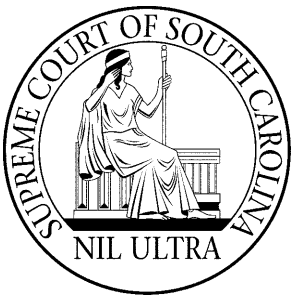

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 15, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

The State, Respondent,

v.

Walter M. Bash, Petitioner.

Appellate Case No. 2015-001582

ORDER

After careful consideration of the petition for rehearing, we grant rehearing. We dispense with further briefing and substitute the attached opinion for the previous opinion. The attached opinion clarifies the circuit court did not rely on the officers' subjective intent to determine whether the officers conducted a search and that the officers' objective purpose is the proper concern, not their subjective intent.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ Costa M. Pleicones A.J.

s/ DeAndrea Benjamin A.J.

Columbia, South Carolina
March 15, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Walter M. Bash, Petitioner.

Appellate Case No. 2015-001582

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27692
Heard September 7, 2016 – Refiled March 15, 2017

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston; all for Respondent.

JUSTICE FEW: Walter Bash was indicted for trafficking in cocaine and cocaine base. The circuit court found officers conducted an illegal search, and suppressed

the drugs. The State appealed. The court of appeals reversed the circuit court's suppression order and remanded for trial. We issued a writ of certiorari to review the court of appeals' decision. We now reverse the court of appeals and reinstate the circuit court's order suppressing the evidence.

I. Facts and Procedural History

The Berkeley County Sheriff's Office drug enforcement unit received an anonymous tip that "drug activity" was occurring at a home on Nelson Ferry Road near Moncks Corner. An unnamed officer in the drug enforcement unit relayed the tip to Sergeant Lee Holbrook, who was patrolling the area with Sergeant Kimberly Milks. Sergeant Holbrook testified, "We were in the Moncks Corner area . . . , and one of the agents . . . received . . . a phone call stating that there was drug activity at a particular residence, and we . . . drove over there and handled it."

He explained that as they located the house they noticed some men "behind the house in a grassy area." To get to the grassy area, Sergeant Holbrook turned his vehicle off Nelson Ferry Road onto a public dirt road called Shine Bash Lane that ran along the side of the property where the house was located. Sergeant Holbrook testified, "As we travelled down . . . Shine Bash, there were several [men] standing . . . by this little shed, and there was a pickup truck pulled in onto the grass area." The "small utility shed" was just outside a fence surrounding the home. Sergeant Milks testified "as we go down Shine Bash Lane, there's a tree that you can see through [into] the yard" where she saw a pickup truck and three men. The officers pulled off of Shine Bash Lane onto the property, approximately twenty feet from the grassy area where the men were standing.

The officers exited the car. Sergeant Milks testified there were two men by a grill and a third man at the back of the truck. Sergeant Holbrook testified one of the men "thr[ew] down . . . what appeared to be cocaine," and "almost instantly" afterward, a fourth man opened the passenger door of the truck and ran into the nearby woods. Sergeant Milks and several other officers chased the man while Sergeant Holbrook detained the men remaining in the grassy area. This group included Bash, who got out of the driver's side of the truck. After detaining the men, Sergeant Holbrook looked through the window of Bash's truck to see "if there [were] other individuals in that truck hiding." He saw "in plain view what appeared to be cocaine weighing scales" and "cocaine base." Sergeant Holbrook arrested Bash. A grand jury subsequently indicted him for trafficking "four

hundred grams or more" of cocaine in violation of subsection 44-53-370(e)(2)(e) of the South Carolina Code (Supp. 2016), and trafficking "ten grams or more, but less than twenty-eight grams" of cocaine base in violation of subsection 44-53-375(C)(1) of the South Carolina Code (Supp. 2016).

Prior to trial, Bash moved to suppress the drugs. He argued the police violated the Fourth Amendment of the United States Constitution by entering the curtilage of the home without a warrant to conduct a search. The circuit court granted Bash's motion. The court of appeals reversed the circuit court's decision to suppress the evidence. *State v. Bash*, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015). We granted Bash's petition for certiorari.

II. Fourth Amendment

The people's right under the Fourth Amendment to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. CONST. amend. IV, "extends . . . to . . . the curtilage of the home," *State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) (citing *United States v. Dunn,* 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987) and *Rogers v. Pendleton,* 249 F.3d 279, 287 (4th Cir. 2001)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (citing *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978)).

"On appeals from a motion to suppress based on Fourth Amendment grounds, . . . this Court reviews questions of law de novo." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). As to a circuit court's finding of fact, we must affirm "if there is any evidence to support it," and "may reverse only for clear error." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012).

III. Curtilage

The circuit court ruled the grassy area where Bash and the other men were standing when the officers approached them was part of the curtilage of the home.[1] The

[1] The court of appeals stated "it is unclear whether the circuit court ruled on whether the grassy area at issue was part of the curtilage." 412 S.C. at 425 n.4, 772 S.E.2d at 540 n.4. We disagree that the ruling is unclear. Preliminary to its ruling,

curtilage of a home is "the land immediately surrounding and associated with the home" and is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984). As we have stated, curtilage can include "outbuildings, yard around dwelling, garden." *State v. Wiggins*, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998) (discussing curtilage in the context of the duty to retreat under the law of self-defense (citing 40 Am. Jur. 2d *Homicide* § 168 (1968))); *see also* 79 C.J.S. *Searches* § 34 (2006) ("The curtilage is defined by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. It is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life. The primary focus is whether the area harbors those intimate activities associated with domestic life and the privacies of the home." (footnotes omitted)).

We find there is evidence in the record to support the circuit court's determination that the grassy area was within the curtilage of the home. First, both Sergeant Holbrook and Sergeant Milks described the grassy area as part of the "backyard" or "yard area." The grassy area included a grill, and Sergeant Milks testified that when she got out of the vehicle she "saw the two [men] over by the grill." The use of a grill is an activity closely associated with the use of a home.[2] The area also included a shed, and the area was located only a few feet from a fence surrounding the home. In the short distance between the fence and the grassy area, there was a clothes line.[3] Additionally, Shine Bash Lane—though a public road—is a short

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the circuit court engaged in extensive discussion with counsel about the legal concept of curtilage and the facts in the record relating to those principles. Then, explaining its ruling, the circuit court stated the officers "suited up and went into the curtilage of this . . . house based on an anonymous tip alone."

[2] *See United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015) (finding the presence of a cooking grill indicated the resident "made personal use of the area," and thus the grill was one fact supporting a determination the area was part of the curtilage); *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 652 (6th Cir. 2006) (noting the fact the defendants "frequently kept a grill" on their porch as supporting the existence of the area as part of the curtilage).

[3] *See United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997) (finding the defendants using the area "for such things as hanging their wet laundry on a clothesline to dry" was one fact supporting a finding the area was curtilage).

dirt road that reaches only a few residences. It runs very close to the home and comes to a dead end on the property where the home sits. Large trees line the side of the road between Shine Bash Lane and the home. These trees continue past the shed and partially block sight from the road to the grassy area where the men were standing. Sergeant Milks testified she had to look through a tree to see into the yard from Shine Bash Lane.[4] Finally, the circuit court had before it numerous photographs showing the house, the yard, and the extent to which the grassy area was connected to the home and concealed from public view.

