N O T I C E

IN THE MATTER OF WILLIAM E. HOPKINS, JR., PETITIONER

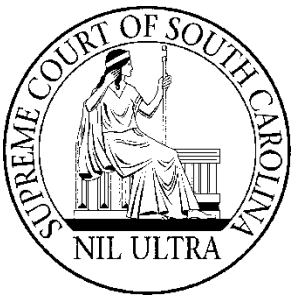
Petitioner was suspended from the practice of law for three years. *In re Hopkins*, 434 S.C. 373, 865 S.E.2d 377 (2021). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
April 3, 2024



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 3, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

EXTENSIONS TO FILE PETITION FOR REHEARING

None

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5933 – The State v. Michael Cliff Eubanks	Pending
5946 – The State v. Frankie L. Davis, III	Pending
5949 – Phillippa Smalling v. Lisa R. Maselli	Denied 3/26/2024
5963 – Solesbee v. Fundamental Clinical	Pending
5965 – National Trust for Historic Preservation v. City of North Charleston	Pending
5968 – The State v. Brandon J. Clark	Granted 3/27/2024
5972 – McEntire Produce v. SCDOR	Granted 3/27/2024
5975 – Rita Glenn v. 3M Company	Pending
5986 – The State v. James E. Daniels, Jr.	Pending
5987– The State v. Tammy C. Moorer	Pending
5988 – The State v. Sidney S. Moorer (2)	Pending
5992 – Rufus Rivers v. James Smith, Jr.	Pending
5994 – Desa Ballard v. Admiral Insurance Company	Pending
5995 – The State v. Kayla M. Cook	Pending
5996 – Palmetto Pointe v. Tri-County Roofing	Pending
5999 – Jerome Campbell v. State	Pending
6001 – Shannon P. Green v. Edward C. McGee	Pending

6004 – Joseph Abruzzo v. Bravo Media Productions, LLC	Pending
6007 – Dominic A. Leggette v. State	Pending
6008 – Tekayah Hamilton v. Regional Medical Center	Pending
6009 – John Doe v. Bishop of Charleston	Pending
6011 – James E. Carroll, Jr. v. Isle of Palms Pest Control, Inc.	Pending
6013 – Jamaine Holman v. SCELC	Pending
6016 – Vista Del Mar v. Vista Del Mar, LLC	Pending
6019 – Portfolio Recovery Associates, LLC v. Jennifer Campney	Pending
6021 – Stewart Buchanan, #69848 v. SCDPPPS	Pending
6022 – J&H Grading & Paving v. Clayton Construction	Pending
6025 – Gerald Nelson v. Christopher S. Harris	Pending
6028 – James Marlowe v. SCDOT	Pending
6029 – Mark Green v. Wayne B. Bauerle	Pending
6030 – James L. Carrier v. State	Pending
6031 – The State v. Terriel L. Mack	Pending
6032 – The State v. Rodney J. Furtick	Pending
6039 – Anita Chabek v. AnMed Health	Pending
6044 – Susan Brooks Knott Floyd v. Elizabeth Pope Knott Dross	Pending
2022-UP-380 – Adonis Williams v. State	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending

2022-UP-425 – Michele Blank v. Patricia Timmons (2) Pending

2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour Pending

2023-UP-005 – David Abdo v. City of Charleston Pending

2023-UP-037 – Diana Bright v. Craig Bright Pending

2023-UP-055 – M. Baron Stanton v. Town of Pawleys Island Pending

2023-UP-062 – Raglins Creek Farms, LLC v. Nancy D. Martin Denied 3/26/2024

2023-UP-070 – James Kincannon v. Ashely Griffith Pending

2023-UP-087 – The State v. Seth H. Smith Pending

2023-UP-091 – The State v. Dale E. King Pending

2023-UP-096 – Viola M. Hackworth v. Bayview Manor LLC Denied 3/26/2024

2023-UP-121 – Mathew C. Dwyer v. State Pending

2023-UP-126 – Innovative Waste Management v. Crest Energy Partners Pending

2023-UP-132 – Monica Brown-Gantt v. Centex Real Estate Pending

2023-UP-138 – In the Matter of John S. Wells Pending

2023-UP-143 – John Pendarvis v. SCLD Pending

2023-UP-151 – Deborah Weeks v. David Weeks Pending

2023-UP-158 – Herman Holcomb v. City of North Augusta Pending

2023-UP-161 – The State v. Terrell D. Knighter Pending

2023-UP-172 – The State v. Gary M. Wirtz Pending

2023-UP-177 – John Mayers v. Konan Henthorn	Pending
2023-UP-178 – CRM of the Carolinas, LLC v. Trevor W. Steel	Pending
2023-UP-179 – Ronald Mims v. Diane Ray	Pending
2023-UP-180 – The State v. Samuel L. Burnside	Pending
2023-UP-201 – Nancy Morris v. State Fiscal Accountability Authority	Pending
2023-UP-202 – SCE&G v. Pitch Landing, LLC	Pending
2023-UP-206 – Andrew McIntire v. Red Bay Constructors Corp.	Pending
2023-UP-232 – Beachwalk Hotel & Condominiums Association, Inc. v. The Town of Hilton Head Island (2)	Pending
2023-UP-236 – U.S. Bank, NA v. Alyce F. Otto	Pending
2023-UP-239 – Wilmington Savings Fund Society v. Rex A. Field	Pending
2023-UP-241 – John Hine v. Timothy McCrory	Pending
2023-UP-243 – David J. Benjamin v. State	Pending
2023-UP-244 – Logan Wood v. Horry County School District	Pending
2023-UP-246 – Ironwork Productions, LLC v. Bobcat of Greenville, LLC	Pending
2023-UP-249 – Buck Investments, LLC v. ROA, LLC	Pending
2023-UP-254 – In the Matter of Lauren Martel	Pending
2023-UP-258 – The State v. Terry R. McClure	Pending
2023-UP-260 – Thomas C. Skelton v. First Baptist Church	Pending
2023-UP-261 – Mitchell Rivers v. State	Pending

2023-UP-263 – Rory M. Isaac v. Laura Kopchynski Pending

2023-UP-264 – Kathleen A. Grant v. Nationstar Mortgage, LLC Pending

2023-UP-272 – Estate of Barbara Owens v. Fundamental Clinical and Operational Services, LLC Pending

2023-UP-274 – Terrence "Terry" Carroll v. Debra Mowery Denied 3/27/2024

2023-UP-281 – Armando Acevedo v. Hunt Valley Holdings, LLC Pending

2023-UP-283 – Brigette Hemming v. Jeffrey Hemming Pending

2023-UP-289 – R-Anell Housing Group, LLC v. Homemax, LLC Pending

2023-UP-290 – Family Services Inc. v. Bridget D. Inman Pending

2023-UP-291 – Doretta Butler-Long v. ITW Pending

2023-UP-293 – NCP Pilgrim, LLC v. Mary Lou Cercopely Pending

2023-UP-295 – Mitchell L. Hinson v. State Pending

2023-UP-301 – Olivia M. Thompson v. College of Charleston Pending

2023-UP-311 – The State v. Joey C. Reid Pending

2023-UP-315 – Capital Bank, N.A. v. Rosewood Holdings, LLC Denied 3/27/2024

2023-UP-321 – Gregory Pencille, #312332 v. SCDC (2) Pending

2023-UP-324 – Marvin Gipson v. Coffey & McKenzie, P.A. Pending

2023-UP-326 – SCDSS v. Joseph Green (2) Denied 3/26/2024

2023-UP-329 – Elisa Montgomery Edwards v. David C. Bryan, III Pending

2023-UP-343 – The State v. Jerome Smith Pending

2023-UP-346 – Temisan Etikerentse v. Specialized Loan Servicing, LLC	Pending
2023-UP-352 – The State v. Michael T. Means	Pending
2023-UP-355 – Terri Sciarro v. Matthew Sciarro	Pending
2023-UP-365 – The State v. Levy L. Brown	Pending
2023-UP-366 – Ray D. Fowler v. Pilot Travel Centers, LLC	Pending
2023-UP-369 – Harland Jones v. Karen Robinson	Pending
2023-UP-375 – Sharyn Michali v. Eugene Michali	Pending
2023-UP-392 – Trina Dawkins v. Fundamental Clinical	Pending
2023-UP-393 – Jeffrey White v. St. Matthews Healthcare	Pending
2023-UP-394 – Tammy China v. Palmetto Hallmark Operating, LLC	Pending
2023-UP-396 – Kevin Greene v. Palmetto Prince George Operating, LLC	Pending
2023-UP-397 – Jennifer Rahn v. Priority Home Care, LLC	Pending
2023-UP-398 – The State v. Rashawn M. Little	Pending
2023-UP-399 – The State v. Donnielle K. Matthews	Pending
2023-UP-400 – Paulette Walker v. Hallmark Longterm Care, LLC	Pending
2023-UP-406 – Carnie Norris v. State	Pending
2023-UP-003 – The State v. Quintus D. Faison	Pending
2024-UP-022 – ARM Quality Builders, LLC v. Joseph A. Golson	Pending
2024-UP-033 – The State v. David A. Little, Jr.	Pending
2024-UP-060 – The State v. Andres F. Posso	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Randy Collins, Respondent.

Appellate Case No. 2021-001176

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 28197
Heard October 3, 2023 – Filed April 3, 2024

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Petitioner.

E. Brandon Gaskins, of Moore & Van Allen, PLLC, of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: Randy Collins was convicted of first-degree arson and criminal conspiracy. The court of appeals reversed and remanded the matter to the circuit court for a new trial on the basis Collins's statement to law enforcement was involuntary and, thus, inadmissible. *State v. Collins*, 435 S.C. 31, 864 S.E.2d 914 (Ct. App. 2021). We granted the State's petition for a writ of certiorari and now affirm as modified. We hold Collins's statement was rendered involuntary when law enforcement gave Collins *Miranda*[1] warnings and subsequently negated them by falsely advising him that his statements would remain confidential.

I. FACTS

On March 29, 2014, firefighters received a call around 1:15 a.m. and responded to a fire at a mobile home that was rented by Marissa Cohen in Andrews, South Carolina. The neighbor who reported the fire indicated that he believed the home to be vacant (as Cohen had recently removed her belongings). However, upon forcibly entering the locked home and extinguishing the fire, the firefighters discovered the body of a twelve-year-old boy—Cohen's youngest son—who had died from smoke inhalation.

