's Office, was monitoring traffic on northbound Interstate 85. At approximately 1:00 p.m., Deputy Gilbert observed a green Hyundai Santa Fe pass him while continuing to strike the dotted lines of its lane of travel. According to Deputy Gilbert, the vehicle was traveling in the middle lane of the three-lane interstate. He further explained that:

> [the vehicle's] left side tire struck the dotted line that divides the middle lane, which [the vehicle] was traveling in, and the fast lane, which would've been to [the vehicle's] left. Then [the vehicle] drifted back

---

[1] Section 56-5-1900 provides in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> > A vehicle *shall be driven as nearly as practicable entirely within a single lane* and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.

S.C. Code Ann. § 56-5-1900(a) (2006) (emphasis added).

> into the middle of that middle lane. And [the vehicle] did that several times in the time that it took me to catch up to the vehicle.

Based on this observation, Deputy Gilbert pursued the vehicle and initiated a traffic stop. At this time, Deputy Gilbert activated his in-dash video camera and called in the license plate number of the vehicle to the Sheriff's Office.

Deputy Gilbert testified that, as he approached the vehicle, he noticed what appeared to be luggage covered by a blanket in the rear cargo area of the small SUV. Deputy Gilbert further stated that when he approached the passenger side window, the driver immediately asked him why he was being stopped. Deputy Gilbert then requested the driver's license, which identified the driver as Alston who resided in Rome, Georgia. In the audio recording, Deputy Gilbert can be heard explaining to Alston that he observed Alston's vehicle drift "several times" and then asking Alston whether he was under the influence of any drugs or alcohol or was too tired to drive. Deputy Gilbert explained that it was his responsibility to ensure that Alston was not under the influence of anything.

When Deputy Gilbert requested the vehicle's paperwork, Alston produced a rental agreement in the name of Tamisha Harris, Alston's girlfriend. The agreement indicated that Harris had rented the vehicle in Cartersville, Georgia, an area outside of Atlanta, on March 26, 2011, and was required to return it on April 2, 2011. According to the terms of the agreement, the vehicle was authorized to be operated only in Georgia, Tennessee, Kentucky, Virginia, and West Virginia.[2]

Approximately two minutes later, Deputy Gilbert asked Alston to exit the vehicle. As Alston complied, Deputy Gilbert noticed a "household air freshener" in the driver's door pocket. When Deputy Gilbert questioned Alston about his travel plans, Alston relayed that he was on his way to New Jersey to visit his mother and bring her back to Georgia for Mother's Day. Alston also told Deputy Gilbert he was concerned for his mother's health and wanted to check on her, and planned to stay in New Jersey for about a week. Deputy Gilbert testified he specifically asked Alston if he planned to stay in New Jersey until the following Monday, April 2, 2011, the date the vehicle was to be returned, and Alston replied in the affirmative.

Deputy Gilbert continued to question Alston while he contacted the Spartanburg County Sheriff's Office to run a check on Alston's license.

[2] The agreement also indicates that Harris paid $10 a day to authorize another driver, which she identified as Alston.

Approximately six and a half minutes after the traffic stop, Deputy Gilbert entered his patrol car and placed a call to request that the K-9 unit be brought to the site of the traffic stop. Shortly thereafter, Deputy Gilbert exited the patrol car and began writing a warning citation.

While writing the warning and waiting for a response on the license check, Deputy Gilbert questioned Alston further about his family and employment. Alston told Deputy Gilbert that he owned a clothing store in Rome, Georgia, and he had six children. Deputy Gilbert testified that, when asked how old his children were, Alston recited seven numbers.[3] Deputy Gilbert further stated Alston initially claimed his license had never been suspended, however, after dispatch indicated to the contrary, Alston admitted it had previously been suspended. Approximately fourteen minutes into the traffic stop, Deputy Gilbert was able to confirm that Alston's license was valid and there were no issues with the vehicle's paperwork or tag.

During the course of the stop, Deputy Gilbert managed to call for a backup officer; however, dispatch informed him that the officer "wasn't necessarily in the same area as [Deputy Gilbert]." Deputy Gilbert testified he intended to ask Alston for consent to search the vehicle but waited, for safety reasons, until another officer arrived at the scene. Approximately fifteen minutes after the traffic stop, the video recording shows that Deputy Gilbert completed the warning and pulled the paper off of a pad.[4]

Shortly thereafter, Deputy Gilbert asked Alston for consent to search the vehicle. Alston replied, "I'm just trying to figure all - - what all this is about." In response, Deputy Gilbert advised he was simply asking a question, at which point Alston said "I mean, yeah, you can search it." Deputy Gilbert further testified that he advised Alston of his right to refuse consent, but Alston had "already told [him] 'yes'." The search of the vehicle yielded 434 grams of cocaine hidden in the steering column.[5]

---

[3] During the sentencing hearing, Alston's counsel informed the trial judge that Alston has seven children.

[4] Deputy Gilbert never gave Alston the warning or returned his paperwork.

[5] In addition to luggage, a backpack, and some other items, the officers discovered a knife in the center console of the vehicle.

Subsequently, a Spartanburg County grand jury indicted Alston for trafficking in cocaine. A jury tried Alston *in absentia*. At the beginning of the trial, Alston's counsel moved to suppress the evidence.

During the pre-trial hearing, Deputy Gilbert recounted the details of the traffic stop and explained that, based on his more than eleven years' experience, the following factors provided him with reasonable suspicion that Alston was involved in criminal activity: (1) Alston's luggage was covered by a blanket, which suggested an intent to divert attention to the luggage and away from the steering column; (2) Alston, unlike ninety-nine percent of other drivers who are pulled over, immediately asked why he was being stopped rather than wait for the officer's explanation; (3) Alston was from outside of Atlanta, a "major hub for criminal activity in the southeast"; (4) Alston was driving on Interstate 85, which is "a major criminal activity corridor connecting Atlanta to many routes to the south and to the north"; (5) the vehicle was rented to a third party who was not present; (6) the vehicle was rented to a female, which is common for "drug trafficking organizations" because they do not think that law enforcement "recognize[s] criminal activity with a female"; (7) the vehicle was being driven in South Carolina and Alston stated he was driving to New Jersey, yet neither were identified as authorized states on the rental agreement; (8) Alston had a "household air freshener" in the vehicle, which can be "used as a masking agent to hide odors of other things, which could be drugs"; (9) house keys were placed on the rental key ring, which may have been an attempt to "personalize the vehicle"; (10) Alston's stated travel plans did not comport with the terms of the rental agreement as he would be arriving in Georgia after the vehicle was due; (11) Alston stated he intended to pick up his mother for Mother's Day, but Mother's Day, was a month and a half away; and (12) Alston stated he had six children but gave the ages for seven children when asked.

After Deputy Gilbert's testimony, Alston's counsel moved to suppress the evidence. As a threshold matter, counsel argued the initial stop was invalid because Alston was merely trying to allow maximum distance between himself and the officer's parked vehicle on the side of the road. Counsel then asserted that Deputy Gilbert lacked reasonable suspicion to extend the traffic stop beyond the time necessary to write the warning citation and, as a result, the vehicle and Alston were illegally seized in violation of the Fourth Amendment. Counsel also noted that Deputy Gilbert "was unable to articulate any specific crime or any specific criminal activity that [Alston] was involved in." Further, counsel maintained that "there was no valid consent" and even if there was consent, "it was obtained by prolonged detention."

The trial judge took the motion under advisement to review the recording of the traffic stop. The next day, the judge denied Alston's motion to suppress, ruling:

> I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based on probable cause, that the detention resulting from that stop was based upon the totality of the circumstances as presented by the evidence in this case, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual knowledge of his right to refuse consent.

Ultimately, the jury convicted Alston of trafficking in cocaine. Six months later, the trial judge opened the sealed sentence and sentenced Alston to twenty-five years' imprisonment.

Alston appealed his conviction and sentence to the Court of Appeals. The Court of Appeals affirmed, concluding that: (1) Deputy Gilbert had probable cause to stop Alston's vehicle for a violation of South Carolina's failure to maintain a lane statute, reasoning that "a lane of travel constitutes the area between the boundary lines" and, thus, driving on a lane line is a sufficient basis for a traffic stop; (2) Deputy Gilbert had reasonable suspicion to warrant a traffic stop based on his testimony that he observed Alston's vehicle "drifting" and his inquiry at the scene of whether Alston was driving under the influence; (3) Deputy Gilbert's continued questioning of Alston exceeded the scope of the initial traffic stop, however, the extended duration was permissible because Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring; and (4) Alston freely and voluntarily consented to the search. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015).

After the Court of Appeals denied Alston's petition for rehearing, this Court granted Alston's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Standard of Review

"On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error." *Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2888, 189 L. Ed. 2d 845 (2014). "However, this

deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

III. Discussion

A. Propriety of the Traffic Stop

Alston asserts the Court of Appeals erred in affirming the trial judge's denial of his motion to suppress. Initially, Alston contends Deputy Gilbert did not have probable cause to stop Alston's vehicle for a traffic violation or have reasonable suspicion that Alston was involved in criminal activity. Alston maintains that "merely striking the dotted line dividing two lanes traveling in the same direction" did not constitute a violation of section 56-5-1900 of the South Carolina Code as this action qualified as driving "nearly as practicable entirely within a single lane." Further, Alston claims that, because it was not unsafe for him to change lanes at the time of the incident, his actions did not violate section 56-5-1900.

Additionally, Alston asserts that Deputy Gilbert did not have reasonable suspicion to support a brief investigatory stop solely based on his observation that Alston was drifting within his own lane of travel. Because there was no evidence that Alston's vehicle was weaving or drifting between two lanes of traffic, Alston claims that his manner of driving could not give rise to reasonable suspicion sufficient to warrant a traffic stop for driving under the influence.

Alternatively, even if the initial stop was proper, Alston maintains that Deputy Gilbert impermissibly exceeded the scope of the traffic stop as he had neither (1) a reasonable and articulable suspicion of illegal activity to warrant the continued detention nor (2) Alston's consent.

The Fourth Amendment to the United States Constitution grants citizens the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV. However, a police officer may "stop and briefly detain a person for investigative purposes" if he "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

"The Fourth Amendment requires that an officer making an automobile stop have probable cause or reasonable suspicion that the person has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." 22

C.J.S. *Criminal Procedure & Rights of Accused* § 89, at 389 (2016). "When a peace officer observes any type of traffic offense, the violation establishes both probable cause to stop the vehicle and reasonable suspicion to investigate." *Id.*

"Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205. "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Id.* (citing *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998)). "The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning." *State v. Pichardo*, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct. App. 2005). "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." *Id.*; *see Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("Authority for the seizure . . . ends when tasks tied to the traffic infraction are--or reasonably should have been--completed.").

"However, once the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." *State v. Moore*, 415 S.C. 245, 252, 781 S.E.2d 897, 901 (2016) (citation and internal quotation marks omitted). "Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." *State v. Provet*, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011), *aff'd*, 405 S.C. 101, 747 S.E.2d 453 (2013); *see Moore*, 415 S.C. at 252, 781 S.E.2d at 901 ("The officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring." (citation and internal quotation marks omitted)).

In *Provet*, this Court enunciated the test for determining whether reasonable suspicion exists in the context of a traffic stop, stating "[t]he test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *State v. Provet*, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citing *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). Further, this Court has emphasized that "[c]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *Moore*, 415

S.C. at 252-53, 781 S.E.2d at 901 (citation and internal quotation marks omitted). Additionally, "in evaluating whether an officer possesses reasonable suspicion, this Court must consider the totality of the circumstances--the whole picture." *Id*. at 253, 781 S.E.2d at 901 (citation and internal quotation marks omitted).

As will be discussed, we conclude that, depending on the totality of the circumstances, a motorist who is observed repeatedly weaving within the lane of travel and striking the dotted lines marking this lane may be subject to a traffic stop.

We find this construction comports with the intent of the Legislature to ensure highway safety and the requirement that criminal statutes be construed against the State and in favor of the defendant. *See State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002) (construing criminal statute strictly against the State and in favor of the defendant).

Cognizant of the rules of statutory construction, we find the text of section 56-5-1900 creates two separate offenses as it mandates that: (1) a motorist drive as "nearly as practicable within a single lane"; and (2) if the motorist departs from the lane of travel, it must be done only when it is safe to do so. In the instant case, we are concerned with the first part of the statute as this was the only basis presented in Alston's motion to suppress. *See State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) (recognizing that an appellate court will not consider issues unless they were raised to and ruled upon in the trial court).

In defining what conduct constitutes a violation of section 56-5-1900, we must parse the initial text of the statute: (1) "entirely within a single lane", and (2) "as nearly as practicable." Although the Legislature prefaced section 56-5-1900 with the word "shall," thus making it mandatory, the phrase "as nearly as practicable" eliminates a finding that this is a strict liability offense. In other words, a motorist's breach of the dividing lines does not necessarily equate to a violation of the statute. *See People v. Chavez-Barragan*, 365 P.3d 981, 984-85 (Colo. 2016) (construing phrase "as nearly as practicable" in a statute similarly worded to section 56-5-1900 and stating that "what is 'practicable' in any given situation depends on the circumstances"); *State v. Prado*, 186 P.3d 1186, 1187 (Wash. Ct. App. 2008) (interpreting phrase "as nearly as practicable" in a statute similarly worded to section 56-5-1900 and concluding that legislature's use of this language "demonstrates a

recognition that brief incursions over the lane lines will happen"); *Dods v. State*, 240 P.3d 1208, 1212 (Wyo. 2010) (analyzing a statute similarly worded to section 56-5-1900 and stating, "when an officer merely observes someone drive a vehicle outside the marked lane, he does not automatically have probable cause to stop that person for a traffic violation. The use of the phrase 'as nearly as practicable' in the statute precludes such absolute standards and requires a fact-specific inquiry to assess whether an officer has probable cause to believe that a violation has occurred").

Thus, the implementation of the statute requires a balance between a motorist's rights and an officer's discretion to assess traffic violations and ensure public safety. As stated by the Supreme Court of Tennessee when it analyzed a statute similarly worded to section 56-5-1900:

> an individual's constitutional rights against unreasonable seizures must be balanced against the public interest of police officers enforcing traffic statutes designed to ensure the safety of the motoring public, pedestrians, and property. While minor traffic infractions may lead to the commendable discovery of an intoxicated motorist, we are cognizant that there are many distractions in today's driving environment that may divert a sober motorist's attention and cause her to momentarily and inadvertently leave her lane of travel. . . . Commentators have cautioned that allowing police officers to stop motorists for de minimis driving anomalies creates a "stop at will" environment at complete odds with the Fourth Amendment.