The State points out the Supreme Court of the United States has identified four factors courts should consider in deciding whether an area is part of the curtilage of a home, citing *Dunn*, 480 U.S. at 301, 107 S. Ct. at 1139, 94 L. Ed. 2d at 334-35. The *Dunn* court stated:

> Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id. The State argues "the circuit court judge did not appear to have considered *any* of the factors." However, the record indicates the circuit court was aware of and did consider *Dunn*. Near the end of the hearing, the State cited *Dunn* and offered to provide a copy of it to the court. The circuit court immediately responded, "I have it."

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[4] *See United States v. Johnson*, 256 F.3d 895, 902 (9th Cir. 2001) ("[I]n rural pieces of property . . . , natural boundaries such as thick trees or shrubberies may also indicate an area 'to which the activity of home life extends.'" (citation omitted)).

In *Dunn*, the Supreme Court stated "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. at 301, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335; *see also United States v. Jackson*, 728 F.3d 367, 373-74 (4th Cir. 2013) (stating the Supreme Court "cautioned" for the limited use of the *Dunn* factors). While the circuit court should have made findings as to the *Dunn* factors,[5] we find the court's analysis was properly focused on the "centrally relevant consideration" the Supreme Court identified in *Dunn*.

We find the circuit court correctly applied the applicable principles of law regarding curtilage, and the evidence supports the court's factual finding that the grassy area in the backyard was sufficiently tied to the home to be within the curtilage. Therefore, we affirm the circuit court's finding the area where the officers encountered Bash was within the curtilage of the home.

IV. Search

A law enforcement officer must have a warrant to enter a home for the purpose of conducting a search, *see State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015) (stating "the Fourth Amendment requires the police to have a warrant in order to conduct a search"), unless an exception applies, *see State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (listing exceptions to the warrant requirement). *See generally State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014) (stating "warrantless searches and seizures inside a man's home are presumptively unreasonable absent a recognized exception to the warrant requirement"). This protection "extends . . . to . . . the curtilage of the home." *Herring*, 387 S.C. at 209, 692 S.E.2d at 494; *see also Covey v. Assessor of Ohio*

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[5] After reciting the four factors, the *Dunn* Court engaged in an extensive analysis of them. 480 U.S. at 302-03, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335-36. In this case, however, the State never requested the circuit court to make findings as to the *Dunn* factors, and the State did not object to the circuit court's failure to do so. Thus, we question whether any error in the lack of findings on the *Dunn* factors is preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Cty., 777 F.3d 186, 192 (4th Cir. 2015) ("The Fourth Amendment protects homes and the 'land immediately surrounding and associated' with homes, known as curtilage . . . ." (quoting *Oliver*, 466 U.S. at 180, 104 S. Ct. at 1742, 80 L. Ed. 2d at 225)). The circuit court determined the officers in this case entered the curtilage for the purpose of conducting a search, and thus violated the Fourth Amendment because they did not have a warrant and no exception applied.

When officers "physically occup[y] private property for the purpose of obtaining information," a search has occurred. *United States v. Jones,* 565 U.S. 400, 404, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911, 918 (2012). The majority in *Jones* explained:

> Whatever new methods of investigation may be devised, our task, *at a minimum,* is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

565 U.S. at 406 n.3, 132 S. Ct. at 950–951 n.3, 181 L. Ed. 2d at 919 n.3; *see also* 565 U.S. at 413, 132 S. Ct. at 954, 181 L. Ed. 2d at 923 (Sotomayor, J., concurring) ("I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.'"); *United States v. DE L'Isle*, 825 F.3d 426, 431 (8th Cir. 2016) ("It is clear that a physical intrusion or trespass by a government official constitutes a search within the meaning of the Fourth Amendment."); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches."). *Cf. Jackson*, 728 F.3d at 373 (affirming "the district court's conclusion that the officers' actions did not involve an unlicensed physical intrusion of a constitutionally protected area" and thus was not "an illegal search or seizure" and noting "if [the officers] breached the curtilage of Cox's apartment . . . , it would be fairly clear that their actions . . . would implicate the protections of the Fourth Amendment").

In this case, after receiving an anonymous tip indicating illegal activity was occurring at the home, the officers "drove over there and handled it." Sergeant

Holbrook told Sergeant Milks, "Hey, let's go . . . we need to check out this drug tip that we got." On their way, they radioed other officers to meet them there, and they arrived at the home with other officers in cars behind them. Sergeant Milks testified that on their way, "We put on our vests, our hat . . . that we wear that says 'Sheriff' on it; a vest that says 'Sheriff' on it." Later, when applying for a warrant to search the home, Sergeant Milks signed an affidavit stating, "Members of the Berkeley County drug enforcement unit were investigating a suspicious complaint at . . . Nelson Ferry Road . . . ." When Sergeant Holbrook was asked, "What was your reason for pulling on to the grass?" he responded,

> I . . . received a tip that there was some type of active drug activity going on at that time. As I approached the house, I didn't see anybody around it, and that just caught my attention. So, I just simply drove back there, and that activity was supposed to be happening in the . . . rear of the property, so that was my reasoning . . . I just didn't feel the need to actually make contact with the actual house. I just went down Shine Bash Lane.

Based on this evidence, the circuit court found the officers conducted a search. The court stated the Fourth Amendment does not "allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." The court then ruled:

> [The officers] roll[ed] up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any.

The State contends that the officers did not conduct a search, but entered the property simply to conduct a "knock and talk." The court of appeals accepted the State's argument. *Bash*, 412 S.C. at 428, 772 S.E.2d at 541. A knock and talk "occurs when a law enforcement officer . . . approaches a residence by a route available to the general public, knocks on the front door of the residence, and speaks with an occupant of the residence who responds to the knocking." 68 Am.

Jur. 2d *Searches and Seizures* § 21 (2010).[6] A knock and talk is not a search under the Fourth Amendment. *State v. Counts*, 413 S.C. 153, 164-65, 776 S.E.2d 59, 66 (2015) (discussing the knock-and-talk procedure in detail); *see also United States v. Walker*, 799 F.3d 1361, 1364 n.1 (11th Cir. 2015) (stating "a warrantless . . . knock and talk . . . is not considered a search"); *Rogers v. Pendleton*, 249 F.3d 279, 289–90 (4th Cir. 2001) ("[P]olice officers do not need a warrant to do what any private citizen may legitimately do—approach a home to speak to the inhabitants.").

We agree with the circuit court the officers conducted a search of the grassy area, not a knock and talk. First, Sergeant Holbrook testified, "So instead of actually approaching the house and conducting a knock and talk investigation, we just simply drove toward the backyard." Second, and more importantly, the totality of the circumstances surrounding the officers' entry into the grassy area objectively demonstrates their purpose was to conduct a search of the grassy area, not to speak to the homeowner. Sergeants Milks and Holbrook (1) radioed other officers to meet them at the home, (2) put on gear indicating they were with the sheriff's office, (3) arrived at the home with other officers in cars behind them, and (4) bypassed the front of the home. Further—in their testimony and in Milks' affidavit—Sergeants Milks and Holbrook gave no indication they were approaching the home in order to speak to the homeowner.

In finding the officers conducted a search—not a knock and talk—the circuit court relied in part on *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). The issue in *Jardines* was "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." ___ U.S. at ___, 133 S. Ct. at 1413, 185 L. Ed. 2d at 499; *see also* ___ U.S. at ___, 133 S. Ct. at 1414, 185 L. Ed. 2d at 500 ("We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment."). Quoting *Jones*, the Supreme Court set forth what it called the "simple baseline" of Fourth Amendment protections: "When 'the Government obtains information by physically intruding'

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[6] *See also Bash*, 412 S.C. at 424-25 n.2, 772 S.E.2d at 539 n.2 ("A knock and talk . . . is a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints." (quoting *State v. Dorsey*, 762 S.E.2d 584, 588 n.6 (W. Va. 2014))).

on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" ___ U.S. at ___, 133 S. Ct. at 1414, 185 L. Ed. 2d at 500. After finding "the officers' investigation took place in a constitutionally protected area"—the curtilage—the Supreme Court "turn[ed] to the question of whether [the investigation] was accomplished through an unlicensed physical intrusion." ___ U.S. at ___, 133 S. Ct. at 1415, 185 L. Ed. 2d at 501-02.

