The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF DAVID ARTHUR BRAGHIROL, PETITIONER

Petitioner was definitely suspended from the practice of law for nine (9) months, retroactive to June 24, 2008. In the Matter of Braghirol, 383 S.C. 379, 680 S.E.2d 284 (2009). Thereafter, Petitioner was definitely suspended from the practice of law for fifteen months, retroactive to the end of the earlier nine month suspension. In the Matter of Braghirol, 392 S.C. 5, 707 S.E.2d 428 (2011). 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, SCACR, 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 for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than May 17, 2013.

Columbia, South Carolina
March 18, 2013

The Supreme Court of South Carolina

In the Matter of Joanne B. Haelen, Petitioner

Appellate Case No. 2013-000380

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 22, 1992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 27, 2013, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Joanne B. Haelen shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 25, 2013

The Supreme Court of South Carolina

In the Matter of John T.S. Williams, Petitioner

Appellate Case No. 2013-000430

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 6, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 27, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John T.S. Williams shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

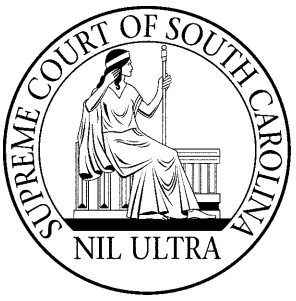
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 25, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
March 27, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Petitioner,

v.

Sarah W. and Vaughn S., Defendants,

Of Whom Sarah W. is the Respondent.

In the Interest of two minor children under the age of 18.

Appellate Case No. 2012-208546

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Saluda County
Richard W. Chewning III, Family Court Judge

Opinion No. 27235
Heard July 11, 2012 – Filed March 20, 2013

REVERSED

Robin Chandler of Lexington, for Petitioner.

Franklin Grady Shuler, Jr., of Turner Padget Graham & Laney, P.A. of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this appeal from the reversal of an order terminating a biological mother's parental rights, we reverse the court of appeals and hold that the family court properly terminated the biological mother's parental rights pursuant to section 63-7-2570(8) of the South Carolina Code.

FACTUAL/PROCEDURAL BACKGROUND

Sarah W. (Mother) is the biological mother of a minor boy and a minor girl (Boy and Girl) (collectively the children). In 2007, Mother and the children's father, Vaughn S. (Father) (collectively Defendants), and the children resided in a home without heat, electricity, or running water. In August of that year, Mother arranged for her brother and sister-in-law, Thomas W. and Brittney W., to take primary responsibility for the children. On October 4, 2007, the South Carolina Department of Social Services (DSS) requested that the family court issue an ex parte order granting DSS emergency protective custody of Boy. DSS alleged it had probable cause to believe that Boy faced imminent and substantial danger to his health or physical safety. The family court agreed, basing its determination on the fact that Defendants were "unable to provided[sic] even marginally suitable housing" for Boy, and finding that Thomas W. and Brittney W. "apparently abused a sibling" of Boy. The family court awarded emergency protective custody to DSS. On October 5, 2007, the family court held a probable cause hearing and found sufficient probable cause to warrant issuance of the ex parte order. At this same hearing, the family court found that Thomas W. and Brittney W. were no longer willing to maintain custody of Girl, and the court ordered DSS to take emergency protective custody of Girl.

The family court ordered a merits hearing for November 15, 2007. However, Defendants requested a continuance due to their attorney's conflict. The family court noted that DSS was prepared to proceed and rescheduled the hearing for December 20, 2007. The hearing commenced as scheduled, and the family court concluded that Defendants "failed to provide adequate and safe housing for [the children]," and DSS should be awarded custody of the children. Additionally, the family court approved a Placement Plan (the Plan), agreed to by all parties, which set out requirements that Defendants would need to satisfy in order to regain custody of the children. Under the terms of the Plan, Mother was required, among other things, to seek and maintain adequate employment and appropriate housing and space for the children. The Plan also required Defendants to submit to a mental health evaluation and follow the recommendations of that evaluation. The family court ordered a review hearing for June 12, 2008. At that review hearing, the parties agreed that Defendants had not completed the requirements of the Plan,

but that additional time should be allotted for completion. The family court ordered that the conditions of the Plan should continue until September 18, 2008.

On September 4, 2008, DSS issued a Supplemental Report recommending reunification of Defendants and the children. The Report noted that Mother had maintained adequate employment and housing. Additionally, Defendants completed mental evaluations, and no mental health services had been recommended.

On September 30, 2008, the family court held a Permanency Planning Hearing. At this hearing, DSS informed the family court that its September 2008 Supplemental Report addressing the conditions giving rise to Boy and Girl's removal failed to address issues that arose following the children's placement in state custody. Specifically, DSS discovered a court order from January 18, 1994, from Edgefield County, wherein the court found that Father "more likely than not" sexually abused a biological daughter not party to the present action. Additionally, DSS alleged that Girl made statements during a forensic interview that raised the issue of possible alcohol and drug abuse by Defendants. DSS sought to incorporate a plan as to how to protect Boy and Girl as a result of these findings, and sought additional relief, which would require:

(1) that any and all visitation between Father and children be strictly supervised by an adult;

(2) Mother to submit to random drug tests, and a drug and alcohol assessment;

(3) Mother attend and successfully complete a parenting skills class.

The family court rejected the requested relief and ordered a six-month extension of the Placement Plan for the purpose of reunification, and a completion of a thorough investigation of the unaddressed issues.

On January 23, 2009, DSS issued a second Supplemental Report. The Report recommended termination of Defendants' parental rights and adoption as a permanent plan for the children. Despite the fact that Mother obtained adequate employment and housing, DSS stated that her alleged drug use necessitated continued foster care of the children:

> Although [Mother] successfully completed a mental health assessment and no services were needed and obtained adequate employment and housing with space available for 2 children, a Permanency Planning Hearing was held on September 18, 2008 ordering Mother to undergo an alcohol and drug assessment. On December 3, 2008 Saluda County DSS transported [Mother] . . . for an alcohol and drug assessment. [Mother] tested positive for cocaine and marijuana, she denies any drug use and refuse [sic] to comply with treatment services offered . . . , however, her file was unsuccessfully closed as of December 23, 2008 due to her lack of attendance.

The report also noted Father's inability to meet the demands of the Plan:

> [Father] . . . has not obtained adequate housing nor has he demonstrated the ability to economically provide for all the needs of the minor children.

On February 19, 2009, the family court held a Permanency Planning Hearing and DSS presented results and findings from its further investigation of the unaddressed issues from the September 30, 2008 hearing. DSS verified that Father agreed to a court finding that he more likely than not molested his daughter. Moreover, although this order was included in the Statewide Central Registry, DSS previously failed to discover the court order due to an existing law which provided for the purging of the registry following a certain period of time. DSS concluded that because of this molestation issue and Father's unemployment and homelessness, termination of his parental rights with regard to Boy and Girl would be in the children's best interest.

DSS also presented the results of Mother's drug and alcohol assessment from the Supplemental Report, and verified her positive test, refusal to attend group sessions and denial of drug use. DSS argued supportable grounds for termination of parental rights (TPR) existed and termination would serve the best interests of the children. The family court agreed, and issued an order on February 19, 2009, directing severance of parental rights:

> The children have continuously been in foster care since October 5, 2007, a period of sixteen months. S.C. Code Ann. § 20-7-766(F)(Supp. 2007) makes it clear that a reasonable time for reunification is not to exceed eighteen (18) months. Indeed there is no statutory provision for extending the time for reunification based upon

> issues that may arise after the children are taken into care. In this case, the issue of drug use by [Mother] arose because of her conduct; her unwillingness to address that issue has resulted in an expiration of the time this [c]ourt will afford her to demonstrate that she can provide for these minors. The need for permanency for these children will not abide further delays in obtaining that permanency.
> . . . .
>
> DSS shall commence a termination of parental rights proceeding against Defendants within sixty (60) days of the filing of this Order . . . . The next permanency planning hearing shall be held within one (1) year of the date of this hearing.