State v. Smith, 484 S.W.3d 393, 411 (Tenn. 2016) (citation omitted).

Applying the above-outlined principles to the facts of the instant case, we find that Deputy Gilbert had probable cause to stop Alston to determine if he was impaired as he observed Alston's vehicle drifting several times and striking the dividing lines of the lane of travel several times. Consequently, we agree with the Court of Appeals that the initial traffic stop was valid.

B. Extension of the Traffic Stop

Having determined the traffic stop was valid, the question becomes whether Deputy Gilbert extended the detention beyond the purpose of the initial stop. We agree with the Court of Appeals that Deputy Gilbert's questioning exceeded the scope of the initial traffic stop. Approximately fourteen minutes into the traffic stop, Deputy Gilbert received confirmation from the Spartanburg County dispatch that

Alston's license and the vehicle's registration were valid. Further, Deputy Gilbert gave no indication that he believed Alston was driving under the influence as he found it unnecessary to conduct any field sobriety tests. At approximately fifteen minutes into the traffic stop, Deputy Gilbert completed the warning. At that point, the purpose of the traffic stop had been fulfilled. Yet, Deputy Gilbert did not present Alston with the warning and never returned his license or the vehicle's registration. Instead, he continued to question Alston prior to asking for consent to search the vehicle. As found by the Court of Appeals, this continued questioning exceeded the scope of the initial traffic stop.

Thus, we must next analyze whether: (1) Deputy Gilbert had an objectively reasonable and articulable suspicion illegal activity had occurred or was occurring to extend the duration of the stop; or (2) the detention became a consensual encounter.

Given the trial judge's general ruling, it is difficult to ascertain what evidentiary factors formed the basis of the decision. As a result, we have concentrated on those identified by Deputy Gilbert during the pre-trial hearing on the motion to suppress.

Mindful of our deferential standard of review, we must affirm as there is evidence to support the trial judge's ruling. *See Moore*, 415 S.C. at 251, 781 S.E.2d at 900 (identifying the standard of review on appeals from a motion to suppress based on Fourth Amendment grounds and stating, "appellate courts must affirm if there is any evidence to support the trial court's ruling"). While we may have decided the motion to suppress differently than the trial judge, our standard of review prohibits this Court from doing so. *See id.* ("The clear error standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (internal quotation marks and citation omitted)). Instead, we must, like the trial judge, give due weight to Deputy Gilbert's eleven years of experience and training and defer to his common sense judgments as to why certain observations made him suspicious.

We preface our analysis by noting that Deputy Gilbert testified he was employed with the South Carolina Highway Patrol in July 1999 and began working with the Aggressive Criminal Enforcement Team for the Department of Public Safety and Highway Patrol in 2004. In 2010, Deputy Gilbert transferred to the Spartanburg County Sheriff's Office and was assigned to the Interstate Criminal Enforcement Team. In this capacity, Deputy Gilbert received specific training from

the National Criminal Enforcement Association regarding "locating, detecting hidden compartments in vehicles, [and conducting] roadside interviews."

Based on his extensive experience and training, Deputy Gilbert explained why he believed Alston was engaged in criminal activity. We find the following explanations support the trial judge's ruling. Deputy Gilbert identified several inconsistencies in Alston's stated travel plans and the terms of the rental agreement. According to the terms of the agreement, the vehicle was authorized to be operated only in Georgia, Tennessee, Kentucky, Virginia, and West Virginia. Despite these restrictions, Alston was stopped while driving in South Carolina on his way to visit his mother in New Jersey. Alston also indicated that he intended to stay in New Jersey for "about a week," until Monday, April 2, 2011, the date the vehicle was to be returned to a location outside of Atlanta. Alston's claim that he intended to bring his mother back with him for Mother's Day, which is in May, raised "another red flag" for Deputy Gilbert since that holiday was a month and a half away.

While Alston's unusual travel plans and deviations from the rental agreement provide evidence of reasonable suspicion, we question how other seemingly innocuous factors identified by Deputy Gilbert justified extending the traffic stop. Even though Deputy Gilbert believed Alston succumbed to the stress of the situation when he stated he had six children but gave the ages for seven children, this fact is of no consequence as most people are stressed to some extent by an extended traffic stop.

Deputy Gilbert also relied on the fact that he observed Alston driving on Interstate 85, which he characterized as a "major hub for criminal activity in the southeast." Although this factor referenced criminal activity, we are unpersuaded that traveling on Interstate 85 is indicative of one involved in criminal activity given "the number of persons using the interstate highways as drug corridors pales in comparison to the number of innocent travelers on those roads." *United States v. Williams*, 808 F.3d 238, 247 (4th Cir. 2015).

The next set of factors relied on by Deputy Gilbert arose out of observations he made when he approached Alston's parked vehicle. The first of these factors is the fact that Alston's luggage was covered by a blanket, which Deputy Gilbert believed suggested "an intent to divert attention to the luggage and away from the steering column." We question the import of this factor as many innocent travelers

conceal their luggage as a theft deterrent.[6] The second factor was Alston's immediate questioning of Deputy Gilbert as to why he had been stopped. We fail to see the connection, and Deputy Gilbert offered none, as to how such an inquiry is indicative of criminal activity. The third factor was the presence of a "household air freshener," which Deputy Gilbert believed could be used to mask "odors of other things, which could be drugs." Even accepting the premise that air fresheners have been used to mask the odor of drugs, we decline to see the significance of this factor as innocent car owners routinely use air fresheners to mask "odors of other things" such as those emanating from eating in a vehicle.

Additionally, Deputy Gilbert ascertained that Alston's residence was outside of Atlanta, which he characterized as "a major hub for criminal activity in the southeast." While some drug traffickers may hail from this area, the majority of residents do not engage in criminal activity. Next, Alston's use of a car that was rented to a third party, who is female, is of limited value to the reasonable-suspicion evaluation as "the overwhelming majority of rental car drivers on our nation's highways are innocent travelers with entirely legitimate purposes." *Williams*, 808 F.3d at 247. Further, the fact that Alston's girlfriend rented the vehicle and paid for Alston to be an authorized driver is not inherently suspicious as couples who travel often engage in this practice. Also, we are not persuaded by the general assertion that drug traffickers commonly use a female to enter into a rental agreement because law enforcement is less likely to suspect a female of criminal activity. Were we to accept Deputy Gilbert's proposition, then we would necessarily accept the illogical inference that only males engage in criminal activity. A rented car is a rented car. The gender of the renter is irrelevant especially when the driver of the rented vehicle is an authorized driver. Finally, Deputy Gilbert's reliance on the inclusion of personal keys on the rental car key ring is of limited value given Deputy Gilbert offered no connection, and we discern none, as to how this innocent act is indicative of criminal activity.

Nevertheless, because there is evidence to support the trial judge's determination that Deputy Gilbert had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose, we must affirm as did the Court of Appeals.

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[6] Notably, apparently recognizing this common practice, most car manufacturers are now equipping hatch-back vehicles with retractable shields for this very purpose.

C. Consent to Search

Finally, Alston claims the warrantless search was unreasonable because he did not voluntarily consent to Deputy Gilbert's request to search the vehicle. In support of this claim, Alston identifies several statements he made in response to the request to search, which were recorded during the traffic stop. Specifically, Alston explains that when Deputy Gilbert asked for consent to search the vehicle, he responded that he was "just trying to figure what all this is about" and that he "didn't do anything wrong." Alston emphasizes that he told Deputy Gilbert, "[N]ah, I'm not giving you consent, you the one giving consent." Alston further notes that Deputy Gilbert never returned his license and rental agreement and failed to give him the citation for the traffic violation. Alston also points out that a second law enforcement officer was present during the discussion regarding consent.

In reviewing the trial judge's findings of fact regarding the voluntariness of Alston's consent, we apply a deferential standard of review. *Provet*, 405 S.C. at 113, 747 S.E.2d at 460. "The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge." *State v. Mattison*, 352 S.C. 577, 584-85, 575 S.E.2d 852, 856 (Ct. App. 2003).

"A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search." *Provet*, 405 S.C. at 113, 747 S.E.2d at 460. "The existence of voluntary consent is determined from the totality of the circumstances." *Id*. "When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary." *Id*. "A consent to search procured during an unlawful stop is invalid unless such consent is both voluntary *and* not an exploitation of the unlawful stop." *Id*. at 114, 747 S.E.2d at 460 (citation and internal quotation marks omitted).

Having found the detention lawful, our remaining question is limited to determining whether there is evidence to support the trial judge's finding that Alston voluntarily consented to the warrantless search.

During the suppression hearing, Deputy Gilbert acknowledged the statements relied on by Alston. However, he expressly testified that Alston gave him consent to search the vehicle. Deputy Gilbert stated that, after he told Alston that he could refuse to give consent, Alston responded "then go ahead" and pointed to the car. Deputy Gilbert further testified that, in an effort to get a "yes" or "no" answer from Alston, he explained this right. According to Deputy Gilbert, Alston responded "yes" after receiving this explanation. Deputy Gilbert denied coercing Alston or

producing his weapon during the encounter. Deputy Gilbert also maintained that Alston never withdrew his consent.

Because Alston's statements conflicted with Deputy Gilbert's testimony, it was within the province of the trial judge, as the trier of fact, to determine this issue of credibility. Considering the totality of the circumstances, we conclude there is evidence in the record to support the trial judge's finding that Alston voluntarily consented to the warrantless search.

IV. Conclusion

Based on our rules of statutory construction, we hold the offense of failure to maintain a lane is not a strict liability offense. As a result, an officer must consider all relevant circumstances in deciding whether to stop a vehicle for a violation of this statute. Applying this interpretation to the facts of the instant case, we conclude there is evidence to support the trial judge's finding that the initial traffic stop was valid. Further, we find there is evidence to support the trial judge's determination that Deputy Gilbert had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose and that Alston voluntarily consented to the warrantless search. Therefore, while we agree with the result reached by the Court of Appeals, we modify its analysis regarding the interpretation of section 56-5-1900 and the basis for which Deputy Gilbert had reasonable suspicion to extend the duration of the traffic stop. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

HEARN, J., concurs. FEW, J., concurring in a separate opinion in which KITTREDGE, J., concurs. Acting Justice Costa M. Pleicones, concurring in result only.

JUSTICE FEW: I concur in all sections of the majority opinion except section III.B. As to that section, I agree with the result reached by the majority because there is ample evidence to support the trial court's finding that Deputy Gilbert had reasonable suspicion Alston was engaged in criminal activity, and thus the extended detention was reasonable under the Fourth Amendment. *See State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (holding "appellate courts must affirm if there is any evidence to support the trial court's ruling").

I disagree, however, with the majority's concern as to "how other seemingly innocuous factors identified by Deputy Gilbert justified extending the traffic stop." In most cases, none of the individual observations an officer makes will justify reasonable suspicion. In this case, as the majority points out, Deputy Gilbert identified at least twelve individual facts that caused him to suspect Alston was engaged in criminal activity. Some of those facts are almost meaningless even when considered as part of the totality of the circumstances, and none of them would independently support reasonable suspicion to extend the traffic stop. As we have repeatedly held, however, we should not focus on any one factor, but we must consider the totality of the circumstances observed by the officer. *See, e.g.*, *Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (stating "this Court must 'consider "the totality of the circumstances—the whole picture"'" (quoting *United States v. Sokolow*, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989))); *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) ("Courts must look at the cumulative information available to the officer [] and not find a stop unjustified based merely on a 'piecemeal refutation of each individual fact and inference.'" (quoting *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008))).

The majority discounts, for example, the fact Alston told Deputy Gilbert he had six children, and then recited the ages of seven children. Alston gave Deputy Gilbert inconsistent information on a subject anybody ought to be able to speak consistently about—the number and ages of his children. Based in part on that inconsistency, Deputy Gilbert reached the conclusion Alston was feeling "the stress of the situation." The inconsistency alone would not support a finding of reasonable suspicion, but the majority is incorrect to say "this fact is of no consequence." Alston's inability to recite the correct number of his children in a stressful situation is suspicious.

I also disagree with the majority's criticism of Deputy Gilbert's reliance on the facts Alston was from near Atlanta, he was driving a car rented by a third person who was not in the car, and the person who did rent the car was female. The majority states these facts are "not inherently suspicious." Even if the majority was correct, however, its statement would be of minimal importance. Our standard of review requires us to consider the facts in light of the *officer's* explanation as to why *he* thought they were significant, and why they made *him* suspicious. *See United States v. McCoy*, 513 F.3d 405, 411 (4th Cir. 2008) (stating "the Supreme Court has often counseled lower courts to give 'due weight' to the factual inferences drawn by police officers as they investigate crime, for the reasonable suspicion analysis is by its nature 'officer-centered'" (citations omitted)). None of these facts by themselves could support a finding of reasonable suspicion, but Deputy Gilbert explained why he thought each of them had some significance.

This point is illustrated by Deputy Gilbert's reliance on the fact the car was rented by a female who was not in the car. Deputy Gilbert testified he learned "through the classes and the training that I've been through, a lot of your criminal organizations will rent a vehicle in a woman's name for the simple fact that law enforcement does not -- they are not threatened by a woman." Rejecting what Deputy Gilbert learned in his professional training, the majority states, "Were we to accept Deputy Gilbert's proposition, then we would necessarily accept the illogical inference that only males engage in criminal activity." This criticism is based on a misapplication of our standard of review, and misses the significance of Deputy Gilbert's testimony on this subject. When law enforcement officers are trained to consider a certain fact to be important in the officer's attempts to deal with crime on the streets, it is not appropriate for judges to sit in our easy chairs in our secure offices and simply disagree. *See State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (repeating the Supreme Court of the United States' skepticism of the capacity of "legal technicians" to understand reasonable suspicion (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004), which cited *Ornelas v. United States*, 517 U.S. 690, 695-96, 116 S. Ct. 1657, 1661, 134 L. Ed. 2d 911, 918 (1996))). Deputy Gilbert testified he was trained to consider the fact a car was rented in the name of a female to be one fact indicative of drug trafficking because that is a trick drug traffickers use to avoid detection. Describing the possibility this trick might fool a police officer, Deputy Gilbert testified, "At least that's what the drug

trafficking organizations think." If the inference criticized by the majority is "illogical," Deputy Gilbert explained that it is an illogical inference drawn by drug traffickers.