In answering that question, the Supreme Court discussed the implied license any person holds to approach the front door of a home, and knock, and talk.

> "A license may be implied from the habits of the country," . . . . We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

___ U.S. at ___, 133 S. Ct. at 1415-16, 185 L. Ed. 2d at 502 (footnote omitted) (first quoting *McKee v. Gratz,* 260 U.S. 127, 136, 43 S. Ct. 16, 17, 67 L. Ed. 167, 170 (1922); then quoting *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S. Ct. 920, 924, 95 L. Ed. 1233, 1239 (1951); and then quoting *Kentucky v. King,* 563 U.S. 452, 469, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865, 881 (2011)).

The Supreme Court then referred back to "the question before the court"—"whether the officers' conduct was [a] . . . search"—and stated:

> As we have described, that depends upon whether the officers had an implied license to enter the porch, which

> in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

___ U.S. at ___, 133 S. Ct. at 1416-17, 185 L. Ed. 2d at 503.

Relying on this reasoning from *Jardines*, the circuit court in this case found the officers' behavior revealed a purpose to conduct a search. The court specifically found, "They were not there to [talk to] the homeowner." Going to the front door of a home for the purpose of speaking to the homeowner is not an "intrusion" because of the implied license to do what any private citizen might do. *See Rogers*, 249 F.3d at 289–90 (stating "police officers do not need a warrant to do what any private citizen may legitimately do—approach a home to speak to the inhabitants"); *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (stating, "A policeman may lawfully go to a person's home" and "go up to the door"). Rather, the circuit court found the officers were there "to see if they could find any [drugs]," a mission no homeowner licenses a police officer to enter their private property to undertake. *See Jardines*, ___ U.S. at ___, 133 S. Ct. at 1416, 185 L. Ed. 2d at 502-03. Thus, the circuit court found the officers in this case had no license to enter the grassy area, and therefore when they did so they physically intruded onto private property to conduct a search—not a knock and talk. Because no exception to the warrant requirement applied and there was no warrant, the officers violated the Fourth Amendment.

As *Jardines* makes clear, the circuit court was correct to focus on the objective purpose of the officers' actions. As we have explained, the officers' behavior in this case demonstrates objectively the purpose of searching for drugs. The court of appeals found the circuit court erred by relying on the officers' intent. *See Bash*, 412 S.C. at 430-31,772 S.E.2d at 542-43 ("We conclude the circuit court's injection of the officers' subjective intent into its analysis was an error of law."). However, we find nothing in the record indicating the circuit court relied on the subjective intent of the officers.[7] As the Supreme Court explained in *Jardines*, that would not have been proper:

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[7] In this case, the officers' subjective intent is consistent with their objective purpose. Sergeant Holbrook testified that "instead of actually approaching the house and conducting a knock and talk investigation, we just simply drove toward

> The State points to our decisions holding that the subjective intent of the officer is irrelevant. But those cases merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason.

___ U.S. at ___, 133 S. Ct. at 1416, 185 L. Ed. 2d at 503.

The court of appeals relied on *Wright* to support its conclusion the officers in this case did not conduct a search. Quoting *Wright*, the court of appeals stated, "A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." *Bash*, 412 S.C. at 426–27, 772 S.E.2d at 540 (quoting *Wright*, 391 S.C. at 444, 706 S.E.2d at 328). The quoted statement from *Wright*—applicable there—is not applicable here. The key distinction between this case and *Wright* is the officers in *Wright* had probable cause to believe a crime was in progress *before* they departed their path to the front door, and immediately thereafter, they observed exigent circumstances to excuse the warrant requirement. From a public road, the officers in *Wright* "observed a large number of vehicles . . . and saw spotlights." 391 S.C. at 445, 706 S.E.2d at 328. The officers then turned down the private dirt road on their way to the front door. *Id.* We explained:

> The deputies' observations as they drove down the dirt road corroborated the anonymous tip and gave them ample reason to believe dogfighting was in progress. Exigent circumstances developed when the suspects started fleeing. Moreover, the presence of dogs created a potential danger to the deputies. Hence, the deputies had the authority to perform a protective sweep of the premises.

391 S.C. at 445, 706 S.E.2d at 328.

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the backyard." Sergeant Milks said the same thing in her affidavit, they "were investigating a suspicious complaint,"—she did not say they were looking for the homeowner.

The officers in *Wright*, therefore, observed facts that gave rise to probable cause to believe a crime was in progress—before they "physically intrud[ed]" onto private property—and the exigent circumstances exception to the warrant requirement permitted them to proceed without a warrant. *See Herring*, 387 S.C. at 210, 692 S.E.2d at 494 ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement."). In this case, on the other hand, Sergeants Holbrook and Milks observed nothing incriminating—and therefore did not have probable cause for a search—until *after* they drove onto the grassy area and saw one of the men throw down what appeared to be cocaine.

The court of appeals also stated "the Fourth Circuit has adopted the position police may bypass the front door of a residence and proceed to the backyard or other entrance for a knock and talk provided they have reason to believe the person they are attempting to contact will be found there." *Bash*, 412 S.C. at 428, 772 S.E.2d at 541. For this statement, the court of appeals cited *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998). *Id.* However, *Alvarez* does not support the court of appeals' conclusion the officers in this case acted within the Fourth Amendment. The facts of *Alvarez*—quite different from the facts of this case—led the Fourth Circuit to this basic conclusion: "the officers in this case had a 'legitimate reason' for entering the Alvarezes' property 'unconnected with a search of such premises.'" 147 F.3d at 358. Those facts included (1) the officers "were responding to a 911 call;" (2) "about an underage drinking party;" (3) where the officers found "alcohol containers and . . . awkwardly parked cars;" (4) which caused them to "believe[] they had found the party." *Id.* Also unlike this case, the officers actually approached the front door of the Alvarezes' home. 147 F.3d at 357. When they did so, they observed a sign that read "Party In Back" with "an arrow pointing toward the backyard." *Id.* Following the sign's directive, the officers "entered the backyard." *Id.* The Fourth Circuit specifically found the officers did not enter the backyard for the purpose of conducting a search, but rather, "They entered the Alvarezes' property simply to notify the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated." 147 F.3d at 358.

The circuit court in this case found that Sergeants Holbrook and Milks and an unknown number of other officers entered the grassy area behind this home not simply to speak with the homeowner about the complaint, but rather for the

purpose of searching for drugs. In making these findings, the circuit court correctly applied the applicable principles of law. As to the circuit court's factual findings, there is ample evidence in the record to support them. Therefore, the court of appeals erred in reversing the circuit court's finding that a search occurred.

V. Conclusion

The officers entered the curtilage of this home for the purpose of conducting a search for drugs. These actions implicate the Fourth Amendment. Because the officers did not have a warrant for the search and no exception to the warrant requirement was applicable, the officers violated the Fourth Amendment's prohibition against unreasonable searches and seizures. For this reason, we **REVERSE** the court of appeals,[8] and we reinstate the circuit court's order suppressing the drugs.

BEATTY, C.J., Kittredge, J., and Acting Justices Costa M. Pleicones and DeAndrea Benjamin, concur.