The town's fire marshal, who was also the firefighters' chaplain, was struck by Cohen's reaction at the scene, as she seemed unusually calm for someone who had just lost her son. Investigators quickly determined the fire had been set with an accelerant found in kerosene that had been poured on the floor. Further investigation revealed that Cohen had purchased $20 worth of kerosene the night of the fire; that she obtained a $25,000 contents-only insurance policy on the mobile home a few weeks before the fire; and that she had filed a claim under the policy just a week after her son's death.[2]

Collins became part of the investigation based on an anonymous tip received by an investigator with the Georgetown County Sheriff's Office, Melvyn Garrett

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

[2] The insurance company ultimately denied the claim after Cohen was charged with arson.

("Investigator Garrett"), who was told Cohen, Collins, and another individual, Benjamin "Mano" Brown, were involved in the fire.[3]

Investigator Garrett transcribed a short statement from Collins on April 9, 2014, in which Collins denied any involvement and stated he was at a club with James Miller, his nephew, at the time of the fire, and a bartender he knew had been working that night. Investigator Garrett obtained a similar statement from Miller on April 10, 2014, in which Miller stated he was not involved in the fire and had been at a club with Collins.

Investigator Garrett determined there were inconsistencies in the statements from Collins and Miller, however, after he talked to the bartender and other people who had been at the club that evening. Thereafter, officers obtained a search warrant to determine if there had been any communication between the parties. Senior Agent Scott Hardee ("Agent Hardee") from the South Carolina Law Enforcement Division ("SLED"), an arson specialist who assisted in the investigation, reviewed the phone data and discovered that Collins and Cohen had spoken three times just prior to the fire, during the evening hours of March 28, 2014, and again three times after the fire, at 2:50 a.m., 3:01 a.m., and 3:24 a.m. on March 29, 2014.

On June 4, 2014, Collins arranged with Officer Nesmith, someone he already knew, to retrieve his phones at the Andrews Town Hall and Police Department (the offices were located at one complex). Once there, however, Collins encountered Agent Hardee and Investigator Garrett, who knew Collins would be coming to pick up his phones. The two officers were waiting for Collins, as he had previously failed to show up for an interview with them, and they had been trying, unsuccessfully, to reach him.

Collins agreed to talk to Agent Hardee and Investigator Garrett, so the three of them went to a small room on the premises. Prior to the start of the interview, the officers went over a SLED form, entitled "Miranda Rights," with Collins, with the time noted as 10:20 a.m. The form set forth a listing of rights, including the rights to remain silent, to have an attorney present during questioning, and to the appointment of an attorney if he could not afford one. It also included the warning:

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[3] Brown acknowledged at Collins's trial that he had helped Cohen remove some of her belongings from the mobile home, and Cohen had informed him afterward of her plan to burn the home.

"Anything you say can be used in court as evidence against you." Agent Hardee read the form to Collins, and Collins initialed next to each item. Collins signed underneath a "Waiver of Rights" section at the bottom of the form to indicate that he understood his rights and was willing to talk to the officers without an attorney present. The interview lasted approximately three hours. It was recorded using Agent Hardee's personal video camera, which was similar in size to a cell phone and was reportedly visible to Collins on the table. The battery died at about 1.5 hours in, however, so when Agent Hardee realized that, he replaced the battery to resume the recording.

When asked at the beginning of the interview whether he had any preexisting issues, Collins, who was 43, noted he had a stroke in April 2013 and had been in a car accident in 2006. He also noted that he had gotten little sleep the night before and had not eaten breakfast that morning, as he had not planned to be interviewed. Agent Hardee mentioned that the "word on the street" was that Collins had something to do with the fire. Agent Hardee advised Collins that investigators had determined the fire was intentionally set with kerosene and a young boy died in the fire, so they were trying to figure out who could provide information about this incident. Collins initially denied any involvement in the fire and reiterated his position that he had been at a club named Carnell that evening with Miller, his nephew, although Collins changed the timeline slightly from his prior statement, indicating he went to the club at approximately 11:00 p.m. and left around 2:00 a.m. Collins said he recognized T. Chandler running the bar and spoke to him while Miller played pool. Collins stated Miller took him home after they left the club.

As the officers continued the discussion, Agent Hardee asked Collins to set aside their discussion to that point and just tell them what he thought happened and whether the fire was intentional or "a bad accident." Collins responded that he did not know and did not want to "say the wrong thing." Agent Hardee reassured Collins that the interview was confidential, emphasizing that the door was shut and the blinds were closed in the interview room and that anything Collins told them was only for the "file" and would not "leave this room." The court of appeals accurately recounted this point in the interview as follows:

> Of particular note . . . is an assurance made by Agent Hardee approximately twenty-one minutes into the interview, after Appellant was asked whether he thought the fire was intentionally started, and Appellant responded

> he did not want to "say the wrong thing." Agent Hardee responded, "Well, you're not going to say the wrong thing. *Whatever you tell me, it ain't gonna leave this room. This, um, tape is going into my file.* And I'm gonna, I'm gonna burn a copy for him [Investigator Garrett]. And we'll have a copy of this tape. *And it ain't gonna go any further than this room*. That's why we got the door shut, the blinds pulled, there's no sound device in here. I want you to be honest with me and tell me what you think."

State v. Collins, 435 S.C. 31, 41–42, 864 S.E.2d 914, 919 (Ct. App. 2021).

The officers reassured Collins that they were interested in Cohen, not him, and that no matter what happened during the interview, Collins would be able to go home that day. However, the officers also told Collins that if he did not tell them anything, he could be facing over thirty years in prison. Collins asked to stop the interview at one point, but he was told not to leave by the officers, as they believed he was on the verge of revealing inculpatory information.

Collins eventually acknowledged that Cohen, who rented the mobile home, had asked him to burn it down. Collins stated he had declined to do it, but he told Miller about Cohen's request. Collins conceded that he was at the mobile home with Miller the night of the fire, but he maintained that he left the scene and was not the person who actually started the fire.

Ultimately, at the conclusion of the three-hour interview, Collins signed a written, two-page statement for the Georgetown County Sheriff's Office that was labeled "VOLUNTARY STATEMENT" on June 4, 2014, at 1:40 p.m. Collins began the statement by maintaining, "I DID NOT DO it." Collins acknowledged that Cohen had asked him to do a "job" of burning down her home and offered him $5,000; that she told him to "think about it"; that he had told his nephew, Miller, about it; that after he and Miller went to the club that night, he told Miller to take him home, but Miller did not and, instead, drove over to the mobile home; after finding the doors to the home locked, Miller pushed a window open and lit a piece of paper and threw it in the window; Miller thereafter drove around the home several times but did not "see anything lit"; and Miller took him home. Collins ended the written statement by indicating Cohen called him and told him that her son was dead and, after that, at around 3:30 a.m., Miller came to his home and also informed him

that Cohen's son had died in the mobile home fire. Collins was permitted to go home after he gave the officers a written statement.

In August 2014, however, Collins was indicted on charges of first-degree arson and of entering into a criminal conspiracy to commit arson with Cohen and Miller. At Collins's trial in 2018, the trial judge admitted into evidence Collins's two written statements and his videotaped interview. Collins was convicted of first-degree arson and criminal conspiracy.[4]

Collins filed a direct appeal challenging, *inter alia*, the admission of his statement to law enforcement on the basis it was involuntary.[5] The court of appeals found the trial judge erred in ruling Collins's statement was voluntary and in admitting it into evidence. *Collins*, 435 S.C. at 54, 864 S.E.2d at 926. The court of appeals noted it was undisputed that officers gave Collins *Miranda* warnings, but thereafter Collins was falsely advised that any statements he made would not be used against him. *Id.* at 51–52, 864 S.E.2d at 924–25. It additionally noted that the officers specifically advised Collins that they wanted information from him to investigate Cohen, and that "no matter what he told them, [Collins] was going to get to go home after the interview," but that if he did not cooperate, they would seek charges against him. *Id.* at 52–53, 864 S.E.2d at 925. The court of appeals concluded that, under the totality of the circumstances, the officers' "coercive and deceptive tactics during the interview caused [Collins's] will to be overborne, inducing him to make the inculpatory statement." *Id.* at 53, 864 S.E.2d at 925. As a result, the court of appeals reversed and remanded the matter to the circuit court for a new trial. *Id.* at 55, 864 S.E.2d at 926.

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[4] Miller, who was also arrested and charged in this matter, was killed prior to Collins's trial. Cohen's older son, Devon Coombs, pled guilty to the killing of Miller.

[5] For simplicity, Collins's statements will be referred to in the singular. Collins's first written statement denied any knowledge of the fire, so it is not at issue here. The second written statement essentially summarized his oral statements to Agent Hardee and Investigator Garrett in the recorded interview, so these latter two items are the focus of this appeal.

II. STANDARD OF REVIEW

This Court recently clarified the appellate standard of review when considering whether a defendant's statement to law enforcement was voluntarily made. "We agree with those jurisdictions that have found the question of voluntariness presents a mixed question of law and fact." *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023). "[W]e will review the trial court's factual findings regarding voluntariness for any evidentiary support." *Id.* "However, the ultimate legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to de novo review." *Id.*[6]

III. DISCUSSION

The State contends the court of appeals erred in finding Collins's statement was involuntarily made and, therefore, inadmissible. We disagree.

There are two constitutional bases that require statements admitted into evidence to be voluntarily made: (1) the Due Process Clause of the Fourteenth Amendment, and (2) the Fifth Amendment right against self-incrimination. *Id.* at 120, 893 S.E.2d at 313 (citing *Dickerson v. United States*, 530 U.S. 428, 433 (2000)). The United States Supreme Court has observed that the requirement of warnings regarding the Fifth Amendment in *Miranda* "does not, of course, dispense with the voluntariness inquiry." *Dickerson*, 530 U.S. at 444.

In the current appeal we are considering the issue of voluntariness, where one factor in the analysis is that the defendant was advised of his rights (e.g., to remain silent, to have an attorney present at questioning) and given *Miranda* warnings, but the warnings were then negated by law enforcement's false assurances of confidentiality. It is the impact *on voluntariness* of these two opposing points—

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[6] In *Miller* we recognized that, because voluntariness is "a legal question, it is unnecessary going forward for trial courts to submit the question of voluntariness to the jury," but "the parties may continue to argue to the jury why a statement is more or less trustworthy based on its voluntary nature." *Miller*, 441 S.C. at 119 n.10, 893 S.E.2d at 313 n.10. In other words, a trial court's pretrial determination of voluntariness will not prevent a defendant from challenging the reliability of a statement during the trial, as credibility remains an issue for the jury. *Id.* (citation omitted).

warnings of potential consequences, versus a promise of no consequences—that is before us, not the more narrow issue of compliance with the Fifth Amendment warning requirements under *Miranda*.[7] As a result, the question before the Court is more precisely framed as follows: Does a false promise of confidentiality give rise to coercion and, thus, a lack of voluntariness, because it intentionally misleads a suspect about *the law*, i.e., the legal consequences and risks of proceeding with an interview with law enforcement, as distinguished from misleading a suspect about *the facts* in an investigation? We conclude that an intentional misrepresentation of the law in this regard violates due process. Importantly, we note that we reach this result regardless of whether the false assurance was accompanied by *Miranda* warnings. A false assurance of confidentiality from law enforcement is inherently coercive because it interferes with a layperson's ability to make a fully informed decision whether to engage in an interview under such circumstances.

Pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), a defendant "is entitled to a reliable determination as to the voluntariness of his confession by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). In South Carolina, the trial judge makes this initial determination of voluntariness required by *Jackson v. Denno*. *Id.* at 226–27, 222 S.E.2d at 510.

"The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." *State v. Saltz*, 346 S.C. 114, 136, 551

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[7] The court of appeals has noted that "[t]he State conceded in oral argument that if *Miranda* warnings were required here, Agent Hardee's assurance negated the warnings, rendering Appellant's statements inadmissible as a matter of law." *Collins*, 435 S.C. at 51 n.9, 864 S.E.2d at 924 n.9. The State alternatively contends, however, (1) that *Miranda* warnings were not required because Collins was not in custody and voluntarily agreed to speak to law enforcement, so any promises negating (what it terms) the unnecessary *Miranda* warnings cannot be misleading or coercive, or (2) that Collins was properly given his *Miranda* warnings and executed a waiver of his rights, so he should, therefore, have known not to rely on any contradictory promises by law enforcement. We disagree with the State on these contentions. Regardless of whether *Miranda* warnings were initially required, we find law enforcement may not make a false promise of confidentiality during an interview because, ultimately, the impact on due process is the same.

S.E.2d 240, 252 (2001); *see also State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010) ("In South Carolina, the 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.").

"If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252 (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 225 (1973)). "Ultimately, the determination will depend 'upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'" *Miller*, 441 S.C. at 120, 893 S.E.2d at 314 (quoting *Dickerson*, 530 U.S. at 434). We have noted that "[c]ourts may consider the impact of a number of factors" in assessing voluntariness, such as the accused's youth and maturity, lack of education, or low intelligence; the failure to advise the accused of his constitutional rights; the presence of a written waiver of rights; the physical condition and mental health of the accused; the circumstances of the interrogation, including its length, repeated nature, location, and continuity; the use of physical punishment; whether law enforcement offered specific promises of leniency (as opposed to general comments that cooperation would be beneficial); and whether law enforcement made intentional misrepresentations of the evidence against the accused. *See id.* at 120–21, 893 S.E.2d at 314 (enumerating a nonexclusive list of factors).

"It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect." *State v. Parker*, 381 S.C. 68, 89, 671 S.E.2d 619, 630 (Ct. App. 2008) (citation omitted). "These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." *Id.* (citation omitted).

However, "[c]ertain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller*, 441 S.C. at 120, 893 S.E.2d at 313 (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)). "Coercion is determined from the perspective of the suspect." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (citation omitted).

We note that, during the oral argument before this Court, the State itself characterized the officer's statements to Collins as "dangerous" and "inexcusable," and it specifically acknowledged that false promises of confidentiality should never be made by law enforcement:

> [T]he comment from Agent Hardee . . . [giving Collins a false assurance of confidentiality] is terrible, should have never been said, and should never be said again by any law enforcement officer in South Carolina.
>
> . . . .
>
> This statement, in addition to being inexcusable, is incredibly dangerous, and it's so disturbing that it occurs in an investigation of a twelve-year-old's death.

Although the State argued the record supported the trial judge's finding that Collins's confession was, nevertheless, voluntary and that Collins's free will was not overborne by law enforcement's false promise of confidentiality, the State further asserted: "The opinion this Court writes . . . should say that's something that should never have occurred and should never happen again and we condemn it. The State's right there with you, we condemn it as well."

At the outset, we want to commend the State for its candid and forthright acknowledgements at oral argument, and we accept the State's invitation to unequivocally condemn the interviewing technique employed here. However, we disagree with the State's contention that the conduct did not render Collins's statement involuntary. False assurances of confidentiality have been deemed impermissibly coercive and violative of due process in a number of jurisdictions that have had the opportunity to consider the issue, and we find their reasoning persuasive.

In one such case from New Hampshire, a "detective told the defendant that '[w]hat you tell me and what we deal with in here can stay between me and you.'" *State v. Parker*, 999 A.2d 314, 318 (N.H. 2010) (alteration in original). "Later, the detective stated, '[g]et a little counseling and . . . it's over,' implying, according to the defendant, that if he confessed 'he would only have to do counseling and that he would see his children'; [i.e.,] 'he would not have to go to jail.'" *Id.* (first alteration

in original). The New Hampshire Supreme Court stated, "The defendant contends that these promises 'were so irresistible they rendered [his] confession involuntary.'" *Id.* (alteration in original).

The New Hampshire court reaffirmed its earlier precedent that held promises of confidentiality or immunity from prosecution are "categorically different" from other promises and, when relied upon the defendant, warrant a per se exclusion of the resulting statements. *See id.* at 319 (observing that, for most promises or threats, the court examines the totality of the circumstances to determine if a defendant's will was overborne, but "[t]he totality of the circumstances test . . . does not apply to promises of confidentiality or promises of immunity from prosecution" (citing *State v. McDermott*, 554 A.2d 1302 (N.H. 1989))). The court found the defendant's (Parker's) statements relied upon the detective's false promise of confidentiality and were, thus, involuntary, because after "the detective's promise of confidentiality, the defendant admitted to the sexual assault of [the victims]." *Id.* at 321; *see also id.* at 322 ("Because the interviewing detective made a promise of confidentiality that the defendant relied upon, we hold that the defendant's resulting statement was involuntary.").

In *State v. McDermott*, the New Hampshire court affirmed the trial court's suppression of the defendant's confession. The court indicated the case turned on the trial court's finding that an agent with the Drug Enforcement Administration ("DEA") had told the defendant that the information he provided "would not leave the DEA's office." *McDermott*, 554 A.2d at 1305. The court stated, "[T]o allow the government to revoke its promise after obtaining incriminating information obtained in reliance on that promise would be to sanction governmental deception in a manner violating due process." *Id.* at 1306.

The *McDermott* decision is notable because no *Miranda* warnings were ever given to the defendant. *See id.* at 1304 (noting another false statement the DEA agent made was that the defendant's statements would not be used against him because he had never received *Miranda* warnings). Thus, the *negation* of *Miranda* warnings was not crucial to the appellate court's analysis and conclusion that the defendant's confession was inadmissible. Rather, the court found that the false promise of confidentiality, in itself, *violated due process* because this type of promise is uniquely coercive and egregious, and the false promise rendered the resulting incriminating statements involuntary. *Id.* at 1305–06; *cf. State v. Rezk*, 840 A.2d 758, 487–93 (N.H. 2004) (explaining false promises of confidentiality and

leniency, unlike other types of promises, can be dispositive of the issue of voluntariness, but error in the admission of an involuntary statement is still subject to a harmless error analysis because it is a trial error, not a structural error (citing *Arizona v. Fulminante*, 499 U.S. 279, 307–10 (1991))).

We agree with this analysis. Accordingly, our conclusion today is not premised on the State's contentions regarding whether or not *Miranda* warnings were ever "necessary" in the first instance, as the narrower issue of *Miranda* compliance is not before us. Here, the only reasonable interpretation of the officer's statements to Collins—that the door was closed and the blinds were drawn because nothing would ever leave that room or the "file"—is that they constituted a false promise of confidentiality. Although Collins was assured that he would be going home that day regardless of what he said and that he was not the focus of the investigation, the unspoken truth was that law enforcement could—and did—later seek to use Collins's uncounseled, "confidential" statements against him in a court of law, to his detriment, despite these assurances to the contrary. This misstatement of the law and false assurance by law enforcement regarding Collins's constitutional rights violated due process.

We take care to emphasize that law enforcement is under no obligation to advise a suspect on the law, but having undertaken the task of doing so, law enforcement may not mislead a suspect about the law, particularly as to his critical, constitutional rights. Such misleading statements undermine the fundamental fairness that every defendant is entitled to under the law, and are distinguishable from misleading statements about the facts of an investigation.

In another context (involving false promises of leniency), the Fourth Circuit similarly reasoned that, because it is difficult to determine with certainty the effect that a false promise may have had on an individual defendant, the statements resulting from an unconstitutional inducement should be excluded if there is *any* degree of influence:

> Seventy years ago the [United States] Supreme Court recognized the inherent difficulty of calibrating the effect of an unconstitutional inducement, when it observed [that] "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and

> therefore excludes the declaration if any degree of influence has been exerted."

Grades v. Boles, 398 F.2d 409, 412 (4th Cir. 1968) (quoting *Bram v. United States*, 168 U.S. 532, 543 (1897)); *cf. Porter v. State*, 239 S.E.2d 694, 696 (Ga. Ct. App. 1977) (discussing assurances by a GBI agent that the defendant's statement "would not be used against him" and that "it was being recorded just so the agent's secretary could type his notes" for the file and holding "[a] confession given under such a pretense may not be admitted against the confessor").

Based on the foregoing, we agree with the court of appeals' conclusion that Collins's statement was involuntary. We modify its decision slightly to clarify that a false statement of confidentiality can be conclusive on the issue of voluntariness, regardless of the existence or negation of *Miranda* warnings (or the need to examine the totality of the circumstances). However, the erroneous admission of an involuntary statement is still subject to a harmless error analysis. *See Rezk*, 840 A.2d at 487–93.

Having found Collins's involuntary statement was erroneously admitted into evidence, we must consider whether the admission of the involuntary statement was, nevertheless, harmless beyond a reasonable doubt in view of the entire record. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *State v. Morris*, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986) ("We recognize the doctrine that where a trial court error is harmless beyond a reasonable doubt, it does not constitute grounds for reversal. It is a doctrine which should be employed guardedly, however, and on a case by case basis." (citation omitted)); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.").

"Whether an error is harmless depends on the particular circumstances of the case." *State v. Reeves*, 301 S.C. 191, 193, 391 S.E.2d 241, 243 (1990). "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." *Id.* at 193–94, 391 S.E.2d at 243.