For the reasons explained, I vote to **AFFIRM** Alston's conviction for trafficking in cocaine.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richland County, South Carolina, Appellant/Respondent,

and

Central Midlands Regional Transit Authority,
Respondent,

v.

The South Carolina Department of Revenue and Rick Reames, III, in his official capacity as its Director,
Respondents/Appellants,

v.

Richland PDT, a joint venture consisting of M.B. Kahn Construction Co. Inc., ICA Engineering, Inc., and Brownstone Construction Group, LLC, as a unit and Individually, Third-Party Defendants.

Appellate Case No. 2016-001839

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27775
Heard June 14, 2017 – Filed March 7, 2018

AFFIRMED IN PART, REVERSED IN PART AND

REMANDED

Andrew F. Lindemann, of Davidson & Lindeman, P.A., of Columbia, Benjamin E. Nicholson, V and M. Elizabeth Crum, both of McNair Law Firm, P.A., of Columbia, Ray N. Stevens and Ray E. Jones, both of Parker Poe Adams & Bernstein, LLP, of Columbia and Larry Smith, Richland County Attorney, of Columbia, for Appellant/Respondent.

James E. Smith, Jr. and Dylan W. Goff, both of James E. Smith, Jr., P.A., of Columbia, Jason P. Luther, Milton G. Kimpson, Dana R. Krajack, Nicole M. Wooten and Lauren Acquaviva, all of South Carolina Department of Revenue, of Columbia, for Respondents/Appellants.

Elizabeth Van Doren Gray, Robert E. Tyson, Jr. and Alexis K. Lindsay, all of Sowell Gray Robinson Stepp & Laffitte, LLC, of Columbia, for Respondent.

Robert F. Lyon, Jr. and John K. DeLoache, both of Columbia, for Amicus Curiae, South Carolina Association of Counties.

JUSTICE KITTREDGE: This direct cross-appeal involves the scope of the authority the Department of Revenue (DOR) to enforce various provisions of state law relating to the imposition of a transportation penny tax by Richland County (County) and the County's expenditure of the funds generated by the tax. After DOR conducted an audit and informed the County that DOR intended to cease future remittances to the County based on purported misuse of funds, the County filed a declaratory judgment action in circuit court, arguing DOR lacked the authority to stop payments and seeking a writ of mandamus compelling DOR to continue remitting revenues. DOR counterclaimed seeking a declaration that the County's expenditures were unlawful, an injunction to prohibit future unlawful expenditures, and alternatively, the appointment of a receiver to administer the County's tax revenues. Following a hearing, the circuit court issued a writ of

mandamus compelling DOR to remit the tax revenues, denied injunctive relief, and refused to appoint a receiver. Both the County and DOR appealed. For the reasons that follow, we affirm in all respects except we reverse the circuit court's denial of DOR's request for injunctive relief. DOR is entitled to an injunction requiring the County to expend the funds generated by the tax solely on transportation-related projects in accordance with the law.

I.

Through the Optional Methods for Financing Transportation Facilities Act (Transportation Act),[1] the General Assembly has authorized the governing body of a county to "impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money." S.C. Code Ann. § 4-37-30(A) (Supp. 2017). This is commonly referred to as the "penny tax." The types of projects permitted to be funded with such a tax are "highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects*." *Id*. § 4-37-30(A)(1)(a)(i) (emphasis added). The revenues generated from such a tax must be used in accordance with statutory restrictions imposed by the General Assembly—namely, proceeds must be used for the capital costs of the types of transportation projects identified in the Transportation Act. *Id*. § 4-37-30(A)(15).

To implement a transportation penny tax, "[t]he governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance." *Id*. § 4-37-30(A)(1). The local ordinance must specify the projects for which the proceeds of the tax are to be used; the length of time for which the tax is to be imposed; "the estimated *capital cost* of the project or projects to be funded in whole or in part from proceeds of the tax;" and the "anticipated year the tax will end." *Id*. § 4-37-30(A)(1) (emphasis added). At issue in this case is whether and to what extent certain costs qualify as "capital costs" and thus are considered proper expenditures of penny tax revenues.

DOR was "created to administer and enforce the revenue laws of this State," S.C.

[1] S.C. Code Ann. §§ 4-37-10 to -50 (Supp. 2017).

Code Ann. § 12-4-10 (2014), and is authorized "to conduct audits involving all taxes." *Id*. § 12-4-387 (2014). The scope of DOR's activities is quite broad; indeed, DOR "employees and officers are acting within the scope of their employment when administering *any South Carolina statute* which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction." *Id*. § 12-4-325(B) (2014) (emphasis added).

DOR administers and collects the penny tax in "the same manner that other sales and use taxes are collected." *Id*. § 4-37-30(A)(8); *id*. § 12-36-2660 (2014) (providing DOR "shall administer and enforce" the provisions of the Sales and Use Tax Act). Monies generated through a tax imposed under the Transportation Act are considered to be state tax revenues—not local tax revenues.[2] *See id*. § 12-54-15 (2014) (providing every tax imposed, along with increases, interest, and penalties are considered owed "to the State"); *id*. § 4-37-30(A)(9) (providing taxes authorized by the Transportation Act are subject to the general enforcement provisions of the tax code).

Under these enabling provisions of the Transportation Act, on July 18, 2012, the County enacted Ordinance No. 039-12HR (Ordinance) scheduling a referendum on November 6, 2012, for the purpose of seeking approval from voters for a penny sales and use tax (Penny Tax). The Ordinance referenced various provisions of the Transportation Act and proposed the imposition of a tax for twenty-two years for the following projects:

> (d) The Sales and Use Tax shall be expended for the costs of the following projects . . . for the following purposes:
>
> > (i) Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements. Amount: $656,020,644;
> >
> > (ii) Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including

[2] In this regard, an "[a]ction may be brought at any time by the Attorney General, in the name of the State, to recover taxes, penalties, and interest due under [Title 12]." S.C. Code Ann. § 12-54-17 (2014).

> implementation of near, mid and long-term service improvements. Amount $300,991,000; and
>
> (iii) Improvements to pedestrian sidewalks, bike paths, intersections and greenways. Amount: $80,888,356.

The Ordinance further provided:

> The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenue established by the [Transportation] Act, the provisions of this Ordinance, and other applicable law. Subject to annual appropriations by County Council, sales and use tax revenues shall be used for the costs of the projects established in this Ordinance, as it may be amended from time to time, *including, without limitation, payment of administrative costs of the projects*, and such sums as may be required in connection with the issuance of bonds, the proceeds of which are applied to pay costs of the projects. All spending shall be subject to an annual independent audit to be made available to the public.

(emphasis added). Among other things, the parties dispute whether the County properly characterizes certain costs as "administrative costs."

The referendum passed. The Penny Tax became effective beginning May 1, 2013, and is authorized to run for twenty-two years (through April 30, 2035) to raise over $1 billion for specified transportation projects throughout Richland County. Since taking effect, the Penny Tax has generated around $5 million in revenues per month for Richland County. Prior to this dispute, and in accordance with its statutory mandate, DOR allocated and remitted net revenues to the State Treasurer on a monthly basis. Those monies (with interest) were then distributed by the State Treasurer to the County on a quarterly basis as required by the Transportation Act. Specifically, section 4-37-30(A)(15) provides the State Treasurer is to hold these funds in a designated account separate from the general fund of the state, and once distributed, "these revenues and interest earnings must be used only for the purpose stated in the imposition ordinance."

At some point after the Penny Tax became effective, DOR received information concerning the County's possible misuse of Penny Tax funds. In April 2015, DOR initiated an audit to determine the County's compliance with state tax laws, specifically including the Transportation Act. *See* S.C. Code Ann. § 12-4-387 ("The Department of Revenue *shall* use available personnel to conduct audits involving *all taxes* to promote voluntary compliance and to collect revenues for the general fund of the State and designated accounts." (emphasis added)); *id*. § 12-54-100 to -110 (authorizing DOR to conduct examinations and investigations and to issue a summons for any person or political subdivision of the State requiring that person or entity to appear, produce documents, and answer questions). The County did not object to the audit or to DOR's authority to conduct it.

Following the audit, DOR informed the County that it had uncovered (1) evidence of public corruption;[3] (2) evidence of criminal violations of state tax laws[4] and (3) unlawful expenditures of Penny Tax revenues by County Council.

DOR identified specific expenditures it believed were problematic, including the use of more than $554,000 in Penny Tax funds to organize and staff the County's Small Local Business Enterprise (SLBE) Program, which was established as a county-wide program intended to support all facets of County operations—not just Penny Tax projects. These expenses included more than $200,000 in legal services related to "SLBE Program Administration"; approximately $219,000 in personnel costs; $122,000 for a software management system; and $13,000 for website development. In noting these expenditures, DOR explained, "While a [SLBE] program may be laudable, it is simply not allowed under the state laws governing this type of [transportation] tax. If [County] Council wants to encourage small and local business participation in County projects[,] it should do so with general fund dollars—not with dollars approved by voter referendum for an earmarked purpose."

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[3] DOR forwarded these findings to SLED for investigation.

[4] According to DOR, this investigation resulted in criminal convictions of both the former chair of County Council and the former president of the Central Midlands Regional Transit Authority Board.

DOR also noted the County was paying *two* public relations firms monthly payments of $25,000 each for the provision of "public information services" in addition to reimbursing these firms for expenses such as brochures, mailings, business cards, website maintenance, catering, mileage, and computer and cell phone allowances. It was unclear exactly what work these firms performed since a fully operational public information office already existed within the County and because no documentation existed to detail what specific services were provided, the number of hours spent on these projects, or how much each service cost.

DOR further took issue with the more than $38,000 the County spent under a vague and duplicative "mentor-mentee" arrangement whereby the County contracted with certain inexperienced individuals to perform more than $400,000 in real-estate and legal services, then paid each of those individuals and an experienced contractor/vendor $200 per hour (for a combined cost of $400 per hour) to "mentor" and "be mentored" and learn how to perform the very services they were contracted to provide.

Faced with these dubious expenditures, the County put forward the position that all these expenditures were properly characterized as "administrative costs" under the Ordinance.

Nevertheless, the day following the audit, the County responded that it was "shocked and alarmed" and expressed a willingness to "immediately invoke measures to protect and preserve county money and assets" and reimburse any inappropriate expenditures of Penny Tax funds that may have occurred. Over the next several months, officials from DOR and the County continued written and in-person discussions regarding the results of DOR's audit.

Primarily, DOR correctly asserted the County's expenditure of Penny Tax funds on "administrative costs" that were unrelated to any specific transportation project were improper as they exceeded the scope of the Transportation Act. DOR informed the County that regardless of what "administrative costs" the County's Penny Tax Ordinance purported to allow, only those costs allowable under the Transportation Act were proper expenditures of Penny Tax funds. However, DOR also acknowledged this might include certain limited transportation-related administrative costs:

> While some administrative costs may be appropriate expenditures under the [T]ransportation [Act], the use of the term "capital costs" in the statute gives some guidance on what administrative costs may be properly allowable under the law. The term "capital cost" is not defined in the law. However, "capital costs" are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment. . . . The concept of "capitalized costs" for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A, and the accompanying regulations. . . . Since the [Transportation Act] does not define "capital costs," these Internal Revenue Code principles can be used to provide guidance as to which costs are properly allowable under the [T]ransportation [Act].

In an effort to assist the County in identifying and implementing necessary corrections to achieve compliance with state law, DOR explained the potential utility of IRC §§ 263–263A and provided a five-page written guide to help the County develop guidelines to determine which "administrative" costs could appropriately be paid with Penny Tax funds. However, the County insisted it was unnecessary to implement any additional cost-allocation standards (such as IRC §§ 263–263A) to ensure future Penny Tax expenditures complied with the law. Specifically, the County contended its financial recordkeeping procedures were adequate and that more detailed substantive guidelines for determining whether costs were Penny Tax eligible under the Transportation Act were not needed. In response, DOR expressed concern that the County refused to "rectify a core problem of the County's Penny Tax Program—the absence of a uniform standard for determining qualifying expenditures to ensure all Penny Tax revenue is spent specifically on transportation-related projects."

Following several additional meetings between County and DOR officials in an effort to reach an agreement, DOR determined further action was necessary to prompt the County's compliance with the law. On April 27, 2016, DOR informed the County that, based on DOR's responsibility to administer the Penny Tax and enforce revenue laws, DOR planned to immediately cease allocations of revenue to the County's fund until the County adopted a method of evaluating qualifying expenses and brought its Penny Tax program into compliance.

Less than a month later, the County filed this action seeking various forms of relief, including a declaration that the County "is not subject to [DOR]'s directives, demands, or orders on any matter related to [the] County's spending of the Penny Tax Revenues," an injunction prohibiting DOR from issuing directives or demands regarding the County's Penny Tax expenditures, and a writ of mandamus to compel DOR to remit all future Penny Tax revenues to the State Treasurer for disbursement to the County.

DOR and its Director filed an answer and counterclaims seeking declaratory and injunctive relief, as well as the reimbursement of improper expenditures of Penny Tax funds.[5] Specifically, DOR sought injunctive relief prohibiting the County from making any further expenditures of Penny Tax funds until the County adopted some form of substantive framework for evaluating whether expenditures of Penny Tax funds qualify as allowable costs under the Transportation Act and, alternatively, for the appointment of a receiver to marshal, administer, and enforce the proper expenditures of Penny Tax monies. During the hearing before the circuit court, the County challenged whether DOR had standing to seek injunctive relief or seek the appointment of a receiver because, according to the County, DOR has no interest in the County's Penny Tax program.

Following a hearing, the circuit court issued an order (1) granting the County's petition for a writ of mandamus directing DOR to remit the outstanding Penny Tax revenues; (2) finding DOR had "special interest" and "public importance" standing to assert its motions, defenses, and counterclaims; and (3) denying all requests for injunctive relief and DOR's request for the appointment of a receiver. Both parties filed notices of appeal, upon a joint request of the parties, the appeal was certified

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[5] DOR also asserted third-party claims against the County's project development team (PDT) and its members M.B. Kahn Construction Co., ICA Engineering, Inc., and Brownstone Construction Group, LLC, including causes of action for civil conspiracy and constructive fraud arising from improper self-dealing that led to the PDT obtaining a $31 million contract from the County through an improper procurement process. The circuit court dismissed DOR's third party claims on the basis that DOR had no standing to assert claims against private parties and that the PDT and its members were not proper third parties under Rule 14, SCRCP. The dismissal of those claims is not the subject of this appeal.

to this Court pursuant to Rule 204(b), SCACR.