[8] We also granted certiorari to determine whether the police violated article I, section 10 of the South Carolina Constitution by entering the backyard of the home. We need not reach this issue because we affirm the circuit court's ruling suppressing the evidence under the Fourth Amendment. *State v. Gamble*, 405 S.C. 409, 420, 747 S.E.2d 784, 789 (2013).

The Supreme Court of South Carolina

In the Matter William Edwin Griffin, Respondent.

Appellate Case No. 2017-000570

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Within fifteen days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, he may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

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

Columbia, South Carolina

March 8, 2017

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Georgetown County. Effective March 28, 2017, all filings in all common pleas cases commenced or pending in Georgetown County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Allendale	Anderson	Beaufort	Cherokee
Clarendon	Colleton	Greenville	Hampton
Jasper	Lee	Oconee	Pickens
Spartanburg	Sumter	Williamsburg	
Horry—Effective March 14, 2017		**Georgetown—Effective March 28, 2017**	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
March 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alexander Carmichael Huckabee, III, Appellant.

Appellate Case No. 2013-001409

Appeal From Marlboro County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5473
Heard October 12, 2016 – Filed March 15, 2017

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mary Williams Leddon, and Assistant Attorney General William Frederick Schumacher, IV, all of Columbia; and Solicitor William Benjamin Rogers, Jr., of Bennettsville, for Respondent.

GEATHERS, J.: Appellant Alexander Huckabee, III seeks review of his convictions for homicide by child abuse (HCA), inflicting great bodily injury upon a child, unlawful conduct toward a child, and first-degree criminal sexual conduct (CSC) with a minor. Appellant assigns error to the trial court's admission of the testimony of a witness proffered as an expert in criminal behavioral analysis, arguing

the witness's criminal profiling testimony (1) was excludable under Rule 403, SCRE, (2) was based on an unreliable methodology, (3) was given by an unqualified witness, and (4) usurped the jury's role as sole fact finder. Appellant also challenges the admission of his third statement to police because (1) law enforcement did not "re-*Mirandize*"[1] him after a three-day lapse following his previous custodial interrogation and (2) the interrogation was given under additional coercive conditions. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Atelia Hunt was living with Appellant in Bennettsville on October 6, 2011, when Hunt took her three-year-old daughter (Victim) to the local hospital's emergency room at approximately 9:45 p.m., complaining that Victim was not breathing. Linda Hooper, one of the nurses on duty, called a "code team" to attempt to revive Victim, but tragically, the attempt was unsuccessful. Hooper noticed Victim had several bruises and burn marks all over her body and her head had been shaved. Dr. Cynthia Schandl performed Victim's autopsy and reported the cause of death as a "massive" blood infection that started as a urinary tract infection, traveled to Victim's bladder and kidneys, and ultimately entered into her blood.

Sergeant John Hepburn and Lieutenant Larry Turner of the Bennettsville Police Department conducted videotaped interviews of several witnesses, including Hunt and Appellant. Appellant's interview lasted approximately thirty to forty minutes, beginning on October 7, 2011, at 12:42 a.m. At that time, Appellant was not a suspect in Victim's death or injuries. Sergeant Hepburn, nonetheless, provided Appellant his *Miranda* rights in writing prior to questioning him, and Appellant signed the waiver of rights near the bottom of the form. Hunt and Appellant were later arrested in connection with Victim's death and injuries.

Lieutenant Turner also assisted Lieutenant Kathy Bass, an agent with the South Carolina Law Enforcement Division (SLED), in conducting a second interview of Appellant at the Bennettsville Detention Center on October 10, 2011, at approximately 10:45 a.m. Lieutenant Bass went over a *Miranda* form with Appellant, reading him his rights, and Appellant signed the waiver of rights near the bottom of the form. This interview, which was not recorded, lasted approximately one and one-half hours. Near the conclusion of the interview, Lieutenant Bass asked Appellant to submit a voluntary handwritten statement. Appellant began writing but stopped after two or three sentences. Lieutenant Bass then asked Appellant if he

[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

would be willing to meet with her at a later date at the Bennettsville Police Department so that his statement could be videotaped in lieu of being handwritten. Appellant agreed and met with Lieutenant Bass again on October 13, 2011.

At the beginning of the October 13 interview, Lieutenant Bass reminded Appellant that she had given him written *Miranda* warnings at their previous meeting. She also gave verbal *Miranda* warnings but skipped over the right to counsel. According to the prosecutor, this third interview lasted approximately four hours.[2]

Appellant was indicted for HCA,[3] inflicting great bodily injury upon a child, unlawful conduct toward a child, and first-degree CSC with a minor. Prior to Appellant's trial, Hunt pled guilty to unlawful conduct toward a child and to HCA under the aiding and abetting provision of the HCA statute.

At Appellant's trial, Dr. Schandl testified that when she examined Victim, she discovered areas of Victim's brain in which blood clots had cut off the blood supply, ultimately causing brain death. Dr. Schandl explained that this process began approximately one week prior to Victim's death and would have caused Victim to feel fatigued. Victim also would have been difficult to arouse, she might have had a suppressed appetite, and she might not have walked as comfortably as she normally would have. Dr. Schandl stated it was highly unlikely that Victim would not have had those symptoms during her last week. Dr. Schandl also stated Victim might have experienced seizures and would have eventually fallen into a coma.

Dr. Schandl then described the symptoms Victim might have exhibited at the beginning of her urinary tract infection: burning upon urination, urinating more often, leakage, and blood in the urine. As the infection spread to Victim's kidneys, she might have experienced back pain, and as the infection went into Victim's blood, she would have experienced fever, chills, and sweating. Dr. Schandl stated that based on the progression of symptoms, it would have become obvious that Victim was very sick.

Dr. Schandl also found a hemorrhage approximately one centimeter inside Victim's vagina, which made her suspicious of a sexual encounter. She noticed

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[2] In his brief, Appellant estimates the third interview lasted "nearly three hours."

[3] Appellant was indicted under the principal provision of the HCA statute, section 16-3-85(A)(1) of the South Carolina Code (2015), rather than the aiding and abetting provision of the statute, section 16-3-85(A)(2).

cigarette burns and bruises on Victim as well. The burns were in varying stages of healing, and some of them were "more round" than others, indicating Victim was still when she experienced those burns. Dr. Schandl further testified Victim was missing two front teeth. She found this to be strange because Victim was three years old and children "don't start losing their teeth until they are six or seven."

The trial court admitted into evidence Appellant's third statement, in which he admitted that, on one occasion, he "popped" Victim for "messing with [a] wall socket" and the impact left a bruise. He also admitted he should have sought help for Victim and should have insisted that Hunt take Victim to the hospital earlier than she did. However, Appellant consistently denied inflicting the cigarette burns on Victim and instead implicated Hunt. He stated he asked Hunt about the burns and she told him they were blisters. He also stated Hunt performed an internet search on how to heal burns. When asked about the hemorrhage inside Victim's vagina, Appellant stated he did not know what caused the hemorrhage. Despite the lengthy questioning by Lieutenant Bass, Appellant remained strong-willed in his responses.

Hunt testified Victim's bruising was caused by Appellant grabbing Victim by her ankles, as she was standing in front of him, and trying to separate her legs to "make her do a split." She asserted Appellant explained Victim's bruises by stating he and Victim were "playing too hard" and "she ran up against the table or she had [fallen]." Hunt also stated whenever she would try to take Victim to a doctor during the last week of her life, Appellant would tell her to wait until Victim's bruises healed so they could avoid being reported to the Department of Social Services (DSS).