Despite this finding, at the termination of parental rights hearing, the family court found that the evidence supported Defendants' claim that DSS failed to provide services to assist them in meeting their goals:

> The parental rights of Defendants . . . should not be terminated because it is not in the best interest[s] of the children to do so at this time. Defendant's claim that Plaintiff was dilatory and mishandled this case which resulted in the extended time in which the children have been in Plaintiff's custody. It is undeniable that had the Plaintiff uncovered subsequently discovered concerns sooner, [Defendants] would have been afforded more time to adequately address those concerns and more importantly, to consider the consequences of failing to address those concerns.

Additionally, the family court noted that, in September 2008, DSS appeared ready to return the children to the custody of Mother, and "while there were good and justifiable reasons for the [c]ourt's refusal to do so, it does not appear that [DSS] has provided sufficient time and guidance and services in remedying those concerns." The family court then mandated the continued placement of the children with DSS and ordered the parties to agree on a Placement Plan designed to effectuate the reunification of Defendants and the children. The family court required that the Plan include at least a psychological evaluation and random alcohol and drug tests for Defendants, parenting skills classes, closely monitored visitation, and resolution of issues regarding Defendants' ability to provide for the ongoing basic needs of the children to include maintenance of adequate employment and transportation. The family court also took care to warn

Defendants of the importance of timely and successful completion of the Plan's objectives:

> Pursuant to S.C. Code Ann. § 63-7-1680(E) Defendants are generally advised that failure to substantially accomplish the objectives stated in the Placement Plan within the specified time frames provided may result in termination of parental rights . . . . However, in light of the extensive time that the minors have been in foster care, time of [sic] the essence as for Defendants and that the requirements of this plan must be successfully, fully, and entirely completed prior to the review date, which will be March 4, 2010 at 3:00 P.M. or the Court will direct [DSS] to proceed with another termination of parental rights hearing.

On April 20, 2010, the family court held another Permanency Planning Hearing, and reviewed the conduct of the parties pursuant to the Plan adopted at the August 27, 2009 hearing. The court's order relied rather substantially on the testimony of the Saluda County DSS worker assigned to the case. That worker testified in pertinent part, that:

> (1) DSS recommended TPR based primarily on psychological evaluations, drug test results, and concerns regarding Mother's ability to adequately provide for the children's needs.
>
> (2) On January 12, 2010, Father tested positive for cocaine. However, Father denied the use of drugs. Due to Father's positive test and prior issues related to child molestation, DSS did not recommend return of the children to a household in which he resided. However, Mother could not adequately support the children without assistance from Father, and could not assert herself against him in order to protect the best interest of the children.
>
> (3) Defendants completed certain items of the Plan, including visitation, parenting and anger management classes, the maintenance of adequate shelter, and the preparation of a financial budget. However, Defendants' limited income and budget failed to provide for all of the children's necessary expenses.

(4) Despite a medical recommendation of short term psychotherapy for Mother's anxiety issues, DSS had been unable to assist with such services.

The Guardian ad Litem (GAL) testified and also recommended TPR. The GAL expressed concern that Defendants denied drug use during the periods they tested positive, and that their home had a strong odor of second-hand smoke.

Thus, the family court approved TPR and adoption as the children's permanency plan. According to the family court, the best interests of the children would not be served by return to Defendants and DSS made reasonable and timely efforts to make and finalize a permanent plan for the children. The court summarized the myriad issues working to prevent reunification of the family unit:

> Both Defendants, at times, have taken initiative and made progress, but neither has placed himself or herself in a position to be awarded custody of the children at the time of this hearing. They now find themselves in somewhat of a Catch-22 situation living in the [F]ather's home, especially in light of [Father's] continued drug use and [Mother's] financial limitations and inability to provide for the children on her own. The parties have never married, and [Father] has not offered to move out of his own home. Any financial aid available to [Mother] would be in the form of assistance, not a substitute for her parental obligations, and would not meet the basic needs of the children even in combination with her limited income.

On January 27, 2011, the family court commenced a TPR hearing. The family court found that the facts of the case presented grounds for TPR pursuant to section 63-7-2570(8), and addressed directly the delay in processing the case:

> Nowhere in the above is there substantial evidence that the delay in the processing of this case is attributable to the acts of others, unless the various Family Court Judges that have heard this matter constitute others, a proposition this [c]ourt will not accept.

The family court noted many of the issues addressed in the prior review hearing, placing special emphasis on the special needs of the children, and the parent's inability to provide for these needs. Thus, the court found TPR in the best interests of the children, and approved adoption as the plan for permanency.

Mother appealed the family court's TPR order. On November 29, 2011, the court of appeals reversed in an unpublished opinion pursuant to Rule 268(d)(2), SCACR. DSS petitioned this Court for review, and we granted that petition.

ISSUES PRESENTED

I. Whether section 63-7-2570(8) of the South Carolina Code is unconstitutional when it is the only basis for the termination of parental rights.

II. Whether the court of appeals erred in reversing the family court's finding that DSS proved by clear and convincing evidence that termination was in the children's best interest where the children had been in foster care for fifteen of the most recent twenty-two months.

STANDARD OF REVIEW

In reviewing the decision of the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). While this Court retains its authority to make its own findings of fact, we recognize the superior position of the family court in making credibility determinations. *Id.* at 392, 709 S.E.2d at 655. In addition, "consistent with our constitutional authority for de novo review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." *Id.* Thus, "the family court's factual findings will be affirmed unless 'appellant satisfies this Court that the preponderance of the evidence is against the finding of the [family] court.'" *Id.* (citations omitted).

LAW/ANALYSIS

I. The constitutionality of section 63-7-2570(8) of the South Carolina Code.

Mother challenges the constitutionality of section 63-7-2570(8), and claims in her brief that in order to reverse the court of appeals, "this Court must hold as a matter of law, that it is constitutionally permissible to terminate parental rights based on nothing more than the passage of time." We disagree.

In deciding the constitutionality of a statute, every presumption will be made in favor of its validity, and no statute will be considered unconstitutional unless its invalidity leaves no doubt that it conflicts with the constitution. *State v. Gaster*, 349 S.C. 545, 549–50, 564 S.E.2d 87, 89–90 (2002). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the constitution." *State v. White*, 348 S.C. 532, 536–37, 560 S.E.2d 420, 422 (2002).

The family court relied on section 63-7-2570(8) as the sole basis for terminating Mother's parental rights. That section provides in pertinent part:

> The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child . . .
>
> (8) The child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months.

S.C. Code Ann. § 63-7-2570(8) (2010).

In *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the United States Supreme Court recognized that parents have a fundamental liberty interest in the care, custody, and management of their children. This interest does not "evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.") The Supreme Court held that the Due Process Clause of the Fourteenth Amendment[1] prevents a state from completely and irrevocably severing the rights of parents in their natural child unless the state's allegations against those parents can be proven by at least clear and convincing evidence. *Id.* at 747–48. This Court has long recognized and applied this principle to the termination of parental rights in South Carolina. *Hooper v. Rockwell*, 334 S.C. 281, 296, 513 S.E.2d 358, 366 (1999); *Richland Cnty. Dep't of Soc. Servs. v. Earles*, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998); *Greenville Cnty. Dep't. of Soc. Servs. v. Bowes*, 313 S.C. 188, 193, 437 S.E.2d 107, 110 (1993), *superseded by statute*, S.C. Code Ann. § 20-7-1572 (Supp. 1997), *as recognized in Hooper*, 334 S.C. at 297 n.6, 513 S.E.2d at 366 n.6.

[1] U.S. Const. amend. XIV, § 1.