II.

On appeal, the County argues DOR lacks standing to raise affirmative defenses and counterclaims and that the circuit court erred in refusing the County's request for a temporary injunction. In its cross-appeal, DOR argues the circuit court erred in issuing a writ of mandamus and in denying its motions for an injunction and for a receiver. We address each of these arguments in turn.

A. DOR's Standing to Pursue Affirmative Defenses and Counterclaims

The County argues the circuit court erred in finding DOR has standing to assert defenses and counterclaims. Specifically, the County claims public importance standing does not apply to an executive branch agency like DOR and that "special interest" standing is neither available to nor established by DOR in this case. We find DOR has standing in this case.

In a dispute between two government agencies, "the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked." *Camp v. Bd. of Pub. Works of City of Gaffney*, 238 S.C. 461, 469–70, 120 S.E.2d 681, 685 (1961). When a state agency has significant duties relating to the subject matter of the action, the agency's real and substantial interest in the case is established. *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (finding State Election Commission's administrative duties in regulating county commission's preparation and distribution of ballots and statutory power to promulgate regulations established the entity's real and substantial interest in the case). Moreover, a party who names a state agency in a complaint and motion cannot thereafter claim the state agency lacks standing to appear and defend itself in the action. *Id*.; *see also* Rule 13(a), SCRCP (A counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.").

Based on these authorities, the circuit court properly found that DOR's extensive administrative, oversight, and enforcement responsibilities in the Transportation Act and throughout Title 12 of the South Carolina Code confer upon DOR a duty

in ensuring the County's expenditures of Penny Tax revenues comply with the revenue laws DOR is charged with enforcing. S.C. Code Ann. § 12-4-10 (2014) (establishing DOR was "created to administer and enforce the revenue laws of this State"); *id*. § 12-4-325(B) (setting forth the broad scope of DOR authority which includes "administering any South Carolina statute which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction"); *id*. § 12-4-387 (DOR is authorized "to conduct audits involving all taxes"); *see id*. § 4-37-30(A)(8) (providing the Penny Tax is administered and collected by DOR in the same manner as other sales and use taxes); *id*. § 12-36-2660 (providing DOR "shall administer and enforce" the provisions of the Sales and Use Tax Act); *see also id*. § 4-37-30(A)(9) (providing taxes authorized by the Transportation Act are subject to the general enforcement provisions of the tax code). Because DOR is the agency statutorily tasked with administering the Penny Tax program, and the expenditure of millions of dollars of Penny Tax revenues is an issue of wide concern both to DOR and to the residents and taxpayers of Richland County, the circuit court correctly determined DOR has standing, and we affirm.[6]

B. Writ of Mandamus

Next, DOR argues the circuit court erred in issuing a writ of mandamus directing it to continue remitting all Penny Tax revenues to the State Treasurer despite its

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[6] The County also argues that principles of Home Rule and Separation of Powers preclude a finding that DOR has standing to pursue its defenses and counterclaims. We reject these arguments and affirm the circuit court pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 4-9-25 ("All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, *not inconsistent with the Constitution and general law of this State* . . . ." (emphasis added)); *Riverwoods, LLC v. Cty. of Charleston*, 349 S.C. 378, 386, 563 S.E.2d 651, 656 (2002) (where a county ordinance is inconsistent with the enabling act, "the County's assertions regarding Home Rule provide it no refuge"); *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002) ("Separation of powers is not predicated on differentiating between who actually spends the money, but on whether [one governmental] branch assumes powers belonging to another branch of government.").

concerns about improper expenditures, arguing its broad administrative powers include the authority to determine whether Penny Tax revenues are being used in accordance with the law. DOR seems to acknowledge it has a duty to remit Penny Tax revenues; however, DOR strenuously argues that its specific role in administering the Penny Tax and its general authority to enforce tax laws demonstrate that its duty is not a ministerial one. Although we acknowledge DOR's broad administrative duties, we reject DOR's argument. Our analysis is controlled by the language of section 4-37-30 (A)(15), which we find imposes upon DOR a ministerial duty to remit Penny Tax revenues. We therefore affirm.

"Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion." *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999) (citing *Jolly v. Marion Nat'l Bank*, 267 S.C. 681, 685–86, 231 S.E.2d 206, 208 (1976); *Linton v. Gaillard*, 203 S.C. 19, 23, 25 S.E.2d 896, 898 (1943)). "An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." *Id*. (citing *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

"To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 582–83 (2008) (citing *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002)). A writ of mandamus "'is designed to promote justice, subject to certain well-defined qualifications. Its principal function is to command and execute, and not to inquire and adjudicate.'" *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 182, 519 S.E.2d 567, 571–72 (1999) (quoting *Willimon v. City of Greenville*, 243 S.C. 82, 86–87, 132 S.E.2d 169, 170–71 (1963)).

"The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial)." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008) (citing *Redmond v. Lexington Cty. Sch. Dist. No. Four*, 314 S.C. 431, 445 S.E.2d 441 (1994)). "The character of an official's public duties is

determined by the nature of the act performed." *Id*. (citing *Long v. Seabrook*, 260 S.C. 562, 197 S.E.2d 659 (1973)). "The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id*. (citation omitted). "It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion." *Id*. "In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Id*.

The relevant statutory provision provides:

> The revenues of the tax collected in each county pursuant to this section *must* be remitted to the State Treasurer and credited to a fund separate and distinct from the general fund of the State. After deducting the amount of refunds made and costs to the Department of Revenue of administering the tax, . . . the State Treasurer *shall* distribute the revenues and all interest earned on the revenues while on deposit with him quarterly to the county in which the tax is imposed, and these revenues and interest earnings must be used only for the purpose stated in the imposition ordinance.

S.C. Code Ann. § 4-37-30 (A)(15) (emphasis added).

Here, in the course of conducting an audit, DOR discovered County expenditures which it believed to be a glaring misuse of Penny Tax funds. Despite DOR's broad investigative and enforcement powers, it is beyond dispute that the relevant duty is set forth in section 4-37-30(A)(15) and that the legislature's use of the term "must" in a statute means that the action is mandatory. *S.C. Police Officers Ret. Sys. v. City of Spartanburg*, 301 S.C. 188, 191, 391 S.E.2d 239, 241 (1990). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). Because the Legislature's use of mandatory language is unambiguous, this Court has no right to impose another meaning. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation omitted)). We therefore find the circuit

court correctly concluded DOR's duty to remit Penny Tax funds is ministerial, and we affirm the writ of mandamus.

C. Denial of Injunctive Relief

Both parties argue the circuit court erred in denying their respective requests for injunctive relief. Specifically, the County contends it is entitled to a temporary injunction prohibiting DOR from issuing directives, demands, or orders that the County adopt and implement appropriate safeguards to ensure that expenditures of Penny Tax funds are proper under the Transportation Act. Conversely, DOR argues it is entitled to an injunction forbidding the County from making further expenditures of Penny Tax revenues until the County adopts and implements appropriate compliance safeguards. For the reasons that follow, we affirm the circuit court's denial of the County's motion but reverse the denial of DOR's request for an injunction. DOR has established its entitlement to an injunction preventing the County from expending Penny Tax funds in violation of the Transportation Act.

1. The County's Motion for Temporary Injunction

"An order granting or denying an injunction is reviewed for abuse of discretion." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citation omitted). "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (citation omitted). "To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010) (citation omitted)). "[I]n order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner." *Headdon v. State Highway Dep't*, 197 S.C. 118, 14 S.E.2d 586, 588 (1941).

The circuit court denied the County's motion for a temporary injunction finding that, in light of the circuit court's issuance of a writ of mandamus ordering DOR to

remit and allocate Penny Tax revenues, the County could not show it would suffer irreparable harm and therefore an injunction was unnecessary. On appeal, the County argues that, even if it receives Penny Tax revenues, it nevertheless continues to suffer irreparable harm by virtue of what the County characterizes as DOR's "interfer[ence] with the County's implementation and operation of its Penny Tax Program." We disagree.

The circuit court properly found that, in light of the writ of mandamus directing DOR's continued remittance of Penny Tax Revenues, the County will not suffer any "negative financial consequences" and therefore the County cannot show irreparable harm. Accordingly, a preliminary injunction is unnecessary. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (explaining a "preliminary injunction should issue only if necessary to preserve the status quo ante"). Further, DOR's actions in auditing the County and administering the Penny Tax are squarely within DOR's statutory duties and do not warrant an injunction. *See* S.C. Code Ann. § 12-4-325(B) (setting forth the broad scope of DOR authority which includes "administering *any South Carolina statute* which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction" (emphasis added)); *id.* § 12-4-387 (DOR is authorized "to conduct audits involving all taxes"); 42 Am. Jur. 2d Injunctions § 158 (in order to enjoin a governmental agency from exercising its discretion, a complainant must show the agency's actions are outside its statutory duties, or that the agency intends to act in bad faith, arbitrarily, capriciously, or in a "wantonly injurious manner"). We therefore affirm.[7]

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[7] As an alternative sustaining ground, we also find the County has woefully failed to demonstrate a likelihood of success on the merits with regard to its interpretation of the Transportation Act. *See, e.g.*, *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power"). To the contrary, DOR has presented a

2. DOR's Motion for Injunction

Turning to DOR's request for injunctive relief, DOR contends the circuit court erred in finding it failed to demonstrate irreparable harm in support of its motion for an injunction because, as DOR asserted to the circuit court, the taxpayers of Richland County would suffer irreparable harm if the County is not required to follow the law. We agree.

It is axiomatic that the County's Ordinance may not expand the scope of expenditures authorized in the enabling provisions of the Transportation Act, which requires a nexus between expenditures and a transportation-related capital project. *See, e.g.*, S.C. Code Ann. § 4-37-30(A)(1)(a)–(c); *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power"). A proper expenditure of Penny Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project.

In light of the County's many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds until the County "adopts IRC 262/263A or some other acceptable alternative as a standard to be used to determine when expenditures are proper within the [Transportation] Act." Under these compelling circumstances, we find an injunction is appropriate. To ensure objective criteria establishing compliance with the Transportation Act, the County shall be subject to guidelines for determining whether expenses are properly allocable to a specific transportation

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compelling prima facie case that some of the County's expenditures of Penny Tax revenues are in violation of the Transportation Act.

project, or the direct administration of a specific transportation project. Accordingly, the County is hereby enjoined from violating the Transportation Act. We direct the circuit court, no later than thirty days following remand, to enter the preliminary injunction in accordance with this opinion.[8]

D. DOR's Motion for the Appointment of a Receiver

Lastly, DOR contends the circuit court erred in denying its motion for the appointment of a receiver. We disagree and find no abuse of discretion. We affirm the circuit court's refusal to appoint a receiver.

South Carolina Code section 15-65-10 sets forth the circumstances under which the appointment of a receiver is appropriate. Before judgment is rendered,

> A receiver may be appointed by a judge of the circuit court . . . on the application of either party when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired . . . .

Id. § 15-65-10(1).

"[T]he appointment of a receiver is within the discretion of the circuit judge." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989) (citing *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964)). "The appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." *Id*. (citing *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957)). "[A]s a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger

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[8] The injunction is effective today. We require the circuit court to issue a standalone injunction consistent with this opinion. We trust the County will comply with the injunction, but in the event of any alleged violation of the injunction, any enforcement action or rule to show cause shall be heard in the circuit court, subject to appellate review as provided by law.

that the property will be materially injured before the case can be determined." *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887) (internal quotation marks and citation omitted).

In affirming the denial of DOR's initial request for a receiver, we recognize that the trial court can order the repayment of any improper expenditures from the County's general fund.[9] We trust that Richland County will abide by the injunction. If, however, Richland County violates the injunction, DOR may renew its request for the appointment of a receiver.

III.

Based on the foregoing, we affirm the trial court's issuance of a writ of mandamus, affirm the denial of the County's request for injunctive relief, reverse the denial of DOR's request for injunctive relief, affirm the refusal to appoint a receiver, and remand this case for further proceedings.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HEARN, FEW and JAMES, JJ., concur. BEATTY, C.J., concurring in part and dissenting in part in a separate opinion.

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[9] In addition to the challenged expenditures that gave rise to this litigation, we further recognize it may be contended that the County expended Penny Tax funds contrary to the Transportation Act during the pendency of this appeal. If the circuit court determines the County violated the Transportation Act during the pendency of the appeal by expending Penny Tax funds on matters unrelated to a transportation project or unrelated to the direct administration of a transportation project, the circuit court shall order the County to repay the improper expenditures from the County's general fund.

CHIEF JUSTICE BEATTY: I concur in part and dissent in part with the majority's decision. I concur with the majority's decision in all respects other than the extent of the injunction the majority authorizes the circuit court to grant to DOR, and the inference that DOR has broad powers to enforce any constitutional South Carolina statute.

DOR requested an injunction to prohibit Richland County from making any further expenditures of transportation penny tax revenue until the county adopted a penny tax expenditure evaluation process suitable to DOR. Notwithstanding the majority's statutory citations, DOR's demand in this regard is void of any statutory authority, and far exceeds its statutory authority to enforce the revenue statutes of this state.

In my view, DOR's enforcement authority in this case is limited to a legal challenge to the improper expenditure of penny tax revenue. Thus, I agree with the majority that DOR cannot refuse to disburse penny tax revenue to Richland County. If DOR mounts a legal challenge to an improper expenditure, the available relief should be limited to an injunction of further use of penny tax funds for the identified improper expenditure and the reimbursement of the improperly expended funds. The Optional Methods for Financing Transportation Facilities Act is like every other law, it cannot be enforced until it is violated. Although there are allegations of past violations, the remedy authorized by the majority will allow DOR to impose its preferred method of project evaluation to future project expenditures when no violation as to those expenditures has been identified.

DOR has no statutory authority to micro-manage a county's governing entity by demanding a particular project evaluation process, or any other evaluation process, be used in determining which expenditures are in compliance with the transportation penny tax statute. To allow DOR to make such a demand of a county government, in effect, gives DOR pre-approval authority of each project. In my view, this would be a clear violation of the County Home Rule Act. S.C. Code Ann. §§ 4-9-10 to -1230 (1986 & Supp. 2017). Specifically, the code section that authorizes county government "to provide for an accounting and reporting system whereby funds are received, safely kept, allocated and disbursed." *Id*. § 4-9-30(8) (1986). The majority's grant of plenary authority to DOR leaves the county with no recourse but to resort to preemptive litigation. I would limit DOR's injunction to those expenditures declared improper by the circuit court.