According to Hunt, when she noticed blood on a burgundy towel, Appellant explained it as an accident in which Victim had been climbing on a chair and hit her crotch on it. Hunt also claimed she asked Appellant about burn marks on Victim and Appellant told her to search the Internet to determine what to use on burns to heal them. Hunt further testified she lied to police during her interrogation because Appellant told her "to be quiet and that he'll take care of everything, and that he'll let them know what had happened."

When Appellant testified, he characterized Hunt as dishonest and controlling. He stated Hunt lied to him about her financial circumstances when they first met.[4] He admitted he should have done something to help Victim. However, he later stated he did not know Victim was as sick as she was. He also stated he was afraid DSS

[4] Hunt admitted that when she first met Appellant, she lied to him about owning her parents' residence.

would take his seven-year-old son away from him if he sought medical help for Victim. However, he denied ever touching the inside of Victim's vagina.

SLED agent Paul LaRosa gave expert testimony concerning the characteristics of individuals who sexually abuse children. He focused specifically on the infliction of cigarette burns near Victim's vagina and on her buttocks, characterizing this behavior as sexual. The State proffered Agent LaRosa as an expert in "Crime Analysis and Crime Scene Reconstruction." The State clarified that the area of Crime Analysis included profiling: "[J]ust to make sure the record is clear[, w]hen I say Crime Analysis, that would be slash Profiler."

The trial court qualified Agent LaRosa and admitted his testimony "in the area of Criminal Behavioral Analysis and Crime Scene Reconstruction." Agent LaRosa described his work as a criminal profiler at SLED in the following manner:

> The bulk of the work that we do when it comes to violent crimes or cases like this, where we get the agency who comes to us and says, we have had a crime, and the crime is [sic]. We know who the potential suspects are. And we need some help because of the nature of the crime, the violence of the crime, and the bazaar [sic] behavior in the crime. We need help. We need help from [the] interview stand point [sic]. Evidence collection. How to prosecute this case. What to charge them with.[5]

Agent LaRosa stated a person who inflicts well-defined cigarette burns on a three-year-old child would have to be someone who had complete control over the child over a long period of time. Notably, this specific testimony was based on Agent LaRosa's experience as a crime scene reconstructionist. He then gave his criminal profiling testimony, stating that the overwhelming majority of sexual offenders are male. His profile of an individual who would inflict cigarette burns near the victim's vagina was simply an adult male, approximately twenty-five to forty years of age. As of October 13, 2011, one week after Victim's death, Appellant was twenty-nine years of age.

The jury returned guilty verdicts against Appellant on the charged offenses. He was sentenced to life imprisonment for HCA and concurrent terms of (1) life

[5] Appellant and Hunt were known suspects when Agent LaRosa was engaged to work on the present case.

imprisonment for first-degree CSC with a minor, (2) twenty years for inflicting great bodily injury upon a child, and (3) ten years for unlawful conduct toward a child. This appeal followed.

LAW/ANALYSIS

Rule 403, SCRE

Appellant argues Agent LaRosa's criminal profiling testimony was excludable under Rule 403, SCRE, because the testimony suggested Appellant's guilt on an improper basis, and therefore, the danger of unfair prejudice outweighed any possible probative value. We agree.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Rule 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." *Id.* "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (citation omitted) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

We conclude the nature of the challenged testimony in the present case presents exceptional circumstances. Criminal profiling testimony is not probative of an individual defendant's guilt in a particular case. *See Commonwealth v. Day*, 569 N.E.2d 397, 399 (Mass. 1991) (holding that evidence of a "child battering profile" did not meet the test for relevance because the mere fact that a defendant fit the profile did not establish that a particular defendant physically abused the victim); *State v. Clements*, 770 P.2d 447, 454 (Kan. 1989) (examining and adopting case law from Arkansas, Washington, and Vermont and stating the thrust of these opinions "is that (1) evidence [that] only describes the characteristics of the typical offender

has *no relevance* to whether the defendant committed the crime in question; and (2) the only inference [that] can be drawn from such evidence, namely that a defendant who matches the profile must be guilty, is an impermissible one" (emphasis added)); *see also United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (holding the trial court abused its discretion in admitting expert testimony of drug profiles as substantive evidence of the defendant's guilt); *id.* ("This is not a case in which evidence of the drug profile was used as purely background material to explain why the defendant was stopped . . . . Rather, it is a case in which the government attempted to establish the defendant's guilt by showing that he has the same characteristics as a drug courier. The use of the drug courier profile in this manner is clearly impermissible." (citations omitted)); *id.* ("[T]he use of expert testimony as substantive evidence showing that the defendant 'fits the profiles and, therefore, must have intended to distribute the cocaine in his possession' is error." (quoting *United States v. Quigley*, 890 F.2d 1019, 1023–24 (8th Cir. 1989))).

In *Commonwealth v. Day*, the Supreme Judicial Court of Massachusetts reversed the defendant's manslaughter conviction due to the superior court's admission of expert testimony regarding the profile of individuals who physically abuse children. 569 N.E.2d at 397. The testimony included the expert's opinion that a risk factor in child abuse cases was a repeated pattern of partners of single mothers who sometimes offend against children while the mothers are at work. *Id.* at 398–99. The court explained that the testimony "improperly suggested to the jury that the defendant physically abused the [victim] simply because he was the mother's partner[] and because he was left with the responsibility of caring for the child on the night [that] she died." *Id.* at 400. The court found the expert's forbearance from stating the defendant fit the profile was insignificant because "a reasonable jury" could have interpreted the testimony as a suggestion that the defendant "fit the 'child battering profile,'" and "was responsible for the child's fatal injuries." *Id.*

While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial to determine the guilt of a specific individual. In other words, this type of testimony unduly tends "to suggest a decision on an improper basis." *Lyles*, 379 S.C. at 338, 665 S.E.2d at 206 (quoting *Gilchrist*, 329 S.C. at 627, 496 S.E.2d at 427); *cf.* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."); *State v. Nelson*, 331 S.C. 1, 4–5, 7, 501 S.E.2d 716, 717–19 (1998) (holding that the admission of children's toys, videos, and photographs depicting young girls, all seized from the defendant's bedroom, invited the jury to infer the defendant was acting in conformity with being a pedophile when

he allegedly committed the crimes with which he was charged and stating, "Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted"); *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990) ("Evidence of prior criminal acts [that] are independent and unconnected to the crime for which an accused is on trial is inadmissible *for purposes of proving that the accused* possesses a criminal character or *has a propensity to commit the crime with which he is charged*." (emphases added)).

One neighboring jurisdiction has also condemned criminal profiling testimony as propensity evidence. In *Sanders v. State*, 303 S.E.2d 13, 18 (Ga. 1983), the Supreme Court of Georgia held,

> [U]nless a defendant has placed her character in issue or has raised some defense [that] the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation for demonstrating the defendant has the characteristics of a typical battering parent.

The court explained that, in the case before it, the expert's construction of a profile of the typical abusive parent, coupled with previous testimony showing the appellant possessed many characteristics within the profile, "could lead a reasonable juror to no other inference than . . . this parent . . . had in fact murdered her baby." *Id.* "It matters little that, as the state points out, [the expert] never expressly drew the conclusion that [the] appellant fit his profile of battering parents . . . ." *Id.* The court concluded the trial court erred in admitting the portion of the expert's testimony constructing a profile of the typical abusive parent. *Id.* While the court ultimately concluded the error was harmless in light of the overwhelming evidence against the appellant,[6] the present case is distinguishable as to the harmless error analysis. *See infra*.