Therefore, when DSS seeks TPR pursuant to section 63-7-2570, the allegations supporting that termination must be proved by clear and convincing evidence. Moreover, it is paramount that termination under those grounds is in the best interests of the child. *See* S.C. Code Ann. § 63-7-2570 ("The family court may order the termination of parental rights upon a finding of one or more of the following grounds *and* a finding that termination is in the best interest of the child.") (emphasis added).

In *Charleston County Department of Social Services v. Marccuci*, 396 S.C. 218, 721 S.E.2d 768 (2011), we decided that parental rights cannot be terminated pursuant to section 63-7-2570(8) merely due to the passage of time, and held that the family court erred in terminating the father's parental rights because his actions did not materially contribute to the delay in reunification:

> Here, there is substantial evidence that this little girl languished unduly in foster care not because of any actions, or inactions, by [father], but because the delays generated and road blocks erected in the removal action made it impossible for the parties to regain legal custody of [minor] prior to the expiration of the fifteen month period . . . . Taking our own view of the evidence, we find that [father] did not sit idly by while his child was in foster care, but rather he was stymied by the system charged with the responsibility of protecting this child . . . . The various continuances requested by other parties were largely the reason the child remained in foster care . . . and under these circumstances, we hold that this ground should not serve as the basis for terminating this father's parental rights.

Id. at 227, 721 S.E.2d at 773 (alterations in original).

Thus, section 63-7-2570(8) may not be used to sever parental rights based solely on the fact that the child has spent fifteen of the past twenty-two months in foster care. The family court must find that severance is in the best interests of the child, and that the delay in reunification of the family unit is attributable not to mistakes by the government, but to the parent's inability to provide an environment where the child will be nourished and protected. *See* S.C. Code Ann. § 63-7-2510 (2010) (explaining the purpose behind the South Carolina Code's TPR statute).

In dissent, Justice Beatty argues that these considerations are only relevant within the context of an "as-applied" challenge. We disagree. These considerations are part and parcel of the application of section 63-7-2570(8) and

are essential to an analysis of facial constitutionality. This interpretation comports with the General Assembly's intent in creating a robust child protection regime.

The General Assembly sought to establish a mechanism for "reasonable" and "compassionate" TPR only after a child has been "abused, neglected, or abandoned." S.C. Code Ann. § 63-7-2510 (2010). The General Assembly decided that TPR under these circumstances was necessary in order to make these children eligible for adoption and placement in the type of environment necessary for a "happy, healthful, and productive life." *Id.* It is neither reasonable nor compassionate to permanently sever parental rights based on significant delays and roadblocks erected by the State. Moreover, TPR granted solely on this basis runs counter to a parent's fundamental liberty interest in the care, custody, and management of his or her child. *See Santosky*, 455 U.S. at 753. In assuming every presumption in favor of the TPR statute's validity, we refuse to find that the General Assembly created a mechanism at conflict with the constitutional rights of parents. Adoption of such a distorted view of section 63-7-2570 would lead to results fundamentally out of step with well-settled constitutional rights, and we must presume that the General Assembly intended no such reading. *Gaster*, 349 S.C. at 549–50, 564 S.E.2d at 89–90. Thus, we hold that section 63-7-2570(8) provides the requisite level of due process to preserve a parent's fundamental rights in a TPR proceeding while at the same time recognizing the State's compelling interest in providing for the health and welfare of children who face abuse, neglect, or abandonment. [2]

[2] We respectfully disagree with Justice Beatty's assertion that section 63-7-2570(8) is inconsistent with the legislative intent of the federal Adoption and Safe Families Act of 1997 (AFSA). *See* Pub. L. No. 105-89, 111 Stat. 2115; 42 U.S.C. § 675; *see also* Act No. 391, 1998 S.C. Acts. As the dissent notes, the General Assembly complied with AFSA by adopting section 63-7-2570(8). However, the dissent mischaracterizes the statute's temporal requirement and states that "unlike other enumerated TPR grounds," section 63-7-2570(8) "does not involve some type of parental conduct or inaction that demonstrates unfitness." As explained, *supra*, courts may not terminate a parent's rights under section 63-7-2570(8) absent a showing that termination is in the best interests of the child, and that the delay in reunification of the family unit is attributable to the parent's inability to adequately provide for the child. The facts of this case undoubtedly establish that Mother is primarily responsible for the delays in resolution of this case, and she has repeatedly refused to remedy the issues preventing her from taking custody of her children. Thus, Mother's unfitness is demonstrated not only by her inadequate parenting, but also by her inaction over the course of several years.

The facial constitutionality of section 63-7-2570(8) does not immunize it from challenge under an as-applied theory. Put another way, and consistent with our holding in *Marccuci*, the statute can be challenged based on the ground that application of the statute has violated a parent's constitutional rights. This could obviously be true if a family court approved TPR, pursuant to the statute, based merely upon the passage of time, or due to circumstances largely outside the control of the parent. However, Mother has not challenged the statute under an as-applied theory. Consequently, that question is not properly before this Court. *Rosamond Enters., Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983) (holding that appellant may not argue different ground on appeal than she argued at trial). Thus, the only question before us is whether DSS proved the termination ground by clear and convincing evidence.

II. Clear and Convincing Evidence

DSS argues that the court of appeals erred in reversing the family court's order terminating Mother's parental rights. We agree. As DSS argues, the facts of this case do not represent a "procedural morass," but instead show prolonged foster care because of valid court findings that reunification of the family unit was not in the children's best interests. Now that a family has stepped forward to provide a stable environment for the children, this Court will not contribute to further delay.

In its unpublished opinion, the court of appeals cited *Marccuci* and *Loe v. Mother, Father, & Berkeley County Department of Social Services*, 382 S.C. 457, 471, 675 S.E.2d 807, 814 (Ct. App. 2009), to support its determination that DSS failed to prove the statutory grounds for termination by clear and convincing evidence, or that TPR would serve the best interests of the children. Ordinarily we would not provide an extensive retelling of the facts of these prior cases. However, because of the significant factual distinctions between those cases and the case sub judice, a review is necessary.

In *Marccuci*, Sean Taylor appealed a TPR order regarding his three year old daughter. 396 S.C. at 220, 721 S.E.2d at 769–70. The minor child was born to Taylor and Christine Marccuci in September 2005. *Id.* In September 2007, Marccuci relocated to South Carolina with the child. *Id.* at 221, 721 S.E.2d at 770. Taylor moved in with Marccuci in North Charleston, with a long-term plan of returning to New Jersey with his child. *Id.* On January 23, 2008, police came to the hotel in search of Marccuci after she failed to report to work. *Id.* A police background check on Taylor erroneously reported that he had an outstanding warrant for rape in New Jersey. *Id.* Police arrested Taylor and placed the child in

DSS protective custody. *Id.* Although no outstanding warrant existed, the trip to South Carolina violated Taylor's prior unrelated probationary sentence, and he was jailed until June 2008. *Id.* at 221–22, 721 S.E.2d at 770–71. Upon his release, Taylor remained subject to an order restraining him from contact with his daughter, but DSS requested priority placement evaluation with his parents (Grandparents), who resided in New Jersey. *Id.* at 222, 721 S.E.2d at 770.

However, Grandparents were unable to take custody of the child due to errors by DSS and the court system. Justice Hearn astutely observed the "procedural morass" that unfairly prevented timely reunification of Taylor and his daughter:

> The action began in a timely manner on January 28, 2008, with the probable cause hearing. The merits hearing was scheduled for February 28, but the court continued it . . . . At some point the merits hearing was set for June 4. However, a pre-trial hearing scheduled for May 13 was continued until June 18 because no judge was available; the June 4 merits hearing accordingly was rescheduled for October 1. . . . Frustrated at the lack of progress in this case, [Grandparents] moved for an expedited placement hearing, but that too was continued on December 8 for unknown reasons. On January 22, 2009, the hearing on the expedited motion was again continued. The merits hearing was then scheduled for April 30, nearly fifteen months after the minor child was removed by DSS, to no avail; it was continued for lack of notice. The hearing was once again continued on May 4 for the same reason. It was not until July 10–far beyond the thirty day limit provided by statute–that the merits hearing was held, and the final order was not issued until August 3, over one-and-a-half years after the child was placed in protective custody.