In the current appeal, the State has argued Collins's statement was voluntary and was properly admitted into evidence, positions that we have rejected. The State did not specifically rely on harmless error. Nevertheless, we find the error clearly is not harmless because Collins's statement was the key evidence placing him at the scene of the fire and linking him to Cohen's arson scheme. *Cf. State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 59 (2011) ("Petitioner argues the admission of Crisco's hearsay testimony was prejudicial because Crisco's testimony comprised the State's only evidence placing Petitioner in the vehicle at the time of the robbery. We agree that without Crisco's testimony, the jury had little evidence from which to conclude Petitioner was in the vehicle at the time of the robbery. Therefore, we find it was prejudicial error to admit Crisco's testimony, and we reverse the conviction on that ground.").

Collins's situation is distinguishable from cases where the inadmissible evidence is merely cumulative to other, unchallenged or properly admitted evidence in the record. *Cf. State v. Miller*, 441 S.C. 106, 129, 893 S.E.2d 306, 318 (2023) ("Here, as at trial, Petitioner does not challenge the voluntariness or admissibility of his three other confessions to Capers, Sabb, and Chief Williams. The allegedly involuntary confession to Agents Johnson and Merrell was cumulative in every material respect to the prior three admissible confessions."); *State v. Henderson*, 286 S.C. 465, 472, 334 S.E.2d 519, 523 (Ct. App. 1985) (concluding the defendant's erroneously admitted pretrial confession was harmless error because "the defendant made virtually the same damaging admissions" at trial, so "the defendant's statement to the police was merely cumulative" to other evidence of guilt).

For these reasons, we conclude the error in the admission of Collins's involuntary statement was not harmless beyond a reasonable doubt.

IV. CONCLUSION

We agree with the court of appeals that Collins's statement was rendered involuntary by law enforcement's false assurance of confidentiality and was, therefore, inadmissible. Although law enforcement has no obligation to advise a suspect as to the law, we reiterate that officers may not mislead a suspect about the law, particularly their constitutional rights. We further find the error in the admission of the involuntary statement was not harmless beyond a reasonable doubt, as it was essentially the only evidence placing Collins at the scene of the fire and linking him to the arson scheme. Consequently, we affirm the court of appeals as

modified, on this specific ground, and we agree Collins is entitled to a new trial. We decline to reach the State's remaining issues.

AFFIRMED AS MODIFIED.

KITTREDGE, FEW, JAMES and HILL, JJ., concur.

The Supreme Court of South Carolina

In the Matter of James Ian Hawkes, Respondent.

Appellate Case No. 2024-000481

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

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

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

Columbia, South Carolina
April 2, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lorenda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman, Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and Workforce, Appellant.

Appellate Case No. 2019-000599

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge,
Clifton Newman, Circuit Court Judge

Opinion No. 6055
Heard August 17, 2023 – Filed April 3, 2024

REVERSED

Robert E. Tyson, Jr., Vordman Carlisle Traywick, III, and Robert E. Stepp, all of Robinson Gray Stepp & Laffitte, LLC, all of Columbia; and Kenneth P. Woodington and William H. Davidson, II, both of Davidson, Wren & DeMasters, of Columbia, all for Appellant.

C. Bradley Hutto, of Williams & Williams, of Orangeburg; Daniel Webster Williams, of Bedingfield & Williams, of Barnwell; Susan B. Berkowitz and Adam Protheroe, both of South Carolina Appleseed Legal Justice Center, of Columbia; and Alexander D. Paterra, of The Paterra Law Firm, LLC, of Greenville, all for Respondents.

Kenneth M. Moffitt, Jessica J. Godwin, and John Potter Hazzard, V, all of Columbia, for Amicus Curiae Thomas Alexander, President of the South Carolina Senate.

Patrick Graham Dennis, Haley Mottel Symmes, and Steven Robert Davidson, all of Columbia, for Amicus Curiae G. Murrell Smith, Speaker of the South Carolina House of Representatives.

VINSON, J.: In this declaratory judgment action, the South Carolina Department of Employment and Workforce (DEW) appeals the circuit court's orders[1] granting judgment in favor of named plaintiffs Archie Patterson and Tammie Bollerman (collectively, Claimants), arguing the circuit court erred by (1) certifying a class, and in the alternative, failing to require a claims-made process, (2) declaring DEW was required to promulgate regulations implementing its online work search requirement, and (3) concluding Claimants were not required to exhaust their administrative remedies prior to bringing this action. We reverse.

FACTS AND PROCEDURAL HISTORY

[1] DEW appeals seven orders: the (1) May 5, 2016 order certifying the class; (2) April 27, 2017 order finding Claimants had standing; (3) October 30, 2017 order denying DEW's motion to reconsider the April 27, 2017 and May 5, 2016 orders; (4) February 15, 2019 order ruling in favor of Claimants on the merits; (5) March 11, 2019 order denying DEW's motion to reconsider the merits order; (6) March 21, 2019 order granting Claimants' motion to amend the merits order; and (7) July 22, 2020 order denying DEW's motion to reconsider the March 21, 2019 order.

In the 2011–2012 Appropriations Act, the General Assembly enacted the following budget proviso pertaining to DEW:

> (DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of [s]ection 41-35-110(3) and [s]ection 41-35-120(5) of the [South Carolina Code (2021)[2]], via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants *and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified*. The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with laws administered by the agency.

Act No. 288, 2012 S.C. Acts 448, § 67.7 (emphasis added). The General Assembly passed identical provisos in 2013, 2014, and 2015. *See* Act. No. 101, 2013 S.C. Acts 475-76, § 83.6; Act No. 286, 2014 S.C. Acts 503, § 83.6; Act No. 91, 2015 S.C. Acts 484-85, § 83.5. The proviso remained in effect until July 1, 2016.[3] In August 2012, after providing advance notice to unemployed insurance benefits claimants, DEW began requiring these individuals to conduct at least one job search per week using SCWOS in accordance with the directive contained in

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[2] *See* § 41-35-110(3) (providing "[a]n unemployed insured worker is eligible to receive benefits with respect to a week only if [DEW] finds he: . . . is able to work and is available for work . . . and . . . is himself actively seeking work"); § 41-35-120(5) (providing, in pertinent part, "[a]n insured worker is ineligible for benefits . . . [i]f [DEW] finds he has failed, without good cause: . . . to apply for available suitable work, when so directed by the employment office or [DEW]").

[3] In 2017, DEW promulgated a regulation addressing this requirement. *See* S.C. Code Ann. Regs. 47-104 (Supp. 2023).

the proviso. DEW distributed a letter titled "Procedure Transmittal Letter Number 1267-3" to all department heads, area directors, claim supervisors, and staff managers on August 10, 2012. The letter explained that beginning with the claim week ending August 11, 2012, any claimants who failed to comply with the online job search requirement for a given week would be notified their benefits were stopped because they failed to make a job search through SCWOS for the specified claim week. The letter further provided,

> Warnings are NOT acceptable for SCWOS work searches. Claimants will not be given a warning if they fail to meet this requirement. There may be a few extraordinary circumstances, such as a court order prohibiting a claimant from using the Internet, or for a claimant whose first language is not English and (s)he cannot read the instructions on SCWOS, where a claimant may be justified in failing to make job searches through SCWOS.

Prior to DEW's implementation of the online work search requirement, individuals claiming unemployment benefits received weekly benefits automatically through DEW's automated system. In other words, benefits were paid unless DEW staff took action to stop the payment. Although DEW required claimants to maintain a paper form, "Form UCB-303," documenting contacts with potential employers each week, verifications of this information did not occur on a weekly basis but occurred on an unspecified, periodic basis. Once the online work search requirement took effect, however, DEW's system automatically stopped benefits payments when it detected a claimant failed to conduct the online search. These claimants then received a written notice explaining their benefits had been stopped and instructing them to report to their local "SC Works Center" immediately if they "would like to receive future benefits." It also instructed them to bring the written notice and their Form UCB-303. The instruction telling them to report to a local employment center was the claimant's opportunity to provide DEW with a statement regarding their failure to perform the online search and to seek payment of the benefits for which they had been deemed ineligible; however, the written notice did not explain this. Numerous individuals failed to comply with this online work search requirement and were denied their weekly benefits as a result.

On February 14, 2013, Claimants filed this declaratory judgment action as a putative class action.[4] Claimants moved to certify the class in May 2013. In their amended complaint filed February 17, 2015, Claimants[5] requested the circuit court (1) certify the class, (2) declare DEW was required to promulgate regulations implementing its online work search requirement, (3) temporarily enjoin DEW from enforcing its policy requiring an online job application, and (4) require DEW to account for and pay all benefits denied as a result of its policy of online applications.

Claimants asserted in their amended complaint that they were wrongfully denied benefits for failing to conduct an online search through SCWOS because DEW implemented this policy without first promulgating regulations. They asserted sections 41-27-510[6] and 41-35-610[7] of the South Carolina Code (2021) and the Administrative Procedures Act, sections 1-23-10 to -680 of the South Carolina Code (2005 & Supp. 2023), required DEW to promulgate regulations before implementing the online work search requirement. Alternatively, they alleged this new policy constituted a binding norm that must be implemented through regulation.

In its amended answer, DEW asserted Claimants were not entitled to relief because they failed to exhaust their administrative remedies and it was not required to promulgate regulations because the online work search requirement was authorized by the General Assembly through the proviso.

DEW filed its first motion for summary judgment in March 2014, which the circuit court denied. In its second motion for summary judgment filed in April 2015, DEW argued that as to Claimants' amended complaint, the directives contained in

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[4] Circuit Court Judge Doyet A. Early, III, designated the case as complex and appointed himself to hear all matters in the case until its conclusion.

[5] Although additional individuals were initially named as plaintiffs, ultimately, only Claimants proceeded as class representatives.

[6] *See* § 41-27-510 ("[DEW] must promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as [DEW] considers necessary.").

[7] *See* § 41-35-610 ("[A] claim for benefits must be made pursuant to regulations [DEW] promulgates.").

the proviso authorized it to implement the online work search requirement and it was therefore not required to promulgate regulations to implement it. DEW additionally asserted Claimants were not entitled to relief because they lacked standing and failed to exhaust their administrative remedies. Claimants filed a cross-motion for summary judgment. The circuit court heard both motions in January 2016. In its May 5, 2016 order, the circuit court granted Claimants' earlier motion to certify the class, concluding Claimants met the five prerequisites for class certification pursuant to Rule 23, SCRCP, and denied the parties' cross-motions for summary judgment.

DEW filed a Rule 59(e), SCRCP, motion to alter or amend the class certification order, arguing the circuit court failed to address the issue of standing and adequate representation in its order. The parties filed a consent motion seeking an evidentiary hearing on the issue of standing of the individual plaintiffs and to hold DEW's 59(e) motion in abeyance. The circuit court held hearings on the standing issue on November 2, 2016, and January 11, 2017. Claimants both testified.