We note our own supreme court indirectly addressed profiling testimony as potential propensity evidence in *Underwood v. State*, 309 S.C. 560, 563–64, 425 S.E.2d 20, 22–23 (1992).[7] In *Underwood*, the State's expert offered her "profile"

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[6] *Id.*

[7] Also, in *State v. Tapp*, the court held the trial court erred in admitting criminal profiling testimony without first determining whether it was reliable but declined to

testimony to explain why she found only a small tear in the hymen of one of the victims. 309 S.C. at 563, 425 S.E.2d at 22. This testimony merely explained the behavior of people who sexually abuse children and its effect on the victim's injuries—the expert stated,

> If you hurt a child very badly, that child is going—another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.

Id. Our supreme court held the defendant's trial counsel was not ineffective for failing to object to this testimony because it was not offered to identify the defendant as the offender. *Id.* at 564, 425 S.E.2d at 23.

In contrast, in the present case, the only testimony necessary to explain how Victim's cigarette burns were inflicted was the testimony based on Agent LaRosa's experience as a crime scene reconstructionist. Yet, Agent LaRosa's profiling testimony went further to specifically target an adult male between the ages of twenty-five and forty as the likely perpetrator of this type of abuse. While this testimony was not *expressly* offered to identify Appellant as the perpetrator, "[i]t matters little that . . . [Agent LaRosa] never expressly drew the conclusion that [A]ppellant fit his profile . . . ." *Sanders*, 303 S.E.2d at 18. Agent LaRosa's profiling testimony "could lead a reasonable juror to no other inference than" Appellant inflicted the burns and, therefore, had a propensity to commit the sexual battery resulting in Victim's hemorrhage.[8] *Id.*

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address the testimony's reliability. 398 S.C. 376, 387 & n.11, 728 S.E.2d 468, 474 & n.11 (2012).

[8] "A person is guilty of [CSC] with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S.C. Code Ann. § 16-3-655(A)(1) (2015). "Sexual battery" for purposes of first-degree CSC with a minor is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015). In arguing against Appellant's directed verdict motion as to the CSC charge, the solicitor recounted what he believed to be the circumstantial evidence of Appellant's guilt:

The purported reason for the State seeking Agent LaRosa's expertise and presenting his testimony was to answer the question of "How could anyone do this to a child?" Yet, the only practical reason for the State to present the answer to this question would be to suggest that Appellant fit the profile of a person who would inflict this type of abuse and, therefore, he must have inflicted the burns and the sexual battery. This is evident in the trial court's Rule 403 analysis, Agent LaRosa's own testimony, and the questions posed by the State to Agent LaRosa. The trial court conducted the following Rule 403 analysis:

> [T]he [c]ourt finds that the jury here is confronted with basic questions. How could anyone do this to a child? Clearly if these wounds are not self-inflicted, these are cigarette burns, and that is the, I guess, the real evidence here, is the State's attempt to prove that [Appellant] did it. That's what brings us here. But the jury has to be wondering how could such a thing occur.

> I will start by highlighting Dr. Schandl's testimony as it relates to the injury inside . . . [Victim's] vagina, which she indicated was consistent with a sexual assault. She specifically said that on questioning by the State. Additionally, when you put that in the circumstances in [its] totality as to what is evidence, as to what was going on in that house, who had access to the child . . . that also adds a particular circumstance.
>
> And then finally . . . we had *[Agent LaRosa's] testimony as it relates to the Profiler*. Remind you, *not pointing out [Appellant], we understand that that was not the purpose of his testimony. But when you put that with the other circumstances, I think there is at least enough evidence for the jury to consider --- whether to consider it as it relates to the guilt of [Appellant] on the CSC charge*.

(emphases added).

> And the [c]ourt finds that this is a core concern. It's really something we haven't discussed yet. I'm sure it will come out in closing about how anyone could do this. How could this type of crime be committed? Clearly the crime was committed here. I'm not saying that [Appellant] did it, but someone did, because again these wounds cannot [be] self-inflicted.
>
> And so, the [c]ourt finds that this type of behavioral analysis to assist the jury in bringing an understanding to what really is a core issue, so I find it highly probative.
>
> I also find that it is not unfairly prejudicial *for the State to put up evidence that would show that [Appellant] would have attempted to have committed the crime*. That's what would be expected by the defense that the State would be putting in that type of evidence.
>
> And *thus, his comments that this would be done by a male* and that has a sexual component to it, the [c]ourt does not find that overly prejudicial.

(emphases added).

Further, in his explanation of how he became involved in the present case, Agent LaRosa stated,

> [W]e were not asked to say who was the individual [who] harmed [Victim], we were asked what is it, first of all. Because it was bazaar [sic] and very violent. And we were asked why would somebody do this. What are the most likely characteristic[s] of a person [who] would do this and harm [Victim] this way.

The State later specifically asked Agent LaRosa to relay his findings regarding the perpetrator's age and gender, to which Agent LaRosa responded that the "overwhelming percentage of the gender of a sexual assault on a child is going to be male" and that he "would be telling the local authorities that [they] would be looking for an adult male, approximately the age of [twenty-five] to forty."

Based on the foregoing, the present case is distinguishable from *Underwood*. Here, Agent LaRosa's profiling testimony had no probative value, and the danger of unfair prejudice to Appellant was high due to the testimony's tendency to suggest Appellant's guilt on an improper basis. Therefore, the testimony should have been excluded under Rule 403, SCRE.

Harmless Error

The State contends the admission of Agent LaRosa's testimony was harmless beyond a reasonable doubt because (1) his testimony regarding the burn marks was "largely cumulative" to Dr. Schandl's testimony and (2) there was "substantial evidence" of Appellant's guilt.

"Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Chavis*, 412 S.C. 101, 109–10, 771 S.E.2d 336, 340 (2015) (citation omitted). For example, "[a police] officer's improper opinion [that] goes to the heart of the case is not harmless." *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).[9] In *Ellis*, the supreme court reversed the trial court's ruling that allowed a police officer qualified as an expert in crime scene processing to exceed the scope of his expertise by imparting to the jury his conclusion, drawn from measurements taken at the scene, regarding the victim's location and body position. 345 S.C. at 177–78, 547 S.E.2d at 491. The court explained,

> In effect, [the police officer] was allowed to give his opinion on the ultimate issue: Whether [the] appellant was acting in self-defense when he shot and killed the victim. This was error. *See* Rule 704, SCRE; *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (opinion may be offered on ultimate issue only where witness is otherwise qualified).

Id. at 178, 547 S.E.2d at 491.

The court held the error could not be deemed harmless in light of the appellant's assertion that he was acting in self-defense. *Id.* The court further stated

[9] *See also Tapp*, 398 S.C. at 393, 728 S.E.2d at 477 (Pleicones, J., dissenting) ("Improper 'expert' evidence [that] goes to the heart of the case is not harmless.").

the error was compounded by the solicitor's closing argument, in which he referenced the "'scientific' testimony of [the officer], 'an expert qualified by the judge.'" *Id.* "The trial court's imprimatur of [the officer] as an 'expert' was exploited by the solicitor to the prejudice of [the] appellant and his defense." *Id.*

In the instant case, the State conceded at trial that there was no direct evidence of Appellant's guilt as to the CSC charge and Agent LaRosa's testimony was part of the circumstantial evidence presented to support that charge. Further, there was no other evidence covering the most damning part of Agent LaRosa's testimony—targeting an adult male between the ages of twenty-five and forty as the likely perpetrator as to Victim's burns and his general statement that the overwhelming majority of sexual assaults on children are inflicted by males. Dr. Schandl's testimony concerning the burn marks merely alluded to the burns being inflicted (1) intentionally rather than accidentally and (2) over a sustained period of time due to the varying stages of healing among the several burns. Similarly, her testimony regarding the vaginal hemorrhage did not place limits on how the underlying trauma was inflicted other than that it was likely sexual in nature. This left open the possibility that Hunt, rather than Appellant, was the perpetrator.[10] In stark contrast, Agent LaRosa's testimony excluded Hunt as the likely perpetrator when it limited the class of possible suspects to adult males. This went to the heart of Appellant's defense that Hunt inflicted the abuse and that her testimony against him was not credible.