Id. at 771–72, 721 S.E.2d at 223–24. Thus, this Court reversed the order of the family court terminating Taylor's parental rights.

In *Loe,* the parents married in 2002 and divorced in 2004. 382 S.C. 457, 459, 675 S.E.2d 807, 808. They had three children together: sister, and twins, daughter and son. *Id.* When daughter was six months old, she was severely injured, reportedly while in the father's care. *Id.* A physician diagnosed daughter's condition as non-accidental, subdural hematomas, *i.e.* bleeding on the brain, which is often associated with "Shaken Baby Syndrome." *Id.* DSS took the children into emergency protective custody, and the family court granted DSS custody of the

three children following a probable cause hearing. *Id.* at 459, 675 S.E.2d at 808–09. In October 2003, DSS voluntarily returned sister to mother's custody. *Id.* at 460, 675 S.E.2d at 809. In August 2004, the family court conducted an initial permanency planning hearing, and DSS recommended a permanent plan of reunification of daughter and son with the mother. *Id.* at 460, 675 S.E.2d at 809. However, the court granted a DSS request for an extension for reunification due to son's significant physical disabilities and daughter's developmental problems resulting from her injuries. *Id.* Over the next two years, the mother's unsupervised visitation, including overnight stays, increased. However, in 2005, son and daughter's foster parents filed actions against the mother and father, and DSS, seeking termination of the parent's rights, and *inter alia*, the issuance of a decree of adoption. *Id.* at 461, 675 S.E.2d at 809. This development did not prevent DSS from moving forward with reunification plans. *Id.* In January 2007, the mother filed an answer to the foster parent's complaint and stated that DSS should return custody of daughter and son to her because she had completed the terms of her DSS plans. *Id.* at 462, 675 S.E.2d at 810. In February 2007, the family court conducted a hearing and found the mother satisfied four statutory grounds for termination, including that son and daughter has been in foster care for fifteen of the most recent twenty-two months. *Id.* at 465, 675 S.E.2d at 812.

On appeal, the mother in *Loe* argued that "the actions of others raised barriers and caused delays that resulted in her children remaining in foster care beyond the statutory time required to trigger this ground for TPR." *Id.* at 469, 675 S.E.2d at 813. Interestingly, DSS aligned itself with mother in opposing TPR. *Id.* at 465, 675 S.E.2d at 812. DSS testified that it caused delays in reunifying Mother with her children:

> DSS dropped the ball. And that really is not something [the mother] has any control over. DSS does have its shortcomings and we are working to overcome those shortcomings, but the fact remains that a good many of the delays in this case have been departmental and not because of anything [mother] did. So while it is true that the children have been in foster care 15 of the last 22 months . . . that can't all be ascribed to mother.

Id. at 469, 675 S.E.2d at 814. Based on these unfortunate circumstances, the court of appeals reversed the family court's TPR order. *Id.* at 474, 675 S.E.2d at 816.

The facts of the instant case bear little, if any, resemblance to those of *Marccuci* and *Loe*.

As the family court noted, a review of the court proceedings in this case demonstrates that "the failure of having the children returned to the parents rests squarely on the parent's shoulders." For example, the family court continued the November 15, 2007, hearing at the request of Mother's attorney. On December 20, 2007, the family court found that it would be contrary to children's best interests to be returned to Defendants' custody. On June, 12, 2008, in a review hearing, the family court found that Defendants failed to complete the requirements set forth in the court approved Placement Plan. Thus, the terms and conditions of that Plan had to be extended. On September 4, 2008, DSS issued a Supplemental Report recommending reunification of the children with Defendants. However, at the September 30, 2008, Permanency Planning hearing, Father's prior stipulation to committing sexual abuse of a minor child came to light. The court ordered a full investigation of previously undiscovered issues, and a six-month extension of the Plan. On January 23, 2009, DSS issued a second Supplemental Report and recommended TPR due to Mother's inability to complete a drug treatment program following a positive drug test, and her continued co-habitation with Father. DSS also demonstrated that Father could not obtain adequate housing or economically provide for the needs of the children. On August 17, 2009, the family court refused to terminate Defendant's parental rights and found that DSS failed to provide Defendants with certain services to assist them in meeting their goals. However, the court cautioned Defendants against further delay in resolving the reunification issue.

Following this admonishment, Father tested positive for cocaine on January 12, 2010. In the final family court order approving TPR as in the best interests of the children, the family court noted that Defendants tested positive for drugs but denied drug use, that Mother could not assert herself and protect the best interests of the children, and that Defendants maintained a limited budget that failed to provide for all of the children's necessities.

Our review of the Record establishes that Defendants are responsible for the significant delays in this case. Admittedly, the late discovery and subsequent investigation of Father's prior act of sexual abuse meant that DSS could not accomplish its previously stated goal of reunification. However, DSS failed to discover the court order because state law purged the record from the Statewide Central Registry, not because of agency shortcomings. This of course does not represent the kind of significant delay evident in *Loe*. Additionally, although at least five family court judges presided over different phases of this action, each judge issued cogent and detailed orders balancing the best interests of the children and Defendant's fundamental rights.

As the family court observed, this case "could serve as the 'poster child case' for how children can end up languishing in foster care." While at times Mother has taken steps to remedy the situation leading to removal of the children, she has failed to make the necessary lifestyle changes to provide them with a safe and stable environment. The first continuance of the Placement Plan was not at the request of DSS, but instead due to Mother's failure to complete the Plan's requirements. Mother still refuses to take responsibility for her own drug activity, and has failed to show that she can provide for the children without the help of Father. Father has admitted that he cannot maintain adequate housing and employment, and stipulated to prior sexual abuse of a minor. However, Mother has continued to cohabitate with Father, even right up until the oral argument of this case. Although Mother has paid lip service to the requirements of reunification, she has taken no legitimate or significant steps toward actually meeting those requirements. Thus, viewing the Record in its totality, we cannot attribute the delays in this case to DSS, or find that DSS made it impossible for Mother to regain legal custody of her children prior to the expiration of the fifteen-month period. Consequently, the court of appeals erred in finding that DSS did not meet its burden of proving termination of Mother's parental rights was in the children's best interests.[3]

There is perhaps no relationship more sacred than that of parent and child. We have long recognized and respected the fact that a parent's fundamental rights cannot be discarded simply because they have not been model parents or find their children under the control of the State. *See Santosky*, 455 U.S. at 753. Despite the

[3] We acknowledge Justice Pleicones's dissent and believe that this opinion and his separate writing sufficiently illustrate our differing views of the facts of this case. Justice Pleicones would refuse to find that any of the delay between October 2007, when the family court awarded DSS emergency protective custody, and March 2010 can be attributed to Mother. However, this viewpoint ignores the Mother's drug use and unwillingness to address that issue. The viewpoint also ignores the threat posed by Father, given his admitted cocaine use and a court finding that he more than likely molested a child. This is not a view we can accept. In addition, the majority fully realizes that poverty is not a ground for TPR. Finally, our decision today does not rest on the presence or absence of secondhand smoke in Mother's home. Instead, as discussed *supra*, this difficult decision rests squarely on Mother's refusal to take the necessary steps toward reunification with the children, and that Defendants, rather than the State, are primarily responsible for the significant delays in this case.

importance of these rights, the purpose of the statutory ground allowing for TPR once a child has been in foster care for fifteen of the last twenty-two months is to ensure that children do not languish in foster care when TPR is in their best interests. *Charleston Cnty. Dep't of Soc. Serv. v. Jackson*, 368 S.C. 87, 101–02, 627 S.E.2d 765, 773 (Ct. App. 2006). Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether TPR is appropriate. *See id.* at 102, 627 S.E.2d at 773. Adoptive parents have stepped forward and provided a loving and stable environment, and the children wish to remain a part of that environment. This Court will not prolong the uncertainty of their status only to give more time to a biological parent who refuses to place herself in a position to be awarded custody of her children.