Bollerman testified that when she failed to receive her benefits check, she contacted DEW. She explained to a DEW staff member[8] that she conducted at least four job searches, including the online job search. Bollerman noted she completed a Form UCB-303 but was not asked to provide it. She testified she told the staff member she went through SCWOS but might have inadvertently navigated away from the site when she attempted to apply for a position. Bollerman stated she also explained to the staff member she conducted some of her searches on Saturday and was told DEW was "having problems" with the system and it "was[no]t counting Saturday searches." Bollerman acknowledged the determination she received from DEW informed her the decision would be final unless she filed an appeal within ten days. She stated she did not file an appeal of that determination.

Patterson testified that when he did not receive his benefits check for the week ending August 25, 2012, he visited the unemployment compensation office. He stated he could not remember if he was told the reason he did not receive a check

[8] A DEW employee, Kevin Cummings, testified during the November 2016 hearing on standing that Bollerman gave her statement to a "factfinder" who then provided her statement to a "claims adjudicator," and the claims adjudicator determined Bollerman was not eligible for benefits for that week.

was because he failed to complete one of his job searches online. Patterson indicated he *did* complete an online job search for that week but when he did not receive a check he "assum[ed] that [DEW] did[no]t get [his] paperwork." He explained that when he reported to the unemployment compensation office, the staff member "said just put anything down, so [he] said [he] forgot" to do the search. He agreed he did not appeal.

The circuit court issued an order on April 27, 2017, finding Claimants had standing to bring the action and represent the class. The circuit court determined Claimants each had individual standing and rejected DEW's argument that they lacked standing because they failed to exhaust their administrative remedies when they failed to appeal DEW's denial of benefits. The circuit court reasoned "any appeal concerning whether [they] were required to complete an online job search would be futile" because Romi Robinson, chief administrative hearing officer of DEW, testified a hearing officer had no authority to rule on the issue of whether DEW was required to promulgate a regulation regarding the online searches. The circuit court further reasoned exhaustion was not required because Claimants alleged DEW acted outside of its authority. DEW filed a Rule 59(e), SCRCP, motion to reconsider the April 27, 2017 order. On October 30, 2017, the circuit court denied DEW's motions to reconsider its May 5, 2016 class certification order and April 27, 2017 order finding Claimants had standing.[9]

The circuit court held a merits hearing on October 31, 2018. Prior to the hearing, the parties stipulated either party could submit affidavits, deposition testimony, and testimony from previous court hearings as evidence; no witnesses testified during the merits hearing.[10] The evidence included affidavits, deposition testimony, and hearing testimony of several DEW employees, including Cummings and Robinson. In addition, Claimants included a Legislative Audit Council review that recommended DEW promulgate regulations implementing the online search requirement. On February 15, 2019, the circuit court issued an order ruling in favor of Claimants. The circuit court stated DEW failed to promulgate regulations

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[9] DEW appealed the circuit court's May 6, 2016 and April 27, 2017 orders. This court dismissed DEW's appeal as not immediately appealable, and our supreme court denied DEW's petition for a writ of certiorari.

[10] In addition, Claimants submitted a proposed class notice to the circuit court. By consent order, the parties agreed to withhold sending notice to class members until a final resolution of this case.

regarding the online work search requirement and was therefore without authority to implement it. The circuit court concluded the budget proviso simply directed the expenditure of monies and did not suspend any other statutes governing DEW or relieve DEW of its statutory duty to promulgate regulations to implement the online work search requirement. The circuit court again determined Claimants met their burden of establishing standing. The circuit court next concluded Claimants' failure to exhaust their administrative remedies was excused because (1) pursuing such remedies would have been futile and (2) DEW was acting outside of its authority when it implemented the online work search requirement without first promulgating regulations. Additionally, the circuit court rejected DEW's argument Claimants were time barred from bringing this action under section 41-35-660 of the South Carolina Code (2021)[11] because this was not an appeal from an initial determination, redetermination, or subsequent determination. Finally, the circuit court reaffirmed its previous order certifying this case as a class action. The circuit court additionally included a requirement that the class proceed on a "claims-made" basis. The circuit court required class members must "still show that they satisfied the requirements to receive benefits for the week or weeks in question[] once the disqualification for failure to make an online work search is removed." Claimants filed a 59(e), SCRCP, motion, requesting that the circuit court remove the requirement that the class proceed on a claims-made basis. The circuit court granted the motion and issued an amended order on March 21, 2019, concluding a claims-made process was unnecessary.

DEW filed Rule 59(e), SCRCP, motions as to both the February 15, 2019 order and the March 21, 2019 order. On July 22, 2020, the circuit court[12] granted DEW's 59(e) motion only as to the parties' stipulation to modify the language in the March order and the corresponding language in the February order regarding notice to the class. This language was modified to provide that persons who had otherwise exhausted the full amount of unemployment benefits they were entitled to receive during any pertinent period were excluded from the class. This appeal followed.

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[11] *See* § 41-35-660 (providing a claimant may "file an appeal from an initial determination, redetermination, or subsequent determination *not later than ten days* after the determination was mailed to his last known address" (emphasis added)).

[12] The Chief Judge for Administrative Purposes, Circuit Court Judge Clifton Newman, heard this motion because Judge Early retired after entering the prior orders at issue.

STANDARD OF REVIEW

"Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 217, 893 S.E.2d 342, 346 (Ct. App. 2023) (alterations in original) (quoting *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

LAW AND ANALYSIS

DEW argues Claimants were statutorily required to exhaust their administrative remedies and the futility exception did not apply. DEW asserts the exclusive method for challenging its determinations regarding unemployment benefits and review of such decisions is provided by statute. DEW further contends that DEW, the Appellate Panel, and the Administrative Law Court (ALC) all had authority to address the issue of whether DEW was required to promulgate a regulation regarding the online work search requirement. We agree.

"Relief is not generally available to one who has not exhausted administrative remedies." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995). "Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances." *Id.* "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583.

"[T]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Cox*, 441 S.C. at 218, 893 S.E.2d at 347 (alteration in original) (quoting *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012)).

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583. "A [circuit court] must have a sound basis for excusing the failure to exhaust administrative relief." *Id.* at 209, 442 S.E.2d at 583.

> There are two types of exhaustion of remedies: judicially imposed and statutorily mandated. The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few. When the exhaustion of remedies is statutorily mandated . . . legislative intent prevails.

Ward v. State, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) (citations omitted) (footnotes omitted). "[An] exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." *Id.* at 19, 538 S.E.2d at 247. "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Cox*, 441 S.C. at 221, 893 S.E.2d at 348 (quoting *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010)); *see also Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 526-27, 520 S.E.2d 339, 350-51 (Ct. App. 1999) (holding a party's belief "even with good reason[] that [the agency would] reject her claim[] d[id] not establish futility as a basis for excusing exhaustion in the absence of a definitive statement by the agency administrator").

"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006); *id.* (holding the plaintiff was not required to exhaust administrative remedies when it challenged the validity of an ordinance itself). "[A]s a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling." *Ward*, 343 S.C. at 18, 538 S.E.2d at 247; *id.* at 19-20, 538 S.E.2d at 247-48 (holding the circuit court erred in dismissing a declaratory judgment action for failure to exhaust administrative remedies when the action challenged the constitutionality of a statute, which was an issue the ALC could not decide).

Section 41-35-690 of the South Carolina Code (2021) pertaining to DEW provides:

> The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the [DEW] Appellate Panel, as established by [s]ection 41-29-300[of the South Carolina Code (2021)], and afterward to the [ALC], pursuant to [s]ection 41-29-300(C)(1), *is the sole and exclusive appeal procedure*.

(emphasis added). Section 41-35-740 of the South Carolina Code (2021) provides "judicial review is permitted only after a party claiming to be aggrieved by [DEW's decision] has exhausted his administrative remedies."

We hold the circuit court erred by finding Claimants were excused from their failure to exhaust administrative relief. *See Ward*, 343 S.C. at 18, 538 S.E.2d at 247 ("[W]hile there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few."). First, the record does not support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. Rather, according to Cummings's March 2014 affidavit, "Approximately 1,300 appeals related to the online job search requirement were taken between August 2012 and early February 2013. In those appeals, there were 214 reversals of disqualifications." This equals about a 16 percent success rate on appeal. Further, according to Robinson, of the total 2,613 appeals pertaining to a claimant's failure to satisfy the online job search requirement that were heard and decided on the merits, 728 (or 28 percent) were reversed. Although the rate of reversals was not high, it was not so low as to support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. *See Smith*, 336 S.C. at 526-27, 520 S.E.2d at 350-51 (holding a party's belief "even with good reason[] that [the agency would] reject her claim[] d[id] not establish futility as a basis for excusing exhaustion in the absence of a definitive statement by the agency administrator"). Thus, we conclude the record does not support the circuit court's ruling that Claimants' pursuit of administrative relief would have been futile.

Second, we hold the circuit court erred in concluding exhaustion was not required because DEW acted outside of its authority. In reaching this conclusion, the circuit

court cited to three cases: *Responsible Economic Development v. South Carolina Department of Health & Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007); *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010); and *Ex parte Allstate Insurance Co.*, 248 S.C. 550, 151 S.E.2d 849 (1966). We hold these authorities do not support its conclusion that Claimants should be excused from their failure to exhaust their administrative remedies.

In *Responsible Economic Development*, our supreme court did not address the issue of exhaustion of administrative remedies. *See* 371 S.C. at 550-53, 641 S.E.2d at 427-28. In fact, in that case, the parties did go through the administrative process by bringing a contested case before the ALC, appealing that decision to the board, and further appealing that decision to the circuit court before appealing to the court of appeals. *Id.* at 549, 641 S.E.2d at 426. Although our supreme court stated that "[a]s a creature of statutes, regulatory bodies . . . . have only the authority granted them by the legislature" and that "[a]ny action taken by [a regulatory body] outside of its statutory and regulatory authority is null and void," it did not specifically address whether the exhaustion requirement would apply when a case involves a challenge to agency authority. *Id.* at 553, 641 S.E.2d at 428 (citations omitted). Thus, we conclude *Responsible Economic Development* does not support the circuit court's determination that Claimants were not required to exhaust their administrative remedies because they alleged DEW acted outside of its authority.

Next, in *Brown*, this court noted "[an] exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." 389 S.C. at 55, 697 S.E.2d at 611-12 (citing *Responsible Econ. Dev.*, 371 S.C. at 553, 641 S.E.2d at 428). However, in *Brown*, this court concluded the appellant was entitled to appeal directly to the circuit court rather than participating in a hearing before the board of trustees because the board had already reached a final determination not to renew her teaching contract and therefore her participation in a hearing after the fact would have been a futile act. *Id.* at 55, 697 S.E.2d at 612. Thus, the court applied the futility exception and did not directly consider whether the appellant was excused from exhausting her administrative remedies based on the board's acting outside of its authority. Thus, we conclude *Brown* likewise does not support the circuit court's conclusion on this issue.