Additionally, I disagree with the majority's inference that section 12-4-325(B) imbues DOR with authority to enforce any constitutional South Carolina statute. In my view, this interpretation of section 12-4-325(B) is taken out of context and may be misleading.

Section 12-4-325 is entitled "Defense and indemnification of Department of Revenue employees and officers." Subsection (B) of section 12-4-325 states in pertinent part:

> Department of Revenue employees and officers are acting within the scope of their employment when administering any South Carolina statute which has not been held to be unconstitutional or unlawful.

S.C. Code Ann. § 12-4-325(B) (2014). I do not interpret this statute to grant broad powers or authority to DOR. In my view, this language refers to the employment status of employees when performing their work-related duties. Moreover, the powers and duties of DOR are found in sections 12-4-310 and 12-4-320. *See* S.C. Code Ann. § 12-4-310 (Supp. 2017) (identifying and enumerating the mandated powers and duties of DOR); *id*. § 12-4-320 (2014) (identifying and enumerating the permissive powers and duties of DOR). Neither section authorizes DOR to require that a county use the DOR's preferred method of project evaluation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

County of Florence and Florence County Council,
Respondents,

v.

West Florence Fire District, purported to have been created by S.C. Act No. 183 of 2014, the West Florence Fire District Commission, purported to have been created by S. C. Act. No. 183 of 2014, David Brown, Dustin Fails, Linda Lang Gipco, Richard Hewitt and C. Allen Matthews, each in his or her purported official capacity as a member of the West Florence Fire District Commission and the State of South Carolina, Defendants, of whom West Florence Fire District, purported to have been created by S.C. Act No. 183 of 2014, the West Florence Fire District Commission, purported to have been created by S. C. Act. No. 183 of 2014, David Brown, Dustin Fails, Linda Lang Gipco, Richard Hewitt and C. Allen Matthews, each in his or her purported official capacity as a member of the West Florence Fire District Commission are Appellants.

Appellate Case No. 2017-000693

Appeal from Florence County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27776
Heard December 13, 2017 – Filed March 7, 2018

AFFIRMED

Blake A. Hewitt, of Bluestein Thompson Sullivan LLC, of Columbia and Wallace H. Jordan, Jr., of Florence, for Appellants.

Steve A. Matthews, of Haynsworth Sinkler Boyd, P.A., of Columbia and D. Malloy McEachin, Jr., of McEachin & McEachin, P.A., of Florence, for Respondents.

Attorney General Alan Wilson and Deputy Solicitor General J. Emory Smith, Jr., for Defendant, State of South Carolina.

JUSTICE HEARN: In this declaratory judgment action, Florence County challenges the validity of the West Florence Fire District, arguing that it violates this Court's decision in *Wagener v. Smith*, 221 S.C. 438, 71 S.E.2d 1 (1952) and conflicts with the state's constitutional provisions concerning special legislation and home rule. *See* S.C. Const. art. III, § 34, and S.C. Const. art. VIII, § 7. The circuit court held in favor of Florence County on all three grounds, and the West Florence Fire District appealed. We affirm on Article VIII, section 7 grounds.

FACTUAL BACKGROUND

Prior to 2014, Florence County (the County) operated several special tax districts to fund fire protection services provided by not-for-profit fire departments. Each district implemented its own capital expense programs and bore responsibility for its own expenditures. To fund these services, the County assessed a millage rate based on ad valorem property taxes within each district, resulting in different millage rates between districts. For example, shortly before the County restructured the districts, residents in West Florence were taxed at a rate of 8 mills while Johnsonville residents were taxed at a rate of 40 mills.

In 2014, in an effort to reform the method for financing fire protection services, the County hired a firm to analyze and recommend improvements to the

existing scheme, one of which was to consolidate the districts into one district to achieve a more equitable millage rate scheme and to ensure adequate funding. Under the consolidated district, the County planned to assess a unified rate and provide more administrative oversight in an effort to lower millage rates for many residents, cut the insurance premiums for the district, and enact a more equitable funding scheme. However, while the proposal expected to curtail the high millage rates for many residents, the rate in West Florence would nearly triple.

The County conducted public hearings and, over the course of a few months, garnered enough public support for the consolidation proposal. However, residents of West Florence, upset about their increased millage rate, looked to their representatives in the General Assembly for help. In response, the General Assembly passed Act No. 183 in the spring of 2014 (the Act), creating the West Florence Fire District which encompassed part of Florence County—mainly West Florence—and a negligible portion of Darlington County that consisted of the right-of-way along a one-mile stretch of Interstate 95 and three small parcels of land adjacent to the interstate.

The General Assembly explained the purpose of the Act, stating:

> [T]hat a certain portion of Darlington County primarily consisting of Interstate 95 from the Florence County line northward to Exit 169 in Darlington County is presently served by fire departments in Florence County because no fire department in Darlington County provides service to this area. This therefore presents *concerns for the safety and well-being of citizens residing and traveling in this area in addition to placing additional burdens on fire personnel in Florence County which are called on to provide fire service in this area.* The General Assembly has therefore determined to create a joint county fire district in the same manner other joint county fire districts have been established pursuant to this chapter, *consisting of areas in two counties*, to solve this problem, and to provide fire service to all areas of the district on the most economically feasible basis possible.

S.C. Code Ann. § 4-23-1000 (Supp. 2017) (emphasis added). When the County challenged the constitutionality of the Act, the General Assembly reacted by passing an amendment (Amended Act) that: (1) clarified the precise boundary of the district;

(2) added part of a neighborhood in Darlington County[1] to the district; (3) transferred property from the prior district to the West Florence District; and (4) included a sunset provision whereby the amendment would expire five years after its effective date.

In response, the County filed a declaratory judgment action, arguing both the Act and the Amended Act were unconstitutional under Article VIII, section 7, Article III, section 34, and *Wagener*. The West Florence District countered that statutes are presumed constitutional and the County had failed to meet its burden in demonstrating otherwise. The circuit court ruled in favor of the County on all three grounds. First, the court held *Wagener* prohibited the General Assembly from establishing an entity that provided the same service in an area served by Florence County, noting that the rule was applied to a special tax district in *North Carolina Electric Membership Corporation. v. White*, 301 S.C. 274, 391 S.E.2d 571 (1990) (holding that a city council could not create a special tax district to perform water and sewage services in the same area where the General Assembly had previously created a special purpose district). Second, the circuit court found the Act violated the rule against special legislation under Article III, section 34. Lastly, the circuit court held Article VIII, section 7's prohibition against laws for a specific county rendered the legislation unconstitutional, even though three parcels of Darlington County were included.

STANDARD OF REVIEW

A party challenging the constitutionality of a statute has a high hurdle to overcome because all statutes are presumed constitutional. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). Furthermore, "[A] legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62–63, 467 S.E.2d 739, 741 (1995).

DISCUSSION

The West Florence District contends the Act does not violate Article VIII, section 7 because the district encompasses more than one county. Moreover, it

[1] The neighborhood consists of about 100 lots and straddles the Darlington and Florence County lines.

argues the circuit court improperly weighed the wisdom of the legislation, thereby encroaching on the prerogative of the General Assembly. On the other hand, the County asserts the negligible portion of Darlington County does not transform what is essentially a special purpose district for West Florence into a multicounty district. Additionally, the County claims the circuit court did not impermissibly weigh the wisdom of the legislation; instead, the court merely inquired into the territorial composition of the West Florence District to determine whether there was sufficient regional impact to constitutionally justify its creation.

We begin by recognizing the General Assembly's plenary power to enact legislation. *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) (citing *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E. 481, 486 (1935) ("[T]he General Assembly has plenary power over all legislative matters unless limited by some constitutional provision.")). One constitutional limitation is commonly referred to as "home rule," which this Court has recognized as a means to determine how power is allocated between the General Assembly and local governments. *See Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 804–05 (1993) (citing *Southern Bell Telephone and Telegraph Company v. City of Aiken*, 279 S.C. 269, 271, 306 S.E.2d 220, 221 (1983) ("Article VIII of the South Carolina Constitution was completely revised for the purpose of accomplishing home rule; thus granting renewed autonomy to local government.")). Prior to the 1970s, "Columbia [was] the seat of county government," as the General Assembly had the power to control local functions. *Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974). However, the state constitution was amended to reverse this allocation of power,[2] and under Article VIII, section 7, the General

[2] Addressing special purpose districts within a county, the Court in *Knight* warned:

> There is a sound reason for curtailing the power of the General Assembly to create special purpose districts within a county. If, despite the prohibition of laws for a specific county, the General Assembly may continue to carve a given county into special purpose districts, a frightful conflict would exist between the power of the General Assembly and the power of the county government. Each county could be carved into enumerable special districts. Commission[s] or other agencies might be established for each, with each given the power to perform a function intended to have been vested in the county government. Such a result could well be chaotic and home rule intended

Assembly cannot enact legislation "relating to a specific county which relates to those powers, duties, functions and responsibilities, which under the mandated systems of government, are set aside for counties." *Kleckley v. Pulliam*, 265 S.C. 177, 183, 217 S.E.2d 217, 220 (1975). This transfer of power "reflects a serious effort upon the part of the electorate and the General Assembly to restore local government to the county level." *Knight*, 262 S.C. at 569, 206 S.E.2d at 876. While Article VIII, section 7 did not dissolve pre-home rule special purpose districts, it does apply to legislation enacted post-home rule that concerns a special purpose district created prior to the rule. *Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 80, 321 S.E.2d 258, 265 (1984).

South Carolina jurisprudence is clear that a special purpose district limited to one county violates home rule. In *Knight*, the Court held that a special purpose district established by the General Assembly and limited to providing recreational facilities in a portion of Dorchester County was unconstitutional because it violated Article VIII, section 7. *Knight*, 262 S.C. at 572, 206 S.E.2d at 878. In discussing home rule, the Court noted, "It is clear that Section 7 sought to put an end to this practice, at least insofar as it relates to special purpose districts within a given county." *Id.* However, the Court expressly left open the question of whether Article VIII, section 7 prevents multicounty special purpose districts. *Id.* at 573, 206 S.E.2d at 878.

The Court again addressed the limits of home rule in *Kleckley*, which involved a pre-home rule special purpose district funded in part by legislation enacted after home rule. In that case, the Court denied an Article VIII, section 7 challenge to legislation that funded improvements to airport facilities within the Richland-Lexington Airport District. *Kleckley*, 265 S.C. at 180, 217 S.E.2d at 218. In order to fund the improvements, the General Assembly imposed an annual ad valorem tax on property within the district. *Id.* In response to a taxpayer lawsuit claiming the legislation violated Article VIII, section 7, the Court upheld the provision because it concerned two counties, and more significantly, because the district's purpose

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> by Section 7 would be frustrated in whole or in part since the result could well be that the governing body in each county contemplated by the draftsmen of Section 7 would have little or no power left. To point out the potential results of such a theory compels its rejection.

Knight, 262 S.C. at 572–73, 206 S.E.2d at 878.

triggered a state-wide interest rather than a purely local concern limited to one county. *Id.* at 185, 217 S.E.2d at 221. Emphasizing the importance of the airport district as a state interest, the Court ultimately held the legislation was "not a county *function* within the meaning of Article VIII, Section 7, but one of state concern." *Id.* at 187, 217 S.E.2d at 222 (emphasis added). Thus, the Court weighed the *function* of the district more heavily than the territorial boundary.

Just one year after *Kleckley*, the Court reached a different conclusion in *Torgerson v. Craver*, 267 S.C. 558, 563, 230 S.E.2d 228, 230 (1976), which also involved funding for facilities within an airport district. This time the Court relied heavily on the fact that the Charleston County Airport District was solely within Charleston County. *Id.* at 563, 230 S.E.2d at 230. Additionally, the Court stated that although the airport served travelers from across the region, the county was capable of solving any problems within the district, unlike in *Kleckley*, where neither Richland nor Lexington County alone could regulate the district. *Id.* While the physical boundary of the district was important, the Court clarified its holding in *Kleckley*, noting that the bond legislation in *Kleckley* was not for a specific county but rather for a *region*.

Kleckley and *Torgerson* demonstrate the conjunctive nature of the analysis—in determining whether legislation violates home rule, a district's physical boundaries *and* function must be taken into account. In this case, the West Florence District relies in part on a 2011 South Carolina Attorney General's opinion that focuses almost entirely on the district's physical boundary. S.C. Att'y Gen. Op. dated Apr. 25, 2011 (2011 WL 1740746). Addressing the South Lynches Fire District, the 2011 opinion reversed an earlier opinion which concluded that district was probably unconstitutional. *Id.* (reversing S.C. Att'y Gen. Op. dated June 16, 1983 (1983 WL 181917)).

The 2011 opinion acknowledged earlier attorney general opinions that suggested the Court's decisions in *Kleckley* and *Torgerson* stood for the proposition that the nature of the service—whether regional in scope or purely local—*and* physical territory are both important in the analysis. *Id.* However, the 2011 opinion articulated the principle that only physical territory is relevant in determining whether Article VIII, section 7 is violated. Nevertheless, the 2011 opinion addressed a fire district split approximately 60% in Florence County and 40% in Williamsburg County. We find that scenario readily distinguishable from the instant case, where

the vast majority of the challenged district is located in one county and only a comparatively small portion is located in an adjacent county.[3]

Moreover, the Court noted in *Kleckley* that since the General Assembly could not legally pass a special act to curtail the governing body's county-wide powers, it was likewise impermissible for the General Assembly to achieve the same result indirectly. *Kleckley*, 265 S.C. at 184, 217 S.E.2d at 220. Here, home rule precludes legislation of fire protection services specific to West Florence. *See* S.C. Code Ann. § 4-9-30(5) (1986 & Supp. 2017) (stating fire protection services are part of a county government's enumerated powers); S.C. Code Ann. § 4-19-10 (1986 & Supp. 2017) (enacting the Fire Protection Services Act). Therefore, it follows the General Assembly cannot indirectly accomplish the same goal merely by adding a small amount of acreage of another county; to do so would render Article VIII, section 7 meaningless. *Kleckley* and *Torgerson* demonstrate that where the legislation's function is local and within a county, home rule mandates the County is the proper body to address the matter rather than the General Assembly.

Accordingly, we find the Act creating the West Florence District violates home rule. Because our analysis of Article VIII, section 7 is dispositive, we decline to reach the district's remaining two grounds for reversal. *Young v. Charleston Cty. Sch. Dist.*, 397 S.C. 311, 310, 725 S.E.2d 107, 111 (2012) (declining to address additional grounds after reaching a dispositive issue).