Accordingly, we hold that the family court properly terminated Mother's parental rights pursuant to section 63-7-2570(8) of the South Carolina Code. Thus, we reverse the decision of the court of appeals and direct DSS to immediately implement a plan consistent with the findings of the family court.

REVERSED.

KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion. BEATTY, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the Court of Appeals reversal of the family court order terminating respondent's (Mother's) parental rights. Like the Court of Appeals, I would find that petitioner Department of Social Services (DSS) did not meet its burden of proving by clear and convincing evidence that the children have remained in foster care because of Mother's actions or inactions. *See Charleston Cnty. Dep't of Soc. Servs. v. Marccuci*, 396 S.C. 218, 721 S.E.2d 768 (2011) (no TPR where much of child's time in DSS custody is not attributable to parent). As explained below, the majority and I read the record here very differently.

Mother's two children were taken into protective custody by DSS in early October 2007 because of abysmal living conditions.[4] DSS filed a report on September 4, 2008, supporting the return of the children to Mother and scheduled a hearing for September 18, 2008. At that hearing, DSS informed the court and the parties that there were additional unaddressed issues, most relating to a 1994 DSS order which found that Vaughn S., father of Mother's two minor children, had "more likely than not sexually abused" his daughter from a different relationship[5]. Additionally, DSS averred that in July 2008, the parties' seven-year-old daughter had made statements that "raised the specter of alcohol and drug abuse and [of] substantial neglect." Despite these concerns raised for the first time at the hearing, DSS adhered to its recommendation that the children be returned to Mother's custody, with Vaughn's visitation to be strictly supervised by another adult, that Mother submit to a drug and alcohol assessment and comply with any recommendations, that she submit to random drug tests, and that she successfully complete a parenting skills class.

The family court declined to reunite Mother and the children, instead extending the reunification permanency plan for six months. DSS was ordered to conduct a complete and thorough investigation "with all due diligence" of the new issues it raised at the September 2008 hearing.

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[4] Mother had already sent the older child to live with a relative and had filled out the school forms necessary for that relative to enroll the child in the relative's district.

[5] From the record before the Court, it appears that Vaughn's court appointed attorney did not appear at the 1994 hearing where Vaughn consented to entry of this finding. Despite this finding, the same order granted Vaughn supervised visitation with this child.

Mother tested positive for cannabinoid and cocaine in December 2008, but denied using illegal drugs. As a result of her insistence that she had not used illegal drugs, the drug assessment agency closed her file. In February 2009, the family court held another hearing and ordered DSS to commence a termination of parental rights (TPR) action within sixty days.

DSS then sought to terminate Mother's rights for failure to support and because the children had been in DSS custody for fifteen of the past twenty-two months. The family court issued an order after a hearing on July 31, 2009, finding there was no evidence that Mother willfully failed to support her children. The family court also found that termination was not in the children's best interest:

> [Mother and Vaughn] claim that [DSS] was dilatory and mishandled this case which resulted in the extended time in which the children have been in [DSS]'s custody. The evidence supported [Mother and Vaughn]'s claims that [DSS] failed to provide services to them to assist them in meeting their goals. It is undeniable that had [DSS] had [sic] uncovered subsequently discovered concerns sooner, the parents would have been afforded more time to adequately address those concerns and more importantly, to consider the consequences of failing to address those concerns.

The court went on to order that a reunification plan be developed prior to August 27, 2009, when a hearing was scheduled to submit the plan.

In August 2009, the family court approved the new reunification plan. The court set a deadline of March 4, 2010, for successful completion of the plan's requirements by Mother and Vaughn.

This matter was next before the family court in April 2010, resulting in a May 2010 order which was vacated and a new order substituted *nunc pro tunc* in August 2010.[6] At the April 2010 hearing, DSS again sought permission to terminate both Mother's and Vaughn's parental rights. DSS acknowledged that Mother had basically complied with the placement plan, but maintained that the parents' income was not sufficient to support the children.[7] The family court order

[6] I strongly disagree with the majority's findings that any of the delay between October 2007 and March 2010 can be attributed to Mother.

[7] Poverty is not a ground for TPR.

permitted DSS to again seek TPR. This TPR action was commenced April 28, 2010,[8] with Mother being served on May 13, 2010.

The TPR hearing originally set for August 27, 2010, was continued due to a bona fide medical emergency suffered by Vaughn on August 25. The matter finally came before the court on January 27, 2011. The family court judge made the following findings regarding the best interests of the children as they relate to Mother. He found she had demonstrated "a lack of total commitment" to the children because (1) Mother used illegal drugs at least once; (2) she did not provide child support until ordered to; and (3) she never requested unsupervised visitation. He also found that Mother has a passive and submissive nature and therefore could not protect the children from the threats posed to them by Vaughn; that her present home environment is questionable given concerns about the children's sleeping arrangements, the second hand smoke, and the fact she had started a new job only two days earlier; that there remained an unsettled question where she would live if she could not live with Vaughn; that if returned to her custody, the children would have to ride with their grandmother to drop Mother off at work at 11:30 pm; and that the children had "special needs."[9] As explained below, I do not find clear and convincing evidence that these issues demonstrate Mother's lack of commitment to being reunited with her children.

The evidence in the record shows that while Mother had a single positive drug screen in December 2008, she had willingly taken and passed every other drug test since 2007; that Mother has timely paid every child support payment;[10] and that while she may never have asked for unsupervised visitation, she has never missed a visit with her children. The DSS caseworker testified there is a loving bond between Mother and her children, as there is between Vaughn and the children and Mother's mother and the children. It is unclear what "threats" Vaughn posed to the children, but his rights have now been terminated. Further, despite concerns about Mother's timid and submissive nature, the same character traits that caused the family court to consider the daughter "special needs," the psychological counselor who examined Mother and Vaughn at DSS's behest did not suggest either needed

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[8] I note that DSS commenced the TPR action prior to entry of the family court order.

[9] The son has ADHD and the daughter is described as unsure, timid, a follower who has difficulty making decisions. Further, her problem solving skills "are not appropriate for a child her age."

[10] Recall that in the July 2009 order, the family court found no evidence that Mother had willfully failed to support the children.

any treatment nor was he concerned about either parent's suitability to live with the children even in light of the 1994 finding against Vaughn.

At the time of the TPR hearing in January 2011, Mother, Vaughn, and Mother's mother were sharing a three bedroom trailer, meaning the children might have to share a room. Unlike the family court, I am not convinced that the lack of a separate bedroom for each child demonstrates a lack of parental commitment. While the GAL and DSS caseworker expressed concerns about second-hand smoke, neither they nor the court suggested that exposing children to second-hand smoke makes a person an unfit parent.[11] Moreover, Mother was in the process of seeking section 8 housing in an apartment complex at the time of this TPR hearing which would allow her to live apart from Vaughn.[12] Finally, while it is true that Mother testified that the children would have to ride with her when her mother dropped her off at 11:30 pm for work, in my view, this is a reflection of Mother's socioeconomic reality and not her parental fitness.[13]

The Court of Appeals reversed the termination order, finding that the sole ground upon which the termination rested, that the children had been out of the home for fifteen of the past twenty-two months, was inapplicable. The Court of Appeals held there was not clear and convincing evidence that DSS did not bear responsibility for many of the delays in this case, a fact which voids the TPR on the 15/22 months ground.[14] Further, the Court of Appeals found that although the foster parents might offer advantages that Mother could not, "the fundamental right of a fit parent to raise his or her child must be vigorously protected." *SCDSS v.*

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[11] I note there is no evidence that either child suffers respiratory or allergy problems.