Moreover, the State presented Agent LaRosa's testimony immediately after presenting Hunt's testimony, during which Appellant's counsel significantly undermined Hunt's credibility on cross-examination. Agent LaRosa's profiling testimony made it easy for the jury to view Hunt as generally more credible than Appellant and, thus, to choose Hunt's account of the events preceding Victim's death over Appellant's conflicting account. In his closing argument, the prosecutor compounded the prejudice by following up his contrast of Appellant's credibility against Hunt's credibility with a glowing review of Agent LaRosa's profiling testimony, emphasizing his training "with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field." In sum, the jury was prevented from conducting an uncontaminated assessment of the comparative credibility of Hunt and Appellant due to what

[10] We are mindful of the State's reference to evidence showing Appellant was the only smoker in the household. However, this evidence does not exclude Hunt as the perpetrator in the absence of evidence demonstrating Hunt was prevented from accessing Appellant's cigarettes.

Appellant describes as Agent LaRosa's "speculat[ion], under the guise of court-sanctioned expertise, on what kind of person would inflict" the cigarette burns on Victim.

Other jurisdictions evaluating similar circumstances in the conduct of criminal trials have declined to hold that the admission of improper profile testimony was harmless. *See, e.g.*, *People v. Robbie*, 112 Cal. Rptr. 2d 479, 487–88 (Cal. Ct. App. 2001) (declining to characterize the admission of improper profile testimony concerning a particular type of sex offender as harmless and citing to the "starkly conflicting versions of events" given by the defendant and the victim and to the prosecutor's emphasis on the profiling testimony in his closing argument); *id.* at 488 (setting forth the circumstances rendering the admission of improper profile testimony reversible: "[T]he jury's verdict depended largely on whether it found [the victim] or the defendant more credible. [The victim's] credibility had been directly attacked but was significantly bolstered by the expert's testimony."); *Clements*, 770 P.2d at 454–55 (declining to hold the admission of improper profile testimony was harmless "[g]iven the highly prejudicial nature of the expert testimony and the prosecutor's comments in closing argument").

In *Commonwealth v. Day*, the Supreme Judicial Court of Massachusetts held the error in admitting evidence of a "child battering profile" was not harmless because the evidence of the defendant's guilt was not overwhelming. 569 N.E.2d at 400–01. The court noted both the defendant and the mother had access to the victim during the time period in which she died. *Id.* at 401. The court also noted that, although the defendant admitted to police he had hit the victim in the past, a babysitter testified to seeing the mother hit the children. *Id.* Therefore, the court concluded the profiling testimony may have contributed to the jury's conclusion that the defendant was responsible for the victim's injuries. *Id.*

Here, with the exception of unlawful conduct toward a child, the evidence of Appellant's guilt is not so overwhelming as to render the admission of Agent LaRosa's profiling testimony harmless, especially given the credibility problems with Hunt's testimony. On this basis, we reverse Appellant's convictions for first-degree CSC with a minor, inflicting great bodily injury upon a child, and HCA. Therefore, we need not reach the remaining challenges to the trial court's admission of Agent LaRosa's testimony. *See State v. Bostick*, 392 S.C. 134, 139 n.4, 708 S.E.2d 774, 776 n.4 (2011) (declining to address a remaining evidentiary issue when the court's decision on the first issue was dispositive); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an

appellate court need not address remaining issues when resolution of a prior issue is dispositive).

As to Appellant's conviction for unlawful conduct toward a child, the admission of Agent LaRosa's profiling testimony was harmless in light of the other overwhelming evidence of guilt. *See Chavis*, 412 S.C. at 110 n.7, 771 S.E.2d at 340 n.7 (explaining that the trial court's error in admitting certain testimony was harmless "because there [was] other overwhelming evidence of guilt"). Section 63-5-70(A) of the South Carolina Code (2010) defines unlawful conduct toward a child in the following manner,

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) *place the child at unreasonable risk of harm* affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wil[l]fully abandon the child.

(emphasis added). "'Person responsible for a child's welfare' includes . . . an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child." S.C. Code Ann. § 63-7-20(16) (2010).

Appellant's own testimony showed he assisted in Victim's care during the two months she lived with him before she died. Dr. Schandl testified that as Victim's urinary tract infection eventually made its way into her blood, she would have experienced fever, chills, and sweating. Dr. Schandl explained that the process of blood clots cutting off the blood supply to Victim's brain began approximately one week prior to her death and this would have caused her to feel fatigued. Dr. Schandl also explained that Victim would have been wobbly and difficult to arouse and she might have had a suppressed appetite as well as difficulty reacting to people talking

to her. Dr. Schandl stated it was highly unlikely that Victim would not have had these symptoms during her last week.

Dr. Schandl also stated that based on the progression of symptoms, it would have become obvious that Victim was very sick. Appellant admitted on direct examination that he should have done something to help Victim, and his subsequent testimony that he did not know Victim was as sick as she was necessarily implied he knew Victim was sick to some degree. Moreover, Appellant admitted he was afraid DSS would take his son away if he sought medical help for Victim.

Because Dr. Schandl's testimony and Appellant's own admissions overwhelmingly support his conviction for unlawful conduct toward a child, we affirm this conviction.

Third Statement to Police

Finally, as to Appellant's challenge to the admissibility of his third statement, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010) ("[T]he test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession."); *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) ("When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial [court's] ruling is supported by any evidence." (quoting *State v. Miller*, 375 S.C. 370, 378–79, 652 S.E.2d 444, 448 (Ct. App. 2007))).

CONCLUSION

Accordingly, we reverse Appellant's convictions for first-degree CSC with a minor, inflicting great bodily injury upon a child, and HCA and remand for a new trial on these charges. We affirm Appellant's conviction for unlawful conduct toward a child.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dan Abel and Mary Abel, Appellants,

v.

South Carolina Department of Health and Environmental Control and Pawleys Island Community Church, Respondents.

Appellate Case No. 2015-000602

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5474
Heard November 9, 2016 – Filed March 15, 2017

REVERSED AND REMANDED

Amy Elizabeth Armstrong and Jessie Allison White, both of the South Carolina Environmental Law Project, of Pawleys Island, for Appellants.

Daniel W. Stacy, Jr., of Oxner & Stacy, PA, of Pawleys Island, and Deborah Harrison Sheffield, of Columbia, for Respondent Pawleys Island Community Church; Nathan Michael Haber, of Charleston, for Respondent South Carolina Department of Health and Environmental Control.

LOCKEMY, C.J.: In this appeal from the Administrative Law Court (ALC), Dan and Mary Abel (the Abels) argue the ALC erred in refusing to enforce a previous consent order requiring that wetlands on neighboring property be maintained. We reverse and remand.

FACTS

In 2000, Pawleys Island Baptist Church (the Church) filed an application for a coastal zone consistency certification to permit it to fill in wetlands during the construction of a new sanctuary. The South Carolina Department of Health and Environmental Control (DHEC) issued the certification. The Abels, along with David Mims, challenged DHEC's decision to the ALC. The parties subsequently agreed to a settlement agreement that was memorialized in a consent order issued on January 8, 2001. In part, the consent order stated, "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state."