CONCLUSION

In summary, we affirm the circuit court and hold the creation of the West Florence District violates Article VIII, section 7 of the South Carolina Constitution because the district is not truly a multicounty district. To hold that including three parcels—totaling one-tenth of a square mile—is sufficient to remove the legislation from the purview of section 7 would eviscerate home rule.

Accordingly, we **AFFIRM** and **REMAND** the matter to the circuit court for its approval of a plan to transition the district to county control.

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

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[3] It appears from the record that the three parcels in Darlington County total one-tenth of a square mile and represent less than 1% of the district.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Camille Hodge, Jr., as personal representative of the estate of Mable Hodge, Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, M.D., P.A.; and Dr. Herbert A. Moskow; Defendants,

Of which UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are the Appellants.

Camille Hodge, Sr., Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, M.D., P.A.; and Dr. Herbert A. Moskow; Defendants,

Of which UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are the Appellants.

Appellate Case No. 2015-001183

Appeal From Bamberg County
Clifton Newman, Circuit Court Judge

Opinion No. 5541
Heard May 2, 2017 – Filed March 7, 2018

AFFIRMED

Monteith Powell Todd and John Michael Montgomery, both of Sowell Gray Robinson Stepp & Laffitte, LLC, and Robert E. Horner, of Speed, Seta, Martin, Trivett & Stubley, LLC, all of Columbia, for Appellants.

Joseph Preston Strom and Bakari T. Sellers, both of Strom Law Firm, LLC, of Columbia; and Wallace K. Lightsey and Meliah Bowers Jefferson, both of Wyche Law Firm, of Greenville; and John Carroll Moylan, III, of Wyche Law Firm, of Columbia, for Respondents.

KONDUROS, J.: In this medical malpractice case, UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. (collectively, Appellants) appeal the circuit court's determination an arbitration agreement did not apply. Appellants argue the circuit court erred in denying their motion to compel arbitration on several bases. They also maintain the circuit court erred in denying their motion to compel the deposition of Camille Hodge, Sr., one of the Respondents, whose testimony they assert is relevant to whether the arbitration agreement is binding. We affirm.

FACTS/PROCEDURAL HISTORY

Mable Hodge entered a rehabilitation facility—UniHealth Post-Acute Care of Bamberg, LLC (the Facility)—on August 31, 2010, after being hospitalized for heart and kidney problems. The Facility is owned by United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. According to her doctor's records, Mable was "well developed" and "in no real distress" and had a full range of motion in her extremities when she entered the Facility. Her husband, Camille Hodge Sr., (Husband) executed various documents related to her admission, including an Arbitration Agreement and an Admission Agreement. The Facility had an Arbitration Checklist. The first item on the checklist was "Determine competency of patient/resident." The last item on the checklist was "Secure appropriate signatures," which provided:

> ***Competent, capable of signature–***
> Patient/resident must initial each page in the lower right hand corner and sign and date the final page in the presence of Admissions Coordinator and one witness.
>
> ***Competent, incapable of signature–***
> Have the patient/resident verbally confirm in the presence of two (2) healthcare center/agency witnesses that the patient/resident authorizes their family member or friend to sign on the patient/resident's behalf. Have the two (2) healthcare center/agency witnesses execute the contract.

Mable was not present at the time her husband signed these documents on the day before her admission as she was still in the hospital. Mable was competent at the time of her admission and signed additional documents on the day she arrived at the Facility. She had no health care power of attorney at that time.

In both agreements, the top of every page was labeled either "ADMISSION AGREEMENT" or "ARBITRATION AGREEMENT," respectively. The Admission Agreement was individually paginated with pages numbered 1 through 12. The Arbitration Agreement was also individually paginated with pages numbered 1 through 5. Each of these documents contained its own signature page as the last page of each agreement.

The Arbitration Agreement provided:

> Any and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement, including the interpretation of either, or the Patient/Resident's stay at, or the care or services provided by, the Healthcare Center, or any acts or omissions in connection with such care or services, including care or services provided prior to the date that this Agreement was signed, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages, and whether sounding in breach of contract, tort, or breach of statutory or regulatory duties (including, without limitation, any claim based on an alleged violation of the state bill of rights for Patients/Residents of long-term care facilities or federal Patient/Resident's rights, any claim based on negligence, any claim for damages resulting from death or injury to any person arising out of care or service rendered by the Healthcare Center or by any officer, agent, or partner thereof acting within the scope of his or her employment, any claim based on any other departure from accepted standards of health care or safety, or any claim for unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted for arbitration.

The Arbitration Agreement specified "signing of this Agreement is not a precondition to admission." The Arbitration Agreement also stated it could be revoked with notice to the Facility within thirty days. The Arbitration Agreement also noted "[i]n signing this Agreement, Patient/Resident Representative binds both Patient/Resident and Patient/Resident Representative individually." Husband signed but left blank a line on the Arbitration Agreement where he was to indicate his capacity of representation.

The Arbitration Agreement also provided:

> [T]his Agreement shall be governed by and enforced under federal law, specifically, the Federal Arbitration Act (9 U.S.C. §§ 1-16), as opposed to state arbitration law, notwithstanding any provision of state law or any other understanding or agreement between the parties. The parties specifically exclude the application of South Carolina's Uniform Arbitration Act.

The Admission Agreement stated in pertinent part:

> I. This Agreement shall be construed, governed and enforced under the laws of the State of South Carolina. This Agreement together with all exhibits is the exclusive statement of the terms and conditions between the parties with respect to the matters set forth herein, and supersedes all prior agreements, negotiations, representations, tender documents, and proposals, written and oral with respect to the subject matter hereof. Variance from, or additions to, the terms and conditions of this Agreement in any written notification from Patient/Resident shall be of no effect.
>
> J. This Agreement shall not be modified or amended in any respect by Patient/Resident except by written agreement executed by Healthcare Center and Patient/Resident in the same manner as this Agreement is executed. These provisions are subject to federal and state law and may be changed periodically to comply with these laws. This Agreement may be modified or amended by Healthcare Center if Healthcare Center sends a notice of the amendment to Patient/Resident thirty (30) days prior to the implementation of the amendment. If Patient/Resident does not reject such amendment in writing within thirty (30) days of receipt of the amendment, such amendment shall be deemed accepted and incorporated into this Agreement. This Agreement shall not be assigned, directly or indirectly,

> by Patient/Resident without the prior written consent of Healthcare Center. Any attempted assignment by Patient/Resident not in full compliance herewith shall be void and of no force or effect. This Agreement is freely assignable by Healthcare Center.

Around three weeks after her admission, after complaining of increasingly severe back pain, Mable was not able to feel her legs or arms, was unable to stand, and was ultimately transported to Richland Memorial Hospital, where hospital staff confirmed she was paralyzed from the waist down. Mable never walked again and died one year later as a result of her paralysis.

Camille Hodge, Jr. (Son)—Mable and Husband's son—was appointed personal representative of Mable's estate. Husband and Son, in his capacity as personal representative, filed a notice of intent to sue and later filed separate summons and complaints[1] against Appellants.[2] In addition to filing answers, Appellants filed a motion to dismiss and compel arbitration or alternatively, to compel arbitration and stay proceedings in both actions. Appellants also requested they be allowed to depose Husband on topics solely related to the arbitration issue.

The circuit court held a hearing on the motions and subsequently issued orders denying both the motion to dismiss or compel arbitration and the motion to compel the deposition of Husband. Specifically, the circuit court found the following facts were uncontested: (1) The Arbitration Agreement was signed only by the Facility and Husband; (2) Mable and Son did not sign the Arbitration Agreement; (3) Mable was competent at the time she was admitted to the Facility and when Husband signed Arbitration Agreement; (4) Mable had not executed a general power of attorney or health care power of attorney (or any other document giving Husband or other family members the authority to make contractual commitments or waivers on her behalf) at the time she was admitted to the Facility or when Husband signed the Arbitration Agreement; (5) Mable was a patient at Providence Hospital when Husband signed the Arbitration Agreement; and (6) the Facility

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[1] Husband's suit was for loss of consortium and Son's was for negligence and gross negligence.

[2] They also named R. Dale Padgett, M.D., P.A. and Dr. Herbert A. Moscow as defendants, but because those defendants did not seek to compel arbitration, they are not involved in this appeal.

presented Mable with other documents to sign at the time of her admission to it and Mable signed those but not the Arbitration Agreement. Appellants filed a motion for reconsideration, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not reverse those findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

LAW/ANALYSIS

I. Reliance on Unpublished Opinion

Appellants maintain the circuit court erred by denying their motion to compel arbitration for several reasons. First, they contend the circuit court erred by relying on this court's unpublished opinion in *Scott v. Heritage Healthcare of Estill, LLC*.[3] They assert the circuit court utilized a "three-factor test" constructed from this court's statements in *Scott*. We disagree.

Scott involved another nursing home facility with one of the same parent entities as the defendants here. Op. No. 2014-UP-317 at 2. In that case, the personal representative of the estate of a patient who died at the facility brought suit and the defendants sought to compel arbitration. *Id.* The patient's sister had signed an arbitration agreement on behalf of the patient when admitting her to the facility. *Id.* The patient was competent when admitted to the facility, and the sister did not possess a health care power of attorney to sign either contract on her behalf. *Id.* In an unpublished opinion, this court affirmed the circuit court's decision the arbitration agreement was not enforceable against the personal representative of the estate, finding:

> [T]he evidence reasonably supports the [circuit] court's findings that [the sister] lacked authority to enter into the

[3] Op. No. 2014-UP-317 (S.C. Ct. App. filed Aug. 6, 2014).

> [a]rbitration [a]greement on [the patient's] behalf because [the patient] was competent at the time of her admission, and . . . the admissions director [for the facility] . . . agreed it would have been more appropriate for [the patient] to sign the contract herself because she was competent, and [the admissions director] did not know if [the sister] had a power of attorney.

Id. This court noted this determination disposed of the remaining issues on appeal. *Id.* at 3.

"Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. However, "[a]n error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993); *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

In the present case, the circuit court's order contained a summary of the facts from *Scott* and quoted a paragraph containing the *Scott* court's findings. The circuit court stated it found "the reasoning" of this court in *Scott* "persuasive." The circuit court indicated in a footnote:

> The *Scott* case involves the same defendant, represented by the same lawyer, making the same argument that they are making before this [c]ourt today, and thus falls close to the rule's[4] exception. Moreover, the [c]ourt does not treat *Scott* as controlling precedent, but instead views it as persuasive reasoning on the precise issue presented here.

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[4] The circuit court was referencing Rule 268(d)(2), SCACR, which states: "Memorandum opinions . . . have no precedential value and should not be cited except in proceedings in which they are directly involved."

The circuit court did examine the *Scott* decision. But as the circuit court noted, this was an unusual situation in that some of the same parties were making the same arguments in a case with similar facts. Additionally, the circuit court did not rely solely on the *Scott* opinion to make its decision. It also relied on the published opinions of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014)—both of which we discuss below—as well as other cases involving agency or arbitration. Further, this court in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016—a published opinion filed after the circuit court's ruling—also reached the same decision as in *Scott*, relying on the same principles.[5] Accordingly, even if the circuit court did err in referencing the *Scott* opinion, any error would not be reversible because it was not prejudicial. *See Visual Graphics Leasing Corp.*, 311 S.C. at 489, 429 S.E.2d at 841 ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant.").

II. Equitable Estoppel

Appellants also contend the circuit court erred by denying their motion to compel arbitration because equitable estoppel bars Respondents from denying a relationship between Mable and Husband. They maintain equitable estoppel is a different concept than the estoppel discussed in *Coleman*. Appellants also argue the circuit court erred in finding the Arbitration Agreement was separate from the Admissions Agreement because they assert the two documents were merged. They also allege that because Husband is a beneficiary of the Estate, the claims are intertwined. We disagree.

In *Thompson*,[6] the appellants asserted the circuit court should have concluded the "estate was equitably estopped from refusing to comply with the [arbitration

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[5] The *Thompson* case is similar to the present case but the opinion was not released until after the filing of the briefs in the present case, and thus, it is not discussed therein.

[6] Appellants' argument in the present case is similar to the appellants' argument in *Thompson*, in which they asserted

> [Son] represented in the contract itself that he was authorized to sign it . . . . [Daughter] was present while

agreement]. [The] [a]ppellants argue[d] Mother benefited from the [arbitration agreement] because she was admitted to [the facility], received medical care, and became capable of enforcing the [arbitration agreement]." 416 S.C. at 58, 784 S.E.2d at 687. The court recognized a

> recent conflict between the United States Supreme Court and our state courts concerning the application of state law in determining whether a non-signatory is bound by an arbitration agreement. *Compare Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 632 (2009) (holding that a nonparty to an agreement is entitled to invoke the Federal Arbitration Act (FAA) "if the relevant state contract law allows him to enforce the agreement"), *and id.* at 631 ("Because 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from [FAA] relief was error."

> the agreements were signed and made no effort to repudiate [Son's] representations that he was authorized to sign the agreements on [Mother's] behalf . . . . Now, however, [Daughter] seeks to repudiate these agreements on the basis that [Son] was not authorized to sign them on [Mother's] behalf. [Daughter] should be estopped from taking this contrary position. Additionally, . . . the very last sentence of the [arbitration agreement] notes that in signing the [arbitration agreement], the Patient/Resident Representative binds both the Patient/Resident and the Patient/Resident Representative. [Son], [Daughter], and the Estate should be estopped from denying that [Son] had the authority to sign the [arbitration agreement], or that they are bound by it . . . .

416 S.C. at 60-61, 784 S.E.2d at 689 (all alterations by court other than references to arbitration agreement).

> (citation omitted)), *with Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288-89, 733 S.E.2d 597, 601 (Ct. App. 2012) (decided in 2012 and holding "[b]ecause the determination of whether a non[-]signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question").

Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88 (alterations by court).

The *Thompson* court determined the conflict was irrelevant in that case because "the doctrine of equitable estoppel d[id] not apply to [the] estate under either South Carolina law or federal substantive law concerning arbitrability." *Id.* at 59, 784 S.E.2d at 688. The court noted that under federal substantive law, the equitable estoppel doctrine in an arbitration setting allows a party to "be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Id.* (emphasis omitted) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601). Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause. *Id.*

> Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration such as "avoiding the expense and delay of extended court proceedings" or being "capable of enforcing the [arbitration agreement]," as touted by [the] [a]ppellants in the present case—rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision.