[12] Mother had secured such housing for herself and the children prior to the September 2008 hearing at which she expected to receive custody. She lost this housing, however, when she was denied custody.

[13] The record reflects that Mother had just begun a full-time job two days before the TPR hearing, a job which would afford her and the children benefits after 45 days. Prior to obtaining this job, Mother had worked for four and a half years at a restaurant, where her status as a shift worker prevented her from achieving full-time status and its attendant benefits.

[14] Recall that in July 2009, less than a year before this TPR action was commenced, a family court judge had found that DSS was largely responsible for the failure of the family to be reunited. Arguably this unappealed order is the law of the case and requires that the twenty-two month period in § 63-7-2570(8) be restarted as of July 2009.

Sarah W., Op. No. 2011-UP-514 (Ct. App. filed November 29, 2011) citing *Loe v. Mother, Father v. Berkeley Cnty Dep't of Soc. Servs.*, 382 S.C. 457, 471, 675 S.E.2d 807, 815 (Ct. App. 2009).[15] The Court of Appeals reversed the order terminating Mother's parental rights and we granted certiorari to review that decision.[16]

I would affirm the decision of the Court of Appeals, thereby negating the necessity of reaching the constitutionality of § 63-7-2570(8) (2010) as a "stand-alone" ground for TPR. Were I to reach the issue, I agree with Justice Beatty that the statute is unconstitutional, even as narrowed by our earlier decisions requiring that the delay in returning the children to their parent's home be attributable to the parent's conduct. I do not agree, however, that the statute's constitutionality can be salvaged by engrafting a requirement that the family court also make a specific finding that the parent is unfit. In my opinion, the addition of this requirement, without any specification of relevant considerations, renders the statute as newly construed unconstitutionally vague. *E.g.*, *Johnson v. Collins Entertainment Co., Inc.*, 349 S.C. 613, 546 S.E.2d 653 (2002) (statute that does not give fair notice of forbidden conduct is unconstitutionally vague); *Toussaint v. State Bd. of Med. Examiners*, 303 S.C. 316, 400 S.E.2d 488 (1991) ("A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.").

A New York statute required that in order to terminate parental rights, the state establish both that it made diligent efforts to assist the parental relationship and

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[15] The majority, however, rests its clear and convincing evidence finding on this telling fact: "Now that a family has stepped forward to provide a stable environment for the children, this Court will not contribute to further delay." I agree that stability is important for these children, but note that while they were placed in the same foster home from August 2007 until June 2010, they were moved to a new home after this TPR action was commenced because their first foster family adopted two other children. Moreover, it is inappropriate to consider the children's desire to remain with their current foster family or the availability of an adoptive family in determining whether clear and convincing evidence exists for terminating parental rights.

[16] The majority's concern with Mother's delay discounts the fact that Mother prevailed on appeal, and that the only reason this matter was not concluded in November 2011 is because two members of this Court granted certiorari in May 2012.

that the parent failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." The United States Supreme Court found this statute employed "imprecise substantive standards that leave determination unusually open to the subjective values of the judge" and expressed concern that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias." *Santosky v. Kramer*, 455 U.S. 745, 762-3 (1982). A requirement of "unfitness" leaves the decision whether to terminate a parent's parental rights entirely to the subjective values of the family court judge, giving even less guidance than did the New York statute.

Moreover, unlike Justice Beatty, I would not remand this case with instructions that the family court determine Mother's parental fitness under this new test. Leaving aside my concern with whether DSS can meet the 15/22 month requirement especially in light of Mother's successful appeal, it is for DSS in the first instance to review the facts of this case and determine whether it believes there is clear and convincing evidence of Mother's parental unfitness.

I also believe that Justice Beatty's instructions that the family court decide fitness based upon its assessment of Mother's future ability to adequately provide for the basic needs of her children erroneously focuses on predicting her future actions and erroneously places the burden on her to disprove unfitness. In my opinion, we err when we terminate parental rights on anticipated conduct. *Cf.* S.C. Code Ann. § 63-7-2570(6) (2010) (TPR on ground parent has a diagnosable condition unlikely to change within a reasonable time). I am especially concerned that most of the issues which Justice Beatty would instruct the family court to consider – housing, food, clothing, and medical care – are subject to unconscious bias based upon Mother's poverty as is demonstrated by the TPR order here. Moreover, under the circumstances of this case, these issues mirror the grounds for termination set forth in § 63-7-2570(2), which permits termination where a parent has not remedied the conditions which led to the children's removal. While DSS pled that Mother had not remedied the conditions under 2570(2), the family court declined to terminate Mother's rights on this ground. I would not revisit that issue.

I would affirm the decision of the Court of Appeals.

JUSTICE BEATTY: I respectfully dissent as I believe section 63-7-2570(8)[17] is facially unconstitutional to the extent it is used as the sole basis for TPR. In my view, section 63-7-2570(8) is unconstitutional as it impermissibly creates a presumption of parental unfitness due solely to the length of time a child spends in foster care. In order to comport with the guarantees of substantive due process, a determination of parental unfitness is a condition precedent to termination of a parent's fundamental right to the custody of his or her child. As will be discussed, I agree with the decision of the Court of Appeals to the extent it reversed the termination of Respondent's parental rights; however, I would remand the matter to the family court for a determination of Respondent's parental fitness and, ultimately, whether her parental rights should be terminated.

I.

Although our decision in *Marccuci* addressed the implications of section 63-7-2570(8), constitutionality was not an issue in that case. *Charleston County Dep't of Soc. Servs. v. Marccuci*, 396 S.C. 218, 721 S.E.2d 768 (2011). In *Marccuci*, we merely held that strict adherence to section 63-7-2570(8) is not warranted in every case. *Id.* at 226, 721 S.E.2d at 773. Specifically, we found that where there is substantial evidence that much of the delay is attributable to the acts of others, a parent's rights should not be terminated based solely on the fact that the child has spent greater than fifteen months in foster care. *Id.* at 227, 721 S.E.2d at 773. Essentially, we considered an "as-applied" challenge in *Marccuci*. In contrast, the Respondent in the instant case explicitly challenged section 63-7-2570(8) as facially unconstitutional. Thus, it is incumbent upon this Court to now definitively analyze this constitutional question. *See S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 420, 589 S.E.2d 753, 756 (2003) ("We leave for another day the analysis of whether section [63-7-2570(8)] . . . is unconstitutional.").

Pursuant to section 63-7-2570(8) the family court may order the termination of parental rights upon a finding that "[t]he child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months" and a finding that "termination is in the best interest of the child." § 63-7-2570(8). In evaluating the text of this statute, I adhere to the well-established rule of statutory construction that "it is the duty of the court to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations." *Brown v. County of Horry*, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992).

[17] S.C. Code Ann. § 63-7-2570(8) (2010).

Our state and federal Due Process Clauses provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. It has been "long recognized that the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' " *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)). "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " *Id.* (quoting *Glucksberg*, 521 U.S. at 720).