Finally, in *Ex Parte Allstate*, our supreme court determined the requirement of exhaustion of administrative remedies was excused because the issue was solely

one of law as to the statutory authority or jurisdiction of the Chief Insurance Commissioner. 248 S.C. at 567-68, 151 S.E.2d at 855. The court concluded that "[u]nder the undisputed facts, the Commissioner was obviously without [the] authority" to conduct an "investigation into purely political activities of the [insurance] companies and their agents." *Id.* at 567, 151 S.E.2d at 855. However, that case did not involve a statutory provision requiring exhaustion or stating that the administrative remedy was the sole and exclusive appeal procedure as provided in section 41-35-690, which applies in this case. *See id.* at 567-68, 151 S.E.2d at 854-55. Furthermore, the Commissioner made no administrative decision or order in that case and therefore there was no administrative decision that appellants could have appealed. *See id.* at 562, 151 S.E.2d at 852. For the foregoing reasons, we conclude *Ex Parte Allstate* is distinguishable and does not support the circuit court's conclusion on this issue.

Here, Claimants have not challenged the constitutionality of a statute or regulation. Rather, they challenged DEW's authority to enforce the online work search requirement based on DEW's failure to promulgate regulations pertaining to such requirement. As relief, Claimants seek to receive the amount in benefits to which they would have been entitled had DEW not determined they failed to comply with the online work search requirement. Although Robinson testified DEW's appeals process would not have addressed the issue of whether DEW was required to promulgate regulations prior to implementing its online work search requirement, we hold this did not excuse Claimants' failure to pursue administrative remedies. In both Claimants' cases, had they appealed the denial of benefits, DEW might have excused their failures to comply with the requirement and issued their benefits for the applicable week, which would have dispensed with their claims and would not have required a resolution of the question of DEW's authority. Further, notwithstanding Robinson's testimony, nothing prevented the Appeal Tribunal or Appellate Panel from deciding the issue of whether DEW was required to promulgate regulations to implement the online work search requirement. *See* S.C. Code Ann. Regs. 47-51(C)(1) (Supp. 2023) ("All Appeal Tribunal hearings shall be de novo in nature and conducted in such manner as to ascertain the substantial rights of the parties."); S.C. Code Ann. Regs. 47-51(E)(1)(a) (Supp. 2023) ("In addition to the issues raised by the appealed determination the Appeal Tribunal may consider all issues affecting claimant's rights to benefits from the beginning of the period covered by the determination to the date of the hearing."). Moreover, if the Appeal Tribunal and Appellate Panel ruled against Claimants, the ALC could have ruled on the issue upon review of such determinations. *See*

§ 1-23-380(5)(a)-(c) (providing a court reviewing a final agency decision "may reverse or modify the decision [when] . . . the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; [or] (c) made upon unlawful procedure"). Thus, we hold the circuit court erred by concluding Claimants were excused from pursuing administrative remedies based on their claim that DEW lacked authority to implement the online work search requirement.

For the foregoing reasons, we hold the circuit court erred by finding Claimants were not required to exhaust their administrative remedies. Because our determination as to this issue is dispositive of the remaining issues on appeal, we decline to address those issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address an appellant's remaining issues when the determination of a prior issue was dispositive). Accordingly, the circuit court's order granting judgment in favor of Claimants is

REVERSED.

KONDUROS, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., Appellant,

v.

Richard S.W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants,

and

Theodore Stoney, Jr., individually as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors,

of whom Richard S. W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC is the Respondent.

Appellate Case No. 2020-001203

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 6056
Heard October 10, 2023 – Filed April 3, 2024

REVERSED AND REMANDED

Sarah P. Spruill and Tyler Keith Gilliam, both of Haynsworth Sinkler Boyd, PA, of Greenville; and Stafford John McQuillin, III and Scott Y. Barnes, both of Haynsworth Sinkler Boyd, PA, of Charleston; all for Appellant.

Capers G. Barr, III, of Barr Unger & McIntosh, LLC, of Charleston; and Jesse Sanchez, of The Law Office of Jesse Sanchez, of Mount Pleasant; both for Respondent.

VERDIN, J.: The Boathouse at Breach Inlet, LLC (the Company), by and through its member Laurence D. Stoney, Jr. (Laurence),[1] appeals the circuit court's ruling that Laurence lacked standing to bring this derivative action against Richard S.W. Stoney (Richard), individually and as member-manager of the Company, and Crew Carolina, LLC. Laurence also argues the circuit court erred in granting a motion to dissociate Laurence as a member of the Company. We reverse and remand.

FACTUAL/ PROCEDURAL BACKGROUND

In 1995, Richard, who is a licensed attorney, decided to open a restaurant on the Isle of Palms, which he named The Boathouse on Breach Inlet (the Restaurant). He entered into a twenty-year lease with the option to purchase the property and then proceeded with construction and preparations. When an investor backed out at the eleventh hour and Richard was running out of money, Richard's brother, Theodore Stoney (Ted), and their first cousin, Laurence, offered to invest in the Restaurant. On November 21, 1997, Richard, Laurence, and Ted executed the operating agreement to form the Company. [2] Richard owned eighty percent; Laurence owned five percent; and Ted owned ten percent for himself and an additional five percent in trust for Richard, Jr., Richard's son.[3] At the time of trial,

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[1] Because this appeal involves several Stoney family members, we refer to them by their first names.

[2] Laurence invested $28,750; Ted invested $50,000 and received a greater percentage of the Company because he had also provided services during the construction of the Restaurant.

[3] The operating agreement listed slightly different ownership interests, but Richard testified the above-listed percentages were correct.

the Company's members were Richard; Ted; Ted on behalf of Richard, Jr.; Laurence; Richard's now ex-wife, Lori Stoney; Lori on behalf of their daughter Croft Stoney; Gregory Holmes, who bought shares in 2009; and Michael Cox, who bought shares in 2014. Richard maintained sixty percent of the voting rights.

The Restaurant was an immediate success and received national publicity. With the success of the Restaurant, the Company's members opened a second restaurant in downtown Charleston, The Boathouse on East Bay (BEB Restaurant). They formed The Boathouse on East Bay, LLC (BEB) on January 8, 1999, and the BEB Restaurant opened the next month. The BEB members were the same as the Company, with the addition of two new members: Michael Maloney and Beverly Stoney Johnson, Richard and Ted's sister.

Shortly before opening the BEB Restaurant, Richard formed Crew Carolina, LLC (Crew Carolina) to manage the Company and BEB, their corresponding restaurants, and the future restaurants Richard envisioned. Richard, who was Crew Carolina's sole member, held a meeting with the Company's and BEB's members to discuss Crew Carolina's business plan. Richard testified that forming Crew Carolina created savings and increased the buying power in negotiations with vendors by centralizing the restaurants' purchasing, accounting, and operations. Crew Carolina used a sweep account for banking, in which the restaurants' sales were deposited nightly into their individual accounts and then swept into Crew Carolina's central account overnight.

Richard rapidly expanded his restaurant and catering empire under the umbrella of Crew Carolina. However, after BEB, he did not offer Laurence a membership interest in any of the subsequent ventures. Unfortunately, unlike the Company and the Restaurant, none of the subsequent companies enjoyed lasting profitability and success. In order to support these less successful companies and to pay for personal expenses, Richard borrowed money from the Company, which he booked as "due to [the Company]/ due from" Crew Carolina. During his divorce hearing, Richard stated repeatedly that he "'robb[ed] Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 819 S.E.2d 201, 207 (Ct. App. 2018).

Jamie Stabler, Crew Carolina and the Company's current comptroller, bookkeeper, and "crisis manager," acknowledged Richard used funds from the Company to fund his personal expenses and unsuccessful restaurants and entities. She testified

Crew Carolina owed the Company over $4 million. She detailed how Richard's day-to-day operation of borrowing money from the Company put the Company into a cash flow crisis, even though the Company consistently produced income. The Internal Revenue Service charged the Company $43,840 in fines and penalties for failing to pay its taxes in a timely manner. Stabler also testified that the Company at times could not make payroll, harming employees who may have been living paycheck to paycheck. She stated Richard used the Company's funds for non-business travel to the Bahamas, Belgium, Chicago, France, Key West, and New York; payments to his former girlfriend; expenses for his polo ponies; and expenses relating to his share of the family property, Kensington Plantation. She admitted Crew Carolina did not have an income stream or a bank account and she did not believe the Company could collect the outstanding amount it was owed by Crew Carolina. In addition, Stabler testified that Richard had her inquire about writing off the debt to the Company. Eventually, the Company forgave $361,537 in indebtedness on its 2010 tax return.

Richard was advised to stop his practice of taking money from the Company to fund other expenses. On November 26, 2007, Chip Robinson, who was Crew Carolina's comptroller at the time, informed Richard that counsel advised him that any commingling of funds between business entities without identical ownership was not permitted without the members' written permission. In an April 15, 2010 memo, Robinson told Richard they were "consumed with cash flow issues" from two of Richard's other restaurants and suggested removing the Company "in this role as blood donor for the hemorrhages at [the other restaurants to] solve the cash flow issues." Despite these warnings, Richard continued this practice until at least May 2019 and made matters worse.

J. Dennis Jarvis, who was an accountant for the Company, Crew Carolina, and Richard, personally, stated in an affidavit that he was told on numerous occasions that Richard would not repay the millions of dollars he owed to the Company. Because Crew Carolina did not have a cash flow stream or a prospect of generating one, Jarvis and Robinson agreed that Richard should treat the money owed from Crew Carolina to the Company as personal draws to Richard, which must be repaid. In addition, Jarvis stated that Richard proposed closing Crew Carolina and writing off over $4 million that Crew Carolina owed the Company. Finally, Richard instructed Jarvis to refrain from discussing the due to/from book entries with other members of the Company and did not permit him to share the

Company's tax returns with certain members, including Laurence. At trial, Jarvis described Richard's use of the Company's funds for personal expenses as "deadly."

Laurence's expert witness, Don M. Hollerbach, a forensic accountant, testified Richard "commingled funds using funds for personal use and effectively turning a commercial enterprise that is a restaurant enterprise into a banking enterprise." Hollerbach summarized his opinions: (1) Richard owed the Company over $4 million; (2) if this amount was a loan, Richard owed $428,107.23 in interest; (3) there were disproportionate distributions;[4] and (4) the diversion of funds from the Company for personal matters and funding unrelated entities harmed the Company and put it in a cash flow crisis.