Id. at 59-60, 784 S.E.2d at 688.

The court in *Thompson* determined the arbitration agreement in that case was

> not incorporated into the [a]dmission [a]greement; therefore, [the] [a]ppellants' assertion that Mother received benefits under the [a]dmission [a]greement, i.e., being admitted to the facility and receiving medical care, is of no moment. The two agreements are independent of one another, as reflected in the language of the [arbitration agreement] indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement]'s requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

Id. at 60, 784 S.E.2d at 688.

The *Thompson* court next examined the doctrine of equitable estoppel under South Carolina law and noted the elements as to the party to be estopped are as follows:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is *calculated* to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) *intention*, or at least expectation, that such conduct shall be acted upon by the other party; and (3) *knowledge*, actual or constructive, of the real facts.

Id. (emphases added by court) (quoting *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). The court also provided the elements in regards to the party asserting estoppel: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Id.* at 60, 784 S.E.2d at 688-89 (quoting *Boyd*, 369 S.C. at 422, 633 S.E.2d at 142).

In *Thompson*, this court recognized "Mother had dementia prior to being admitted to [the facility]. Therefore, her incapacity prevented her from forming the intent or having the requisite knowledge to mislead [the] [a]ppellants or to assent to the [arbitration agreement's] terms." *Id.* at 60, 784 S.E.2d at 689. The court noted the appellants attempted to bypass this "fact by substituting both Daughter, in her individual capacity, and Son for Mother in the estoppel analysis." *Id.*

The court found the appellants' "argument necessarily implies that Daughter, in her individual capacity, or Son may serve as the legal equivalent of Mother's estate." *Id.* at 61, 784 S.E.2d at 689. The court noted "at least one jurisdiction has rejected this type of premise." *Id.* The court quoted a Maryland Court of Appeals case, which examined an argument identical to the appellants' estoppel argument:

> Respondent is attempting to use equitable estoppel against [the patient's] [e]state based on actions that [patient's companion] took *in her individual capacity*. The fact that [the patient's companion] is *now the personal representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in *her capacity as Personal Representative* of [the patient's] [e]state, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Id. (alterations and emphases added by court) (quoting *Dickerson v. Longoria*, 995 A.2d 721, 743 (Md. 2010)). This court recognized the *Dickerson* "court also noted the absence of evidence that the owner of the nursing home facility had changed its position for the worse based on the assertion of the patient's companion that she was acting on the patient's behalf when she signed the arbitration agreement." *Id.* (citing *Dickerson*, 995 A.2d at 743). The court found that "[l]ike the facility owner in *Dickerson*, [the] [a]ppellants have failed to show how they have changed their position for the worse based on Son's representation that he was acting on Mother's behalf when he signed the [arbitration agreement]." *Id.* at 61-62, 784 S.E.2d at 689. The court stated "the [arbitration agreement] was separate from the [a]dmission [a]greement, and [the] [a]ppellants represented the [arbitration

agreement] to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution." *Id.* at 62, 784 S.E.2d at 689.

The *Thompson* court also found relevant to the equitable estoppel argument the *Dickerson* court's analysis as to "the facility owner's argument that the doctrine of unclean hands should apply to the patient's estate because the patient's companion was an heir to the estate." *Id.* at 62, 784 S.E.2d at 689. The *Dickerson* court explained:

> Respondent notes that [the patient's companion] is "the heir of [the patient's] [e]state," suggesting that we should apply the doctrine of unclean hands because [the patient's companion] may benefit if the [e]state's claims against Respondent are successful. We decline to do so. First, as we have explained, we will not hold against the [e]state acts that [the patient's companion] may have performed *in her individual capacity*. Second, the [e]state may well have other beneficiaries or creditors. We will not hold [the patient's companion's] *individual acts* against these other entities for the same reasons.

Id. at 62, 784 S.E.2d at 689-90 (alterations and emphases added by court) (quoting *Dickerson*, 995 A.2d at 744 n.23). The *Thompson* court determined in that case the appellants could "not hold Mother's estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities. Therefore, the circuit court properly rejected [the] [a]ppellants' equitable estoppel theory." *Id.* at 62, 784 S.E.2d at 690.

In *Coleman*, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility and its parent entities sought to compel arbitration. *Id.* The circuit court denied the motion to compel. *Id.* On appeal, the supreme court noted the "equitable estoppel argument is premised on [the appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged." *Id.* at 355, 755 S.E.2d at 455. The court stated that in South Carolina,

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Id. (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The *Coleman* court found "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, [the] appellants are correct that there was a merger." *Id.* The court noted "[t]he admission agreements contain this language in a section titled 'Entirety of Agreement':"

> This [a]greement, including all Exhibits hereto, and the [a]rbitration [a]greement between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this [a]greement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this [a]greement or in the [a]rbitration [a]greement. This [a]greement may be amended only by a written agreement signed on behalf of the Facility and the Resident.

Id.

The supreme court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger

not apply." *Id.* The court also noted "[e]ven if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, [the] appellants." *Id.* at 355-56, 755 S.E.2d at 455. The court determined the circuit court properly denied the appellants' equitable estoppel argument because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

In the present case, the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. Like in *Coleman*, the Arbitration Agreement recognized a separatedness as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way *relating to this Agreement or the Patient/Resident's Admission Agreement.*" Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication and instead provided the Admissions Agreement could only be amended by the patient with written agreement executed by the Facility and the patient in the same manner as the Admissions Agreement was executed or if the Facility sent a notice of the amendment to the patient and the patient did not reject the amendment within thirty days. Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission. Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.

Moreover, we disagree with Appellants' assertion that *Coleman* does not address the concept of equitable estoppel. In *Coleman*, the appellants argued "even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless *equitably estopped* to deny the [arbitration agreement]'s enforceability." *Id.* at 354, 755 S.E.2d at 455 (emphasis added). The supreme court noted the "[a]ppellants' *equitable estoppel argument* is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged." *Id.* at 355, 755 S.E.2d at 455 (emphasis added). This court also applied the same reasoning in *Thompson* to the equitable estoppel arguments. 416 S.C. at 60, 784 S.E.2d at 688. Likewise, the same reasoning applies in the present case. Because Mable, Husband, and the Estate received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged. The only agreement from which Respondents even arguably received a benefit was the Admission Agreement because Mable

was admitted to the Facility as a result of it. However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted. Respondents are not seeking to enforce the Arbitration Agreement nor have they previously tried to do so. Further, even if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar Respondents' claims.[7]

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[7] Appellants also maintain that because Husband signed the Arbitration Agreement, his claims are subject to the Arbitration Agreement and as his claims are intertwined, the Estate should be compelled to arbitrate its claims as well. We agree with Respondents this argument is unpreserved.

"[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (quoting *Wilder Corp. v. Wilke*, 330 S.C.71, 76, 497 S.E.2d 731, 733 (1998)). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 301-02, 641 S.E.2d at 907 (quoting Jean Hoefer Toal *et al*, *Appellate Practice in South Carolina* (2d. ed. 2002)).

Appellants' specific argument was never made to the circuit court. Appellants contend in their reply brief this argument is preserved because they assert they filed two separate motions to dismiss and compel. However, their motion to dismiss and compel as to Husband's cause of action references the affidavit and materials in Son's cause of action—which makes no mention of this argument—and makes no separate arguments. The Memorandum in Support of their motion in the record references only Son as the plaintiff in the caption; that memo does not include any argument as to why Husband could be forced to arbitrate as the signor, as opposed to Son. At the hearing before the circuit court, Appellants stated "a memo was filed in the case involving the Estate but it basically covers both cases. The issue is the same in both cases." Later at the hearing, Appellants stated "the one memo [they had already argued] would be for both cases." Additionally, Appellants did not make any argument on this basis at the hearing before the

III. Common Law Agency

Additionally, Appellants contend the circuit court erred in denying their motion to compel arbitration by finding there was no common law agency between Mable and Husband. They argue that because Husband had taken over many of Mable's medical affairs, he had become her agent. They also maintain the circuit court erred in failing to find the evidence established an apparent agency relationship. We disagree.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)); *see also Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) ("Agency . . . results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n*, 310 S.C. at 145-46, 425 S.E.2d at 773. "In an actual agency case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so." *Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009); *see also Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) ("The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent." (quoting *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982))).

> "The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the

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circuit court. Further, the circuit court made no ruling on any such issue, and Appellants' motion for reconsideration makes no mention of this argument. Accordingly, because they never raised this specific argument as to why the Agreement could be enforced against Husband on this basis or obtained a ruling on it, this argument is not preserved.

> mere fact of the marital relationship." *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984). Under such rules, "the relationship of agency need not depend upon express appointment and acceptance thereof. Rather, the agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case." *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004).

Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 189, 717 S.E.2d 74, 77 (Ct. App. 2011) (alterations by court).

"A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987). "The existence of an agency relationship is . . . determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011). "[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *McCall*, 294 S.C. at 6, 362 S.E.2d at 29 (alteration by court) (quoting *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939)). "A true agency relationship may be established by evidence of actual or apparent authority." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn*, 366 S.C. at 39-40, 619 S.E.2d at 448 (Ct. App. 2005) (alteration by court) (quoting *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)). However, "such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962).

In *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990), the circuit court granted summary judgment to respondents, who had denied in their affidavits a purported agent was actually their agent, as did the purported agent. This court determined that even though the purported agent stated in a deposition he was respondents' agent, because no other affidavits or

depositions corroborated that claim, there was no question of fact as to agency and it affirmed the grant of summary judgment to respondents. *Id.* at 130, 399 S.E.2d at 165. This court noted, "The law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." *Id.* In *Snell v. Parlette*, 273 S.C. 317, 322-23, 256 S.E.2d 410, 413 (1979), our supreme court found "[t]he testimony of [a purported agent who signed an agreement on behalf of ten relatives] that she was acting as the agent of her ten nonresident relatives is entitled to some weight, but is insufficient without more to establish an agency relationship."

In the *Dickerson* case discussed above, the Court of Appeals of Maryland analyzed whether an estate was required to arbitrate its claims against a nursing home facility when the personal representative of the estate represented herself as the decedent's agent when she signed the arbitration agreement on his behalf when he was admitted to the nursing home. 995 A.2d at 725-26. In that case, the court noted:

> [T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury. *See Walther v. Sovereign Bank*, 872 A.2d 735, 754 (Md. 2005) (explaining that "the 'loss of the right to a jury trial *is a necessary and fairly obvious consequence* of an agreement to arbitrate'" (quoting *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001))).

Dickerson, 995 A.2d at 736-37.

The *Dickerson* court found the facts in that case suggested the decedent "conferred on the [personal representative—]directly or through acquiescence[—]actual authority to make some decisions on his behalf" concerning medical treatments, admission into medical facilities, or his finances. *Id.* at 736. The court found, "This limited range of acts performed on the [decedent]'s behalf suggest that, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that." *Id.*

The *Dickerson* court provided:

> Courts in other jurisdictions have recently concluded that the decision to sign an arbitration agreement was not a health care decision, and they based that decision on the fact that signing the arbitration agreement was not a prerequisite to admission to a health care facility. In *Koricic v. Beverly Enterprises - Nebraska, Inc*, . . . , the Supreme Court of Nebraska concluded that a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement on her behalf. 773 N.W.2d 145, 149-52 (Neb. 2009). In reaching that decision, the court explained that the decision to sign the arbitration agreement was not within the son's authority because the agreement "was optional and was not required for [the mother] to remain at the [nursing home] facility." *Id.* at 151. Similarly, the Supreme Court of Mississippi concluded in *Hinyub* that the decision to sign an arbitration agreement is not a "health care decision" where the patient or his agent "was not required to sign the arbitration provision to admit [the patient] to the [health care facility]." *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008). The Mississippi court drew a distinction between Hinyub's case and previous cases in which "the arbitration provision was an essential part of the consideration for the receipt of 'health care.'" *Id.*

Dickerson, 995 A.2d at 738 (alterations by court except ellipsis).

The *Dickerson* court agreed with the reasoning of those courts, holding:

> The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement. In such a case, the decision primarily concerns the legal rights of the patient with respect to resolving legal claims. If signing the arbitration agreement is necessary to receive health care, then the decision to sign the

> agreement is a health care decision because the receipt of health care depends on whether the patient agrees to arbitrate his or her claims. In that case, the decision to sign the arbitration agreement is effectively a decision about where and whether to receive health care, either from a facility that requires the patient to sign an arbitration agreement, from a facility that does not impose such a requirement, or from no facility at all.

Dickerson, 995 A.2d at 739.

When analyzing whether the decision to sign the arbitration agreement was a health care decision within the scope of the personal representative's authority to act on the decedent's behalf, the court noted the arbitration agreement was a free-standing contract, separate from the admission agreement, and explicitly stated it was not a precondition for admission. *Id*. The court accordingly determined "the decision to enter into the arbitration agreement was not a health care decision; instead, it primarily concerned [a] waiver of [a] right of access to the courts and [a] right to a trial by jury." *Id.* The court found no evidence was presented the decedent conferred on the personal representative the authority to waive those rights. *Id.* The court therefore concluded the personal representative "did not have actual authority to sign the arbitration agreement." *Id.* at 739-40.

In *Curto v. Illini Manors, Inc.*, 940 N.E.2d 229, 231 (Ill. App. Ct. 2010), a wife filed a complaint against a nursing home as administrator of her deceased husband's estate, and the nursing home sought to compel arbitration. The wife had signed an admission contract on the preprinted signature line that designated her as the "Legal Representative," and her husband did not sign the contract. *Id.* The wife had also signed a separate arbitration agreement above a line that stated "Signature of Resident Representative," while the husband did not sign the arbitration agreement. *Id.* The Appellate Court of Illinois found wife's signature on the nursing home documents did not confer express or implied authority to her. *Id.* at 233. The court noted it was joining the majority of states reviewing this issue, which

> followed *Dickerson*'s reasoning and have concluded that a spouse or other family member did not have actual authority to sign an arbitration agreement on the

> resident's behalf. *Koricic*, 773 N.W.2d 145 (decedent's son did not possess authority necessary to sign arbitration agreement); *Hinyub*, 975 So. 2d 211 (daughter did not have authority to enter arbitration agreement whe[n] there was no declaration of resident's inability to manage his affairs and no power of attorney in the record); *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809 (Ky. Ct. App. 2008) (spouse lacked authority to bind resident to arbitration agreement); *Goliger v. AMS Props., Inc.*, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2004) (daughter was not acting as mother's agent when she signed arbitration agreement without some evidence of authority beyond merely signing admission contracts). *See also Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So. 2d 382 (Miss. 2008); *Sennett v. Nat'l Healthcare Corp.*, 272 S.W.3d 237 (Mo. Ct. App. 2008); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. Ct. App. 2007); *Flores v. Evergreen at San Diego, LLC*, 55 Cal. Rptr. 3d 823 (Cal. Ct. App. 2007); *Landers v. Integrated Health Servs. of Shreveport*, 903 So. 2d 609 (La. Ct. App. 2005); *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002).