Without dispute, a parent's interest in the custody of his or her child is a fundamental right that must be recognized in TPR proceedings. *See Troxel*, 530 U.S. at 66 ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). As the United States Supreme Court (USSC) has explained:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (holding that before the State may terminate parental rights, due process requires that the State support its allegations by at least clear and convincing evidence). Therefore, any deprivation of this fundamental right is subject to strict scrutiny. *See Troxel*, 530 U.S. at 80 (recognizing that state action, which limits the fundamental right of parents to make decisions concerning the care, custody and control of their children, is subject to strict scrutiny (Thomas, J., concurring)); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that state actions affecting fundamental rights are given the most exacting scrutiny). As a result, section 63-7-2570(8) must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As the majority recognizes, the State has a compelling interest in preventing children from languishing for years in foster care.[18] However, section 63-7-2570(8), one avenue by which the State may pursue this goal, creates a presumption of unfitness based solely on the length of time a child has spent in foster care. The length of time a child spends in foster care is not inversely proportional to the level of parental fitness. Without a specific determination of parental fitness, I find that section 63-7-2570(8) is not narrowly tailored to achieve the State's interest as this statutory ground deems irrelevant a consideration of whether a parent is able to care for his or her child. *See In re H.G.*, 757 N.E.2d 864, 872-74 (Ill. 2001) (concluding that TPR based solely on the ground that the child has been in foster care for fifteen months violated substantive due process as the presumption of parental unfitness contained in the subsection was "not a narrowly tailored means of identifying parents who pose a danger to their children's health or safety" as there may be "cases in which children remain in foster care for the statutory period even when their parents can properly care for them"); *In re Kendra M.*, 814 N.W.2d 747, 760-61 (Neb. 2012) ("[P]arental rights cannot be terminated solely based on the duration of the out-of-home placement, because it must also be shown that the parent is unfit and that termination is in the best interests of the child. . . . The fact that a child has been placed outside the home for 15 or more months of the most recent 22 months does not demonstrate parental unfitness.").

As the USSC has noted, the "Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' " *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977)). "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to

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[18] Indeed, the General Assembly has proclaimed:

> The purpose of this article is to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 63-7-2510 (2010).

inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68.

Thus, for a TPR action based only on section 63-7-2570(8) to withstand constitutional muster, the family court must make an explicit finding of parental unfitness *before* considering the best interests of the child. This point is where I depart from the majority as its analysis makes no such determination. Instead, the majority deems section 63-7-2570(8) constitutional because a parent's fundamental rights in a TPR proceeding are preserved via an assessment of the fault for the length of time a child has been in foster care and a determination of the best interests of the child. Although I agree these are correct considerations, they are made within the context of an "as-applied" challenge such as in *Marccuci*. Here, however, we are called upon to analyze a strictly facial challenge to section 63-7-2570(8).

Because subsection 8, unlike the other enumerated TPR grounds,[19] does not involve some type of parental conduct or inaction that demonstrates unfitness, it impermissibly creates a presumption of parental unfitness due solely to the length of time a child spends in foster care. In order to comport with the guarantees of substantive due process, a determination of parental unfitness is a condition precedent to termination of a parent's fundamental right to the custody of his or her child.

I believe this analytical framework is constitutionally mandated as TPR involves the involuntary and irrevocable termination of parental rights, which is fundamentally distinguishable from a child custody dispute in a divorce proceeding or a proceeding where a parent has voluntarily relinquished custody and seeks to regain custody. In those contexts, a consideration of parental fitness is implicit in the determination of the best interests of the child. *See Charleston County Dep't of Soc. Servs. v. King*, 369 S.C. 96, 103, 631 S.E.2d 239, 243 (2006) (holding that best interest factors set forth in *Moore v. Moore*, 300 S.C. 75, 386 S.E.2d 456 (1989) were inapplicable to a TPR situation as that situation is governed by statute); *Patel v. Patel*, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001) (recognizing, in a child custody case, that "family court considers several factors in determining the best interest of the child, including: who has been the primary

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[19] *Cf.* S.C. Code Ann. § 63-7-2570(1)-(4) (identifying grounds for TPR as including a parent's abuse or neglect of the child, failure to remedy the conditions that caused the removal of the child from the home, willful failure to visit the child, and willful failure to support the child).

caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children"); *Moore*, 300 S.C. at 78-79, 386 S.E.2d at 458 (holding that family court should consider the following criteria in making custody determination when a natural parent, who has voluntarily relinquished custody of his child, seeks to reclaim custody: (1) the parent must prove that he or she is a fit parent, able to properly care for the child and provide a good home; (2) the amount of contact, in the form of visits, financial support or both, which the parent had with the child while the child was in the care of a third party; (3) the circumstances under which temporary relinquishment occurred; and (4) the degree of attachment between the child and the temporary custodian).

Furthermore, I believe that my interpretation is consistent with the intended purpose of subsection 8. In 1998, in an effort to receive federal funding, our General Assembly enacted subsection 8 in direct response to the federal Adoption and Safe Families Act ("ASFA") of 1997.[20] Act No. 391, 1998 S.C. Acts 2340. The ASFA was passed by Congress "to promote the adoption of children who have been placed in foster care, to ensure their health and safety, and to encourage permanent living arrangements for such children as early as possible." Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6th 173 (2006 & Supp. 2012). "In order to receive federal funds, states are required under ASFA to implement plans which, among other things, limit the obligation to provide reasonable efforts to reunify parents with children in foster care, require permanency hearings within 12 months after a child enters foster care, and require the state to file or join a petition to terminate parental rights, subject to certain exceptions, when a child has been in foster care for 15 of the most recent 22 months or when a parent has committed certain serious crimes." *Id.*

Although our General Assembly complied with the ASFA by adding subsection 8 to the pre-existing TPR statute, Congress did not intend for the fifteen-month requirement to constitute an independent ground or basis for actually terminating the rights of a parent. Elizabeth O'Connor Tomlinson, *Termination of Parental Rights Under Adoption and Safe Families Act (ASFA)*, 115 Am. Jur. *Trials* 465, § 9 (2010 & Supp. 2012). Instead, "the 15/22 provision triggers only the *filing* of a petition to terminate parental rights." Emily K. Nicholson, Comment, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 Duq. L. Rev. 83, 85 n.16 (2006).

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[20] Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. §§ 670-678 (1998)).

Thus, by approving subsection 8 as an independent basis for TPR, the majority goes against the clear legislative intent of the ASFA. *See In re M.D.R.*, 124 S.W.3d 469, 476 (Mo. 2004) (interpreting 15/22 provision of state TPR statute, which tracks the language of the ASFA, and stating, "By considering the history and the circumstances of the enactment of subsection 2 and harmonizing the provisions of the termination statute in its entirety, it is clear the legislature did not intend section 211.447.2(1) [of the Missouri Revised Statutes] as a ground for termination, but rather solely as a trigger for filing a termination petition"). As a result, the majority creates an unconstitutional presumption of parental unfitness due solely to the length of time a child has been in foster care.

II.

Because my decision represents a new construction of section 63-7-2570(8), I recognize the substantive and procedural implications as to the family court and Respondent who did not have the benefit of this analysis. Accordingly, I would remand the matter to the family court to make a determination regarding Respondent's parental fitness and, ultimately, whether her parental rights should be terminated. In assessing whether Respondent is a fit parent, I would instruct the family court to determine whether Respondent can adequately provide for the basic daily needs of the minor children such as housing, personal safety, food, clothing, and medical care. Due to this inherently case-specific determination, I decline to enumerate factors for which the family court should consider as it would be impossible and myopic to identify an all-inclusive list.

However, in reaching its decision, I would urge the family court to weigh certain facts that have been established during this protracted proceeding. In terms of Respondent's ability to care for the minor children, I note that Respondent: performed adequately on her psychological evaluation; procured full-time employment; sought to acquire living arrangements that are separate from Vaughn; sought the assistance of her mother as a supplemental caregiver to the children; and maintained a bond with the children as she has not missed an opportunity to visit with her children. Even though Respondent has made positive strides to demonstrate her fitness as a parent, I am gravely concerned that Respondent still cohabitates with Vaughn despite his admitted sexual misconduct toward his minor daughter from a previous relationship and his continued drug use. Furthermore, the children, who are nearly ten and eleven years old, have expressed their desire not to be returned to Respondent's home. However, the record is unclear as to the children's reasons for not desiring to return to Respondent's home. By all accounts, the children were happy when Respondent visited with them and were sad when the scheduled visitation period ended.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas W. Gladden and Vera H. Gladden, Appellants,

v.