Laurence began to suspect Richard was borrowing the Company's funds as early as 1999 because distributions decreased every year even though the Restaurant was doing well. When he asked Richard why he was not receiving distributions, Richard told Laurence to trust him and assured Laurence in an August 9, 2005 letter, "I'm not in the business with my family and dear friends in an attempt to skim profits or benefits not available to them . . . ." Laurence asked Richard to see the Company's books at least ten times, but the only time Richard offered to let him see the books, Richard required him to sign a nondisclosure agreement, which Laurence declined to do. Laurence acknowledged that his relationship with Richard started to deteriorate when the financial issues began.

Laurence also presented evidence of Richard's questionable actions as the Restaurant's property's landlord. Richard had the Company guarantee his personal loan to purchase the property. On November 7, 2012, Richard had the Company confess judgment in favor of the lender in the amount of $1,812,017.69, which he claimed he did to prevent foreclosure of the property.

In May 2011, Richard, as manager and landlord for the Company, entered into a lease that allowed the Company to renew its lease with him in five-year terms through 2035. However, in February 2015, the limited liability company Richard

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[4] Hollerbach testified Richard improperly made disproportionate distributions to Holmes and Cox when other members of the Company did not receive distributions. Holmes received a total of $227,503 in distributions between 2012 and 2019; Cox received $7,354 in 2019.

formed to own the land, 101 Palm Boulevard, LLC,[5] entered into a new lease that was only for five years. At trial, Richard testified he was willing to extend the lease to 2035, saying he expected everyone to trust him. The February 2015 lease also changed the responsibility for repairing a bulkhead from the landlord to the Company. Richard explained he did not think it was fair or in his best interest as the landlord to have the responsibility for the bulkhead, which served the Restaurant and not the marina on the property.[6]

On October 9, 2015, Laurence brought this derivative action on behalf of the Company against Richard and Crew Carolina (collectively, Defendants), asserting various causes of action including breach of fiduciary duty, conversion, unlawful distributions, an accounting, and unjust enrichment. He sought actual and consequential damages; punitive damages; attorney's fees and costs; prejudgment interest; a full accounting, and orders piercing the corporate veil, declaring Defendants were not entitled to indemnification from the Company, and requiring repayment of the money Richard took from the Company.

Defendants answered, asserting a general denial and various defenses, including the statute of limitations, laches, the business judgment rule, doctrines of waiver and estoppel, unclean hands, and asserting that Laurence could not fairly and adequately represent the Company's interests. Ted and Holmes (collectively, Intervenors) moved to intervene, asserting they opposed the derivative action. Laurence subsequently filed an amended complaint asserting Intervenors were not similarly situated members of the Company because they were motivated by their individual interests and benefited from the improprieties in Richard's management. The parties filed a stipulation that Laurence was not similarly situated to any other member of the Company.

After a preliminary hearing on the issue of Laurence's standing to bring this derivative action, the circuit court issued an order allowing Laurence to proceed. Defendants and Intervenors filed a motion to dissociate Laurence, which the circuit court preliminarily denied. After a non-jury trial, the circuit court issued an order holding Laurence was not a fair and adequate representative under Rule 23(b)(1) of the South Carolina Rules of Civil Procedure (SCRCP) to bring this action. It explained his motivations were vindictive and personal, rather than seeking to

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[5] Richard was the sole member of this company.

[6] One quote for the total replacement of the bulkhead was $900,000.

vindicate a corporate wrong, and the equitable remedy he sought was too tainted by his own inappropriate conduct, especially since ninety percent of the Company's membership opposed the action. In addition, the circuit court granted the motion to dissociate Laurence. Laurence filed a motion to alter or amend, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"A shareholder's derivative action . . . is one in equity." *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). "[A]n action for dissociation is also equitable in nature." *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012). "Therefore, this court may find facts in accordance with our own view of the preponderance of the evidence." *Straight*, 383 S.C. at 192, 678 S.E.2d at 449. "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Id.*

LAW/ANALYSIS

I. Laurence's Standing

Laurence argues the circuit court erred in holding he lacked standing to bring this action because a derivative action was the proper means of seeking redress for alleged wrongs to the Company. He asserts he was a legitimate "class of one" who would fairly and adequately enforce the rights of the Company. We agree.

Section 33-44-1101 of the South Carolina Code (2006) authorizes a member of a limited liability company to bring a derivative action. *See* § 33-44-1101 (authorizing a member to "maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed"). Rule 23(b)(1), SCRCP sets out the requirements for "one or more . . . members" of a limited liability company to bring a derivative action to enforce a right of the company. Thus, under the plain language of the statute and applicable rule, a single member of a limited liability company can bring a derivative action. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret

statutes."); *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."); *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.").

In addition, Rule 23(b)(1) limits who may bring such an action, providing "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP. Because our state has not yet addressed whether a single member of a limited liability company may bring a derivative action, we look to other jurisdictions for guidance.

The Sixth Circuit Court of Appeals set forth the following factors for evaluating whether a derivative plaintiff meets the representation requirements outlined in Rule 23.1 of the Federal Rules of Civil Procedure:[7]

> [E]conomic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc., 619 F.2d 588, 593-94 (6th Cir. 1980).

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[7] South Carolina Rule 23(b)(1) uses the language of the prior version of Federal Rule 23.1, which was in effect at the time *Davis* was decided. Rule 23, SCRCP, note. The 2007 amendment to Federal Rule 23.1 was "intended to be stylistic only." Fed. R. Civ. P. 23.1, Advisory Committee Notes.

However, "these factors 'are not exclusive and must be considered in the totality of the circumstances found in each case.'" *Cattano v. Bragg*, 727 S.E.2d 625, 629 (Va. 2012) (quoting *Jennings v. Kay Jennings Family Ltd. P'ship*, 659 S.E.2d 283, 288 (Va. 2008)). The Virginia Supreme Court recognized in applying the *Davis* factors, a single shareholder derivative claim is possible when "the totality of the circumstances support[s] a finding that the plaintiff's personal interests do not preclude the shareholder from fairly and adequately representing the corporation." *Id.*

The Utah Supreme Court similarly held that due to "the greater vulnerability to malfeasance that is present in closely held corporations" a single shareholder could maintain a derivative action as a "class of one" when the shareholder "(1) seeks by its pleading[s] to enforce a right of the corporation and (2) does not appear to be similarly situated to any other shareholder." *Angel Invs. LLC v. Garrity*, 216 P.3d 944, 951 (Utah 2009). As the Texas Supreme Court noted, "The rule[8] does not place any minimum numerical limits on the number of shareholders who must be 'similarly situated.' It follows that if the plaintiff is the only shareholder 'similarly situated,' he is in compliance with both the letter and the purpose of the rule." *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990).

Numerous other courts have recognized a "class of one" may maintain a derivative action. *See, e.g.*, *Larson v. Dumke*, 900 F.2d 1363, 1368 (9th Cir. 1990) (holding "a single shareholder may bring a derivative suit"); *Jordon v. Bowman Apple Prods. Co.*, 728 F. Supp. 409, 412 (W.D. Va. 1990) ("In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'"); *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987) (holding the plaintiff was a "legitimate class of one" and the defendants did not meet their burden of showing that plaintiff was an inadequate representative); *Brandon v. Brandon Constr. Co.*, 776 S.W.2d 349, 353-54 (Ark. 1989) ("The real test is not the number of shareholders represented in a derivative action, but the alleged injuries and the remedies sought."); *Clemons v. Wallace*,

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[8] *See* Texas Rule of Civil Procedure 42(a). This rule was modeled after the Federal Rule of Civil Procedure 23.1. The comments to the current Texas Rule of Civil Procedure 42 explain that the portion of the rule regarding derivative suits was deleted because it was redundant to Article 5.14 of the Business Corporation Act, which sets forth detailed procedures for derivative suits.

592 P.2d 14, 16 (Colo. App. 1978) (holding Rule 23.1 of the Colorado Rules of Civil Procedure did not preclude a derivative suit by a corporation with only one minority stockholder); *HER, Inc. v. Parenteau*, 770 N.E.2d 105, 114 (Ohio Ct. App. 2002) (holding that the appellant, who was "the only similarly situated shareholder, can fairly and adequately represent the interests of the corporation.").

We agree with the above cases and hold that under the appropriate circumstances, a single member of a limited liability company may "fairly and adequately represent the interests of" a class of one and have standing to maintain a derivative action. To hold otherwise would be to deprive a sole dissenting shareholder from seeking relief from another shareholder's wrongdoing. *Eye Site, Inc.*, 796 S.W.2d at 163 ("[W]e question the wisdom of construing [the rule] in any manner which prevents a shareholder in a close corporation from enforcing his rights.").

Considering the totality of the circumstances, we hold Laurence qualifies as a legitimate class of one. Reviewing the relevant *Davis* factors, we first address whether lack of support from the other members of the Company bars Laurence from maintaining this action. *See Davis*, 619 F.2d at 594 (listing "the degree of support plaintiff was receiving from the shareholders he purported to represent" as a factor). The parties stipulated Laurence was not similarly situated to the other members, and Laurence admitted that no other members officially supported this action.[9] However, we must consider the other members' motivations for opposing this action in determining whether Laurence is an adequate representative. *See Larson*, 900 F.2d at 1368 (stating the lack of support from the non-defendant shareholders did not make the sole shareholder an inadequate representative because "the non-defendant shareholders may have been motivated by individual interests, rather than the good of the corporation . . . ."); *Angel Invs. LLC*, 216 P.3d at 951 (holding that "shareholders' motivation for opposing the derivative action is relevant to determining the question of whether any shareholder is similarly situated to the derivative plaintiff"). Ignoring the opposing shareholders' motivations could "permit corporate looting and malfeasance in circumstances where all but one shareholder benefit personally from the illegality or are at risk of personal detriment were the malfeasance brought to light." *Angel Invs. LLC*, 216 P.3d at 951.

[9] The circuit court noted Richard's ex-wife Lori supported Laurence's action.

It is evident Richard and the other Company members who opposed this action were motivated by their individual interests. Richard, the majority member and the one accused of malfeasance and looting the Company, naturally opposed this action. Ted admitted he opposed the action because he was currently in litigation with Richard to recover over $3 million that Richard owed him. Although he proclaimed he did not support this action, Ted acknowledged the Company supported Richard's other entities[10] and the return of the $4 million Richard "borrowed" from the Company would benefit it. Holmes and Cox benefited from Richard's malfeasance by receiving distributions when other members of the Company did not. While Richard's daughter testified she did not support the litigation, her mother holds her share in trust and supports the action. Therefore, we hold the other members' lack of support does not preclude Laurence from maintaining this action as a class of one.