Curto, 940 N.E.2d at 234-35.

The court noted, "Even whe[n] a health care power of attorney was present, courts have concluded that the spouse lacked authority to sign the arbitration agreement . . . because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights." *Id.* at 234. The court distinguished cases cited by the facility from "a minority of courts that have enforced nursing home arbitration agreements signed by a family member." *Id.* at 235. The court determined:

> Those cases follow the reasoning of *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033 (Fla. Dist. Ct. App. 2009). In *Sovereign Healthcare*, the Florida appellate court held that a daughter-in-law had the authority to sign a contract for

> admission on the resident's behalf, including the arbitration agreement, in reliance on a durable power of attorney. The durable power of attorney in that case included a catch-all provision giving the attorney-in-fact the authority "to sign any and all releases or consent required." *Sovereign Healthcare*, 14 So. 3d at 1035; *see also Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009) (signature of patient's son on arbitration agreement was enforceable whe[n] son had general power of attorney executed by father); *Five Points Health Care, Ltd. v. Mallory*, 998 So. 2d 1180 (Fla. Dist. Ct. App. 2008) (daughter had durable power of attorney to prosecute, defend and settle all actions or other legal proceedings and to "do anything" regarding resident's estate). These cases, however, are distinguishable. In each case, there is at least some evidence of actual authority granting general powers of attorney to the spouse or family representative. Here, [the facility] has produced neither a general or property power of attorney, nor an order of guardianship authorizing [the wife] to administer her husband's legal affairs. Thus, [the wife] lacked actual authority to sign the arbitration agreement on [her husband's] behalf.

Curto, 940 N.E.2d at 235.

In *United Health Services of Georgia, Inc. v. Alexander*, 802 S.E.2d 314, 317 (Ga. Ct. App. 2017), *cert. denied*, the Court of Appeals of Georgia disagreed that the daughter's previous signing of certain medical documents for her mother who had not objected amounted to an express grant of general authority to act as her agent without limitation. In *Hogsett v. Parkwood Nursing & Rehabilitation Center, Inc.*, 997 F. Supp. 2d 1318, 1325 (N.D. Ga. 2014), the court determined that even if it could be assumed a patient must have deduced her daughter had signed the documents a facility required for her admission because she had signed nothing, one cannot assume the mother "would have had the sophistication to understand that, included among the standard medical forms, would be a separate agreement to give up her right to a jury trial should the rehabilitation center be guilty of

negligence," especially considering the mother's "consent to the arbitration agreement was not a prerequisite to her admission."

In *Poole*, 648 S.E.2d at 432, when admitting his wife to a nursing home, a husband signed the admission documents. The son, who had power of attorney, was present during the signing but testified "he did not review the documents or discuss them with his father." *Id.* The Court of Appeals of Georgia found:

> These circumstances do not reveal an agency relationship between [the husband and wife]. [The wife] was not present when her husband executed the arbitration agreement, and the mere fact that he signed on the "authorized representative" line cannot establish agency. Moreover, although [the son] was present when his father signed the document, [the facility] asserts that they did not then know that [the son] held a durable power of attorney for his mother. [The son]'s failure to object to the arbitration agreement, therefore, could not have led [the facility] to believe that [the son] had given his father apparent authority to execute the document.

Id. at 433 (citation omitted).

"[A] power of attorney should be evidenced by an instrument in writing." *Matter of Celsor*, 330 S.C. 497, 501, 499 S.E.2d 809, 811 (1998).

"The relationship of agency need not depend upon express appointment and acceptance thereof. Generally, agency may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case." *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532 (citation omitted). "To establish apparent authority, the proponent must show (1) 'the purported principal consciously or impliedly represented another to be his agent;' (2) the proponent relied on the representation; and (3) 'there was a change of position to the [proponent's] detriment.'" *Thompson*, 416 S.C. at 54, 784 S.E.2d at 685 (alteration by court) (quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. (emphasis added by court) (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* at 54-55, 784 S.E.2d at 686 (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630). "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.* at 55, 784 S.E.2d at 686 (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630).

In *Thompson*, this court determined "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Id.* at 55, 784 S.E.2d at 686. Like *Scott*, *Thompson* also involved a nursing home facility seeking to compel arbitration with the same parent entities as those in the present case. *Id.* at 48, 784 S.E.2d at 682. In *Thompson*, a woman's daughter and son had their mother transferred from a hospital to a nursing home facility. *Id.* The son signed an admission agreement, an arbitration agreement, and several other documents on behalf of his mother, who suffered from dementia. *Id.* The mother was not present at the time as she was in the process of being transported to the facility. *Id.* After the mother's death, the daughter brought suit, individually and as personal representative, and the facility and its owners filed a motion to compel arbitration. *Id.* The circuit court denied the motion to compel, finding the son did not have authority to execute the arbitration agreement on his mother's behalf under either common law agency principles or the Adult Health Care Consent Act.[8] *Id.* at 48-49, 784 S.E.2d at 682. This court determined "the evidence does not show that Son had either actual or apparent authority to execute the [arbitration agreement] on Mother's behalf. Therefore, the circuit court properly concluded Son did not have the authority to bind Mother to the [arbitration agreement]." *Id.* at 56, 784 S.E.2d at 686.

[8] S.C. Code Ann. §§ 44-66-10 to -80 (2018).

In the present case, at the hearing before the circuit court, the parties argued over the interpretation of the supreme court's opinion in *Dean*, which involved a different facility with one of the same parent entities as here. 408 S.C. at 376, 759 S.E.2d at 729-30. In that case, the circuit court denied the motion to compel arbitration for reasons not implicated in the instant case. *Id.* at 378, 759 S.E.2d at 731. The supreme court reversed and remanded to the circuit court for consideration of other arguments but in a footnote addressed the issue in our present case. *Id.* at 387, 759 S.E.2d at 736. The supreme court stated:

> We are concerned that, according to the Record, the patient did not sign either the residency agreement or the [a]greement on her own behalf, despite being competent at the time, nor did Respondent possess a health care power of attorney to sign either contract on the patient's behalf. The parties did not address this issue on appeal, and Respondent's only argument that this issue should serve as an additional sustaining ground was located in a cursory footnote in her brief. Accordingly, we merely note that, on remand, the circuit court must engage in a full inquiry into this matter prior to any attempt to enforce the [a]greement.

Id. at 388-89 n.13, 759 S.E.2d at 736 n.13.

Here, the circuit court did not err in finding Husband was not Mable's agent. At the hearing, Appellants argued the evidence showed Mable authorized Husband to sign on her behalf and they had an actual or apparent agency relationship. The circuit court noted "[i]n the absence of any evidence that Mable . . . gave . . . [H]usband any express authority to act for her, UPAC argues that Mable . . . 'represented' that . . . [H]usband was authorized to act on her behalf by 'allowing' him to procure her admission to the . . . [F]acility." Husband's signing of the Arbitration Agreement, Admissions Agreement, and other forms does not make him Mable's agent. Mable did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that *Mable*, as the principal, represented Husband was her agent. Further, because Mable was competent,

unlike the patient in *Thompson* for whom the family members were allowed to sign medical forms under the Adult Health Care Consent Act, no argument can be made the Adult Health Care Consent Act gave Husband the right to sign medical forms. Similarly, Husband did not have Mable's health care power of attorney. Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686. Accordingly, the circuit court did not err in finding Husband was not Mable's agent.

IV. Third-Party Beneficiary

Appellants also assert the circuit court erred by denying their motion to compel arbitration because it incorrectly found Mable was not a third-party beneficiary of the Arbitration Agreement. At oral argument, Appellants conceded the *Thompson* opinion extinguished their third-party beneficiary argument. *See Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (holding "[a]s to the [arbitration agreement] between [the] [a]ppellants and Son in his individual capacity, 'a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.'" (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010))); *id.* (finding the daughter was "not attempting to enforce the [arbitration agreement] on behalf of Mother's estate. Rather, she has asserted tort claims against [the] [a]ppellants arising out of the patient-provider relationship created by the separate [a]dmission [a]greement"). Therefore, we will not address Appellants' third-party beneficiary argument.

V. Deposition

Appellants contend the circuit court erred by denying their motion to compel the deposition of Husband, whose testimony they assert is relevant to whether the arbitration agreement is binding. Appellants contend because Husband signed medical documents for her on other occasions, they presented evidence Mable

authorized him to make medical decisions on her behalf and they should be allowed to inquire into the scope of that authority.[9] We disagree.

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Rule 26(a), SCRCP.

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[9] "[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008). However, courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review but not when the issues appealed lack a sufficient nexus. *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Appellants raise their motion to compel the deposition as part of their reasoning as to why the circuit court erred in denying the motion to compel arbitration. Accordingly, because it has a sufficient nexus to the appeal of the denial motion to compel arbitration, it is appropriately before this court and we will address it.

"A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Id*.

Appellants argued before the circuit court "the evidence will show . . . [Mable] authorized her husband to sign this agreement on her behalf and that there's an actual or an apparent agency there." They maintained "essentially the issue is . . . was [Husband] her agent for the purposes of admitting her to the nursing home and executing this arbitration agreement. . . . [W]hen we take his deposition[,] the deposition will support that." They further asserted that "when [Mable] was admitted to other hospitals before, [Husband] . . . executed consents and admissions agreements." They indicated they would ask Husband about these instances if they were allowed to depose him. They provided to the court documents Husband executed on Mable's "behalf for healthcare and for responsibility for paying bills and that kind of thing in other situations." Appellants asserted the documents showed Husband "was [Mable's] agent for executing *these kinds of documents*." (emphasis added). Respondents contended the law in South Carolina does not allow a relative to waive a party's right to a jury trial.

The circuit court denied Appellants' motion to compel the deposition of Husband, determining:

> Because the facts material to the [c]ourt's decision are not contested and because the parties submitted, without objection, all documents that they wished the [c]ourt to consider, the [c]ourt concludes that the deposition of [Husband] would not provide any additional material facts that would be helpful to the [c]ourt in reaching its decision.

Apparent authority occurs when the *principal* by written or spoken words or any other conduct, when reasonably interpreted, causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. *Thompson*, 416 S.C. at 54, 784 S.E.2d at 685. "Apparent authority

must be established based upon manifestations by the principal, not the agent. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *Town of Kingstree v. Chapman*, 405 S.C. 282, 314, 747 S.E.2d 494, 510 (Ct. App. 2013) (quoting *R & G Constr.*, 343 S.C. at 432-33, 540 S.E.2d at 118). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." *Id.* (quoting *WDI Meredith & Co. v. Am. Telesis, Inc.*, 359 S.C. 474, 478-79, 597 S.E.2d 885, 887 (Ct. App. 2004)). "To establish apparent agency, a party must prove the purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction." *Id.* "The crux of apparent agency is that the principal holds out to a third party the agent is acting on his or her behalf." *Id.* at 316, 747 S.E.2d at 511.

"[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Frasier*, 323 S.C. at 245, 473 S.E.2d at 868. However, "such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller*, 240 S.C. at 83, 124 S.E.2d at 606. "[A] power of attorney should be evidenced by an instrument in writing." *Matter of Celsor*, 330 S.C. at 501, 499 S.E.2d at 811. "The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." *Stiltner*, 395 S.C. at 189, 717 S.E.2d at 77 (alterations by court) (quoting *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532). "[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686.

In *Klippel*, 303 S.C. at 130-31, 399 S.E.2d at 165, the circuit court granted summary judgment to respondents who, along with the alleged agent, had denied in their affidavits an alleged agent was actually their agent. This court held that even though the purported agent stated in a deposition he was respondents' agent, because no other affidavits or depositions corroborated that claim, no question of fact was presented as to agency, and the court affirmed the grant of summary judgment to respondents. *Id.* at 130, 399 S.E.2d at 165. This court observed "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." *Id.* In *Snell*, 273 S.C. at 322-

23, 256 S.E.2d at 413, our supreme court determined "[t]he testimony of [a purported agent who signed an agreement on behalf of ten relatives] that she was acting as the agent of her ten nonresident relatives is entitled to some weight, but is insufficient without more to establish an agency relationship."

As described above, the Arbitration Agreement was not a prerequisite to admission and the Arbitration Agreement and the Admission Agreement in this case did not merge. Accordingly, signing the Arbitration Agreement was not a healthcare decision. Further, like in *Dickerson*, nothing indicates Mable realized Husband would sign an arbitration agreement in admitting her to the Facility.

Because apparent agency involves Mable's representations to the Facility, Husband's deposition would not add anything to that determination. Appellants argued Husband's deposition would show he was Mable's agent for the purposes of admitting her to the Facility. Appellants' argument Husband was Mable's agent revolved around his representations to the Facility and that Husband did not rebut the presumption he had the authority to execute contracts on Mable's behalf.

Appellants only evidence Husband was Mable's actual agent was based on the fact he previously had signed contracts on her behalf. Much like *Dickerson*, those contracts cited by Appellants were all healthcare contracts or financial responsibility for bills arising out of healthcare procedures. Husband noted on many of those contracts as authority that he was the patient's husband. However, simply being married does not amount to agency. *See Stiltner*, 395 S.C. at 189, 717 S.E.2d at 77 ("The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." (alterations by court) (quoting *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532)). Further, a power of attorney must be in writing. *See Matter of Celsor*, 330 S.C. at 501, 499 S.E.2d at 811. Even if Husband had some authority as Appellants contend is evidenced by Husband signing these documents, this court has held "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686. Moreover, like in *Kippel*, even if Husband provided in a deposition he was Mable's agent, this alone would not be enough to prove agency. *See* 303 S.C. at 130, 399 S.E.2d at 165. Therefore, the circuit court did not abuse its discretion in denying the motion to compel Husband's deposition.

CONCLUSION

Accordingly, the circuit court's denial of the motion to compel Husband's deposition and the motion to compel arbitration is

AFFIRMED.

WILLIAMS, J., and LEE, A.J., concur.