In 2012, the Church applied for a new coastal zone certification to permit it to fill in additional wetlands. During the pendency of that application, the Church requested the ALC modify the consent order. The proposed modified consent order, signed by the Church and Mims, stated, "a new permit/application ('The Permit') is being made by the Church to undertake improvements to the Church and said Permit cannot be reviewed by [DHEC] without applying the heightened restrictions required under the Order until this Modified Consent Order . . . is approved by the Court." The Abels opposed the modified consent order, and the ALC dismissed the Church's request because DHEC had not issued its final decision to issue the permit.

Eventually, DHEC approved the certification. Thereafter, the Abels filed a request for a contested case hearing with the ALC, arguing the 2001 consent order prohibited DHEC from issuing the certification. The Abels also filed a motion to enforce the consent order and a motion to consolidate the 2014 case with the 2001 case. The ALC found the 2001 consent order was a valid and enforceable contract. The ALC then found the contract did not apply to the 2014 case, dismissed the Abels' challenge, and denied their motion to enforce the settlement agreement. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC." *Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct. App. 2012). Under the APA, this court may "reverse or modify the decision [of the ALC] if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . (d) affected by other error of law." S.C. Code Ann. § 1-23-610(B) (2005).

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Nichols Holding, LLC v. Divine Capital Grp.*, 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id*. (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." *Id*. at 336, 785 S.E.2d at 615 (quoting *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010)).

ANALYSIS

The ALC initially noted it would enforce the 2001 consent order if it were valid and enforceable; however, under the ALC's later interpretation, the 2001 consent order only remained in effect during the pendency of that project.

The 2001 consent order contains the following provisions:

> 1. The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "PROPOSED FUTURE BUILDING

PHASE II" so that no portion of this structure will encroach upon the area of the wetland.

2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to continue to explore additional design changes, where feasible from a time and cost perspective, which will allow possible expansion of the wetland area to be preserved.

3. The church agrees that the wetland preserved by this Consent Order shall remain in its natural state.

4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended. In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm.

5. Within the area designated on Exhibit A as the "30' NOISE/VISUAL BUFFER," the Church shall maintain a vegetated buffer of native, evergreen shrubbery and trees, with a density of at least one evergreen tree and one shrub every ten (10) feet; the trees and shrubs will be leyland cypress and wax myrtles and similar species, and at planting will be at least six (6) feet in height with fifty percent (50%) of the trees at least ten (10) feet in height; provided however, that the portions of the vegetated buffer in wetland areas or in wooded areas not affected by development on the property, will remain in their natural state.

> 6. The existing basketball and volleyball fields will be removed and will not be re-located any closer to the rear property line of the church property than the front of the new sanctuary.
>
> 7. All lighting on the church property will be placed so that it is shielded or directed away from the properties adjacent to the "30' NOISE/VISUAL BUFFER,"shown on Exhibit A.
>
> 8. Upon execution of this Consent Order, the Church may immediately begin construction of the new sanctuary and other improvements not inconsistent with this agreement and order.
>
> 9. The Church and the Petitioners will cooperate in the execution of any documents needed to secure any required permit amendments to carry out the provisions of this agreement and order.

In its order dismissing the Abels' challenge, the ALC held, "In the context of the entire agreement, I find the intention of the parties in executing the Consent Order is clear and unambiguous, and the Consent Order's applicability is limited to the 2001 construction project." The ALC acknowledged that clause 3, requiring the Church to preserve the protected wetlands, is ambiguous as to time, but found the agreement as a whole only applied to the 2001 project. The ALC based its analysis in large part upon the preamble to the consent order. It states,

> This proceeding arises out of the application of the [Church] for a state storm water permit for the construction of a new sanctuary and other improvements of its property on US Highway 17 in the Pawleys Island area of Georgetown County. In a related application, the church also requested a wetland fill permit from the US Army Corps of Engineers which required a coastal zone consistency certification by the South Carolina Department of Health and Environmental Control, Office

> of Ocean and Coastal Resource Management (DHEC/OCRM).

The ALC found "[t]his language indicates the Consent Order was executed to address two *specific applications* (the 2000 Permit and CZC) related to a *specific construction project* to be undertaken by the Church in or around 2001." (emphasis added). The ALC also noted clause 1 of the agreement contains a restraint on the development of the wetlands, within the context of the 2001 construction project, because it specifically modifies those plans. With regard to the other clauses, the ALC indicated those clauses also indicated specific restrictions associated with the 2001 project. Accordingly, the ALC found the parties intended the settlement agreement to restrict the Church's ability to modify the wetlands only until the end of the 2001 construction project, not to apply to future projects.

The Abels assert the ALC erred by adding a temporal aspect to its interpretation of clause 3 of the consent order. The Abels agree with the ALC that the consent order is clear and unambiguous, but they disagree that the order was applicable only to the 2001 construction project. We agree.

"Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 497 (Ct. App. 2007) (quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)). Courts "are without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enters. v. S.C. Health & Human Servs. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "To discover the intention of a contract, the court must first look to its language–if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Ecclesiastes Prod. Ministries*, 374 S.C. at 498, 649 S.E.2d at 501. "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Id*. at 498, 649 S.E.2d at 502. However, "[d]ocuments will be interpreted so as to give effect to all of their provisions, if practical." *Id*.

We find the ALC improperly rewrote the unambiguous language in the consent order to apply a temporal aspect to the third clause of the contract. The consent order stated, "The church agrees that the wetland preserved by this Consent Order

shall remain in its natural state." The parties' use of the words "shall remain," without a specific temporal limitation, evidences an intent that the Church will not seek to modify the remaining wetlands in future building plans. The clause's plain language protects the wetlands going forward; the question then becomes whether the remaining language of the contract limits the temporal scope of that clause.

We find the explanatory opening paragraph to the consent order does not create a temporal restriction on the nine clauses contained therein. The consent order explains the background for the negotiated settlement. The order identifies the controversy and the parties and states the parties have "resolved their differences" in the case regarding the 2000 permit. However, this introduction does nothing to limit the clauses contained within the settlement agreement to the controversy being settled. Such a precedent would allow the Church to settle the 2001 case and immediately file for another permit with a different construction plan. Essentially, the settlement would be rendered meaningless. Accordingly, the ALC erred in imposing a temporal restriction on a clause which contains no such limitation.

Furthermore, other clauses also contain restrictions that survive the 2000 construction project by their plain language. Clause 5, for example, requires the Church "maintain a vegetated buffer of native, evergreen shrubbery and trees . . . ." It strains the imagination to construe this clause only to apply to the construction project. Under such an interpretation, the Church need have only maintained the plants until construction was finished and then cut them down if it liked. Finally, clauses 6 and 7 require the Church to reposition volleyball courts and ensure lights are directed away from neighboring properties. These clauses also indicate a future restriction on the Church's ability to modify the negotiated aspects of the 2001 plans in future construction projects.[1]

Accordingly, the ALC erred by interpreting the Consent Order to include a temporal restriction on clauses that contain no such limitation. We therefore reverse the ALC's order limiting the Consent Order to the 2001 construction project and remand for the court to consider the Abels' request for an injunction in light of the conclusions reached in this opinion.

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[1] We note the agreement between the Abels and the Church, by its terms, does not require DHEC to act or refrain from acting in any way, and this court's decision should not be read to impose any such duty.

CONCLUSION

For the foregoing reasons, the ALC's decision is

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.