We next address whether Laurence's vindictiveness towards Richard motivated him to bring this action. *See Davis*, 619 F.2d at 594 (listing "plaintiff's vindictiveness toward the defendants" as a factor). We must keep in mind that "[c]harged emotions and economic antagonism are virtually endemic to disputes in closely held corporations." *Cattano*, 727 S.E.2d at 629. We therefore "must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation." *Id.*

Ted characterized the relationship between Richard and Laurence as being "as bad as you can get" and recalled Laurence threatened to "get Richard" and "turn his world upside down." Although Richard described Laurence as being humble, gracious, and enjoyable to be around at the time they formed the Company, he claimed that by the time they formed BEB, their relationship had deteriorated. The change in their relationship coincided with Richard using the Company's funds to support his other entities and personal expenses, which upset Laurence. In an email dated June 23, 2010, Richard criticized Laurence for being abrasive and threatening litigation, but in the same email, he acknowledged Laurence had not been receiving distributions because profits from the Company were used to support other entities. Ted recalled Laurence "claimed that monies were being

[10] However, he claimed "it was all above-board" because "[e]verything was documented."

diverted from the [Company] to pay for other entities," and he complained about not getting proper distributions from the Company. Laurence acknowledged his concern was the money missing from the Company, but he explained that in bringing this action, he sought to recover the money owed to the Company and use it to make the Restaurant a showpiece.[11] No one disputes Richard owes the Company over $4 million. With this action, Laurence seeks to return this money to the Company. While animosity certainly exists between the parties, we hold this hostility is not fatal to Laurence maintaining the derivative action.

We further hold the remaining *Davis* factors support Laurence's standing to bring this action. *See Davis*, 619 F.2d at 593-94 (listing the factors as "economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; [and] the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself"). Laurence was the driving force of this litigation and was familiar with the proceedings. As far as the record shows, there is no other litigation pending between Laurence and Richard. Laurence has only a five-percent interest in the Company, but he sought to make Richard reimburse the Company over $4 million. As stated above, no one contests that Richard used the Company's funds to support his other entities and personal expenses. Laurence presented evidence that Richard's use of these funds hurt the Company, at times causing it to be unable to make payroll, incur late fees, and owe money to the IRS. Without a doubt, the return of over $4 million would benefit the Company. In addition, to support his breach of fiduciary duty claim, Laurence presented evidence that Richard used the Company as the guarantor for personal loans and modified the Company's lease to make it more beneficial to Richard as landlord. Laurence prosecuted this action vigorously and declared his intent for the proceeds of the action to be returned to the Company to improve the Restaurant. Therefore, we hold Laurence fairly and adequately represented the interests of the class of one in prosecuting this derivative action for the benefit of the Company. *See Cattano*, 727 S.E.2d at 629 ("[W]e must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that

[11] Ted contended Laurence brought the action for personal gain and to get his portion of Kensington, the family plantation.

the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation.").

Furthermore, we doubt Laurence would have had standing to bring an action against Richard individually. Pursuant to Section 33-44-410 of the South Carolina Code (2006), a member of a limited liability company may only maintain an action against the company or another member or manager to enforce that member's rights under the operating agreement and under South Carolina law. That member's loss must be "separate and distinct" from that of the company. *See Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) ("A stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally." (quoting 19 Am. Jur.2d *Corporations* § 2245 (1986))); *id.* ("However, an individual stockholder has no right to bring an action in his own name and in his own behalf for a wrong committed solely against the corporation." (quoting 19 Am. Jur.2d *Corporations* § 2245)); *Wilson v. Gandis*, 430 S.C. 282, 311-12, 844 S.E.2d 631, 647 (2020) (holding the majority members of a limited liability company lacked standing to bring a breach of fiduciary duty claim in their individual capacities against the minority member because the majority members' loss would not be separate and distinct from the company's loss); *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018) ("An action seeking to remedy a loss to the corporation is generally a derivative one." (quoting *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001))); *id.* ("An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action."); *id.* ("'A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation.'" (quoting *Brown*, 348 S.C. at 49, 557 S.E.2d at 684)).

Laurence's claims in this action involved losses to the Company, rather than to his own membership interest, and also involve Richard's alleged breach of his fiduciary duty to the Company; therefore, the claims must be brought in a derivative action. To deny Laurence standing in the derivative action would deny him and the Company a remedy, which we find is not the intent of Rule 23(b)(1). *See Eye Site, Inc.*, 796 S.W.2d at 163 ("[W]e question the wisdom of construing [the derivate standing rule] in any manner which prevents a shareholder in a close corporation from enforcing his rights."). Accordingly, we hold the circuit court erred in finding Laurence lacked standing to bring this derivative action on behalf of the Company.

II. Dissociation

Laurence argues the circuit court erred in granting the motion to dissociate him from the Company because Defendants and Intervenors did not meet their burden of showing it was not reasonably practicable to carry on the business with him. We agree.

"The term 'dissociation' refers to the change in the relationships among the dissociated member [of a limited liability company], the company and the other members caused by a member's ceasing to be associated in the carrying on of the company's business." *Park Regency, LLC*, 402 S.C. at 411, 741 S.E.2d at 533 (alteration in original) (quoting S.C. Code Ann. § 33-44-601 cmt. (2006)). A member may be dissociated from a limited liability company by judicial determination when the member "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member." § 33-44-601(6)(iii).

Though not binding on this court, we find the Supreme Court of New Jersey's factors instructive when determining when judicial dissociation is warranted:

> (1) [T]he nature of the [limited liability company] member's conduct relating to the [limited liability company's] business; (2) whether, with the [limited liability company] member remaining a member, the entity may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the [limited liability company] members precludes them from working with one another to pursue the [limited liability company's] goals; (4) whether there is a deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the [limited liability company's] financial position, there is still a business to operate; and (7) whether continuing the [limited liability

> company], with the [limited liability company] member remaining a member, is financially feasible.

IE Test, LLC v. Carroll, 140 A.3d 1268, 1279 (N.J. 2016). The court cautioned that "[Limited liability company] members seeking to expel a fellow member . . . are required to clear a high bar" and a court may not order disassociation "merely because there is a conflict." *Id.* It explained "disagreements and disputes among [limited liability company] members that bear no nexus to the [limited liability company's] business" did not justify a member's expulsion, and "it must be unfeasible, despite reasonable efforts, to keep the [limited liability company] operating while the disputed member remains affiliated with it." *Id.* at 1278.

In finding Laurence should be dissociated, the circuit court cited (1) Laurence's denigrating the Company to its food vendors; (2) his efforts to change the ownership and management of the Company during Richard's divorce litigation; and (3) his efforts to purchase the BEB land without disclosing his efforts to Richard. We find none of these incidents evidence conduct relating to the Company's business that would warrant judicial dissociation.

Richard and Ted claimed Laurence talked negatively about Richard to the representatives of Richard's major food suppliers at the Carolina Yacht Club, telling them that Richard was not paying his bills, that the restaurants were on a cash basis, and that Richard would not do business with Laurence. In contrast, Laurence stated the "word on the street" with the vendors was that Richard and the Company had bad credit. He maintained he did not tell the vendors that the Company had credit issues; rather, they told him. Both Richard and Laurence acknowledged having a confrontation about Laurence's statements, but while Richard testified that Laurence did not deny making the statements, Laurence asserted he told Richard the vendors were the ones talking about his bad credit.

First, in taking our own view of the preponderance of the evidence, we find Laurence was truthful in testifying the vendors came to him about the credit issues. Richard was, in fact, having credit issues at this time. Furthermore, Richard did not present any of the vendors at trial to contradict Laurence's assertions. Finally, we find Laurence's negativity was directed at Richard and not at the Company. *See* S.C. Code Ann. § 33-44-201 (2006) (stating a limited liability company is a legal entity distinct from its members).

Next, we hold Laurence's testimony at Richard's divorce hearing did not support judicial dissociation. At the 2011 divorce hearing, Laurence testified that he was not averse to the family court awarding Lori the Company and he agreed with her hiring a manager, such as Bill Hall of Hall's Chophouse, to manage the Restaurant. We find Laurence's planning for the possibility of Lori receiving Richard's membership interest in the Company did not warrant dissociation and any negativity was directed at Richard, individually, and not at the Company. *See* § 33-44-201 (stating a limited liability company is a legal entity distinct from its members).

Finally, we find Laurence's attempt to purchase the property that BEB leased for BEB Restaurant did not warrant dissociation. When BEB Restaurant opened, BEB leased the property from the Drew family. The relationship with the Drew family quickly soured, and Richard and Ted entered into negotiations to purchase the property. Laurence also made an offer to purchase the property. He admitted he did not tell Richard and Ted he also wanted to purchase the property and explained he thought the property would be a good investment for him individually. Although Richard and Ted ultimately prevailed in purchasing the property, they paid $100,000 to $200,000 more than they originally planned.

We hold Laurence's attempt to purchase the property did not have a sufficient nexus to the Company's business to warrant dissociation. *See IE Test*, 140 A.3d at 1278 (holding "disagreements and disputes among LLC members that [bore] no nexus to the LLC's business [would not] justify a member's expulsion"). First, BEB was a separate limited liability company from the Company. Second, Richard and Ted bought the property for themselves and not on behalf of BEB or the Company. Accordingly, Laurence did not usurp a corporate opportunity, and he had an equal right to seek purchase of the property as they did. *See* S.C. Code Ann. § 33-44-409(e) (2006) ("A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest."); § 33-44-201 (stating a limited liability company is a legal entity distinct from its members).

In addition, while the parties expressed their opposition to being in business together, we find their animosity was not sufficient for judicial dissociation. Much of their disagreement was over Richard's use of the Company's funds and may be resolved with this action. In addition, with only a five-percent interest, Laurence

was not in a position to interfere with the management of the Company or create deadlock. Furthermore, the Restaurant was doing well financially, and Richard testified he expected it to increase sales by $250,000 to $500,000 that year. Therefore, the Company was in a financial position to continue operating, and Laurence remaining a member would not make the continuation of the Company financially unfeasible.

We, therefore, hold the circuit court erred in finding Laurence "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member." *See* § 33-44-601(6)(iii). Accordingly, we reverse the circuit court's grant of the motion for dissociation.

CONCLUSION

We **REVERSE** the circuit court's finding that Laurence was not an appropriate member representative for this derivative action and its dismissal of this action. We further **REVERSE** the circuit court's granting of the motion to dissociate Laurence. We **REMAND** this matter for a determination of the merits of the derivative action.

Accordingly, the order of the circuit court is

REVERSED AND REMANDED.

WILLIAMS, C.J., and HEWITT, J., concur.