Olivia M. Boykin, Elizabeth Beard, Deborah Appleton, Bob Capes Realty, Inc., Russell & Jeffcoat Realtors, Inc., and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspections Services, LLC, is the Respondent.

Appellate Case No. 2010-160789

Appeal From Kershaw County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27236
Heard February 8, 2012 – Filed March 27, 2013

AFFIRMED

B. Michael Brackett, of Moses & Brackett, PC, of Columbia, for Appellants.

Joseph Scott McCue, of Collins & Lacy, PC, of Columbia, and Logan McCombs Wells, of Collins & Lacy, PC, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellants Thomas and Vera Gladden appeal the trial court's order granting summary judgment to Respondent Palmetto Home Inspection Services, alleging the limit of liability provision in a home inspection contract was unenforceable as violative of public policy and as unconscionable under the facts of this case. We affirm.

FACTS

In the course of purchasing a home, Vera H. Gladden (Mrs. Gladden) entered into a contract with Palmetto Home Inspection Services, LLC (Palmetto), for a home inspection. The contract contained a limit of liability clause, which limited Palmetto's liability to the home inspection fee paid by the client.[1] After Mrs. Gladden contacted Palmetto about certain conditions in the home that were not included in the home inspection report, Palmetto returned the inspection fee.

Subsequently, the Gladdens brought this action against the seller, real estate agents, and real estate companies involved in the transaction as well as against Palmetto. As to Palmetto, the Gladdens alleged an action for breach of contract for failing to conduct the inspection in a thorough and workmanlike manner and to report defective conditions in the home.

The Gladdens thereafter moved for summary judgment on the legal issue of the enforceability of the limit of liability clause. Palmetto filed a cross motion for summary judgment on the basis that the limit of liability clause was enforceable and that it was entitled to summary judgment because it had already refunded the inspection fee paid by the Gladdens.

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[1] In full, the clause read as follows:

> **LIMIT OF LIABILITY:**[]It is understood and agreed that should [Palmetto] and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of it's [sic] obligations, including but not limited to negligence,[]breach of contract or otherwise, the the [sic] liability of [Palmetto] and/or it's [sic] agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

The circuit court denied the Gladdens' motion and granted Palmetto's motion and entered summary judgment in favor of Palmetto, finding the limit of liability clause enforceable. This appeal followed.

ISSUES

I. Did the circuit court err when it held that the limit of liability provision does not contravene South Carolina public policy?
II. Did the circuit court err when it held that the limit of liability provision is not unconscionable under these circumstances?

DISCUSSION

A. Public Policy

On appeal, the Gladdens contend the circuit court erred when it held that the limit of liability provision does not contravene South Carolina public policy. We disagree.

Our courts must determine public policy by reference to legislative enactments wherever possible. *See Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Zerjal v. Daech & Bauer Const., Inc.*, 405 Ill. App. 3d 907, 912, 939 N.E.2d 1067, 1072-73 (Ill. App. Ct. 2010) ("Since the legislature had the opportunity to prohibit or limit exculpatory clauses in home inspection contracts but did not, we decline the opportunity as well.").

The General Assembly has spoken on the issue of home inspections and liability for undisclosed defects in the sale of residential property. Under the statutory scheme crafted by the General Assembly, purchasers are protected from unqualified home inspectors by licensure requirements. *See* S.C. Code Ann. §§ 40-59-500 et seq. (2011). However, the General Assembly did not require home inspectors to carry errors and omissions liability insurance.[2]

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[2] This fact alone substantially distinguishes South Carolina's public policy from that of New Jersey and this case from *Lucier v. Williams*, 841 A.2d 907 (N.J. Super. Ct. App. Div. 2004), on which the dissent heavily relies. The *Lucier* court pointed to the requirement under New Jersey statutory law that home inspectors

Although the General Assembly declined to require such coverage, it did not leave residential home buyers without remedy. The Residential Property Condition Disclosure Act ensures that buyers are informed of defects of which the seller has knowledge. *See* S.C. Code Ann. §§ 27-50-10 et seq. (2007 & Supp. 2011). The Act imposes liability on a seller if she knowingly withholds such information. § 27-50-65. Thus, the General Assembly has already provided specific protection for the consumer risks associated with undisclosed defects, and we must defer to its judgment.

Even without this legislative policy, we would be reluctant to expand our judicially crafted public policy affording heightened protection to home purchasers. It is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering. *See Sapp v. Ford Motor Co*., 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) ("[T]he transaction between a *builder* and a *buyer* for the sale of a home largely involves inherently unequal bargaining power . . . . [W]e created this narrow exception to the economic loss rule to apply solely in the residential home context.") (emphasis added). The General Assembly has imposed liability on the party with greatest access to information about the home's defects, where it most logically resides.

B. Unconscionability

The Gladdens also contend that the circuit court erred when it found that the limit of liability clause was not unconscionable in this case. We disagree.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

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maintain errors and omissions insurance and called this fact "[i]mportant to [its] analysis[.]" *Lucier*, 841 A.2d at 914-15. This distinction is highly significant, since enforcement of a liability limit in the home inspection contract would conflict with the clear intent of the New Jersey legislature that purchasers have recourse to insurance coverage in the case of a home inspector's negligence.

Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it. *See Head v. U.S. Inspect DFW, Inc*., 159 S.W.3d 731, 748-49 (Tex. App. 2005) (noting that courts uphold limitations of liability in burglar and fire alarm system contracts and finding limitation of liability clause in home inspection contract commercially legitimate for the same reasons). We cannot say that a limitation of liability clause in a home inspection contract is so oppressive that no reasonable person would make it and no fair and honest person would accept it.

Thus, we need not consider whether the Gladdens lacked meaningful choice due to one-sided contract provisions. Nevertheless, we note our disagreement with the dissent's analysis.[3] Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract. *See Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445, 449 (D.C. Cir. 1965).

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[3] The dissent again relies on *Lucier v. Williams*, a New Jersey decision that represents a dramatic departure from the narrow traditional use of unconscionability doctrine and markedly different from that of South Carolina law. *See Lucier*, 841 A.2d at 911 ("There is no hard and fast definition of unconscionability. . . . [It] is an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term implies is a lack of good faith, honesty in fact and observance of fair dealing." (internal quotation marks and citations omitted)); *cf. Simpson*, *supra*; *Williams*, *infra*. As for *Pitts v. Watkins*, another case on which the dissent relies, we agree with the *Pitts* dissent that *Pitts* dramatically departs from contract and unconscionability law, effectively rewriting a contract the court found "unfair" but that fell far short of oppression and completely omitting analysis whether the plaintiffs had a meaningful choice in entering into the contract. *See* 905 So.2d 553, 559-64 (2005) (Dickinson, J., dissenting).

In this case, a self-employed home inspector operating out of his home had no significantly greater bargaining power or cognizably more sophistication than a trained though not practicing real estate agent, and there is no allegation that Mrs. Gladden lacks the education to understand the terms of a contract or protect her own interests. On the contrary, the record demonstrates that Mrs. Gladden directly engaged in sophisticated negotiations throughout the process of buying the home, even urging the seller to forego the use of a real estate agent. Moreover, we have no record on which to find that home inspection contracts without exculpatory clauses are unavailable in the market. Not only did Roberts testify that he had altered the contract for a customer on another occasion, but Mrs. Gladden had sought out this particular inspector's services, declining to employ a different home inspector who had been described to her as "harder but best." *See Jordan v. Diamond Equip. & Supply Co*., 362 Ark. 142, 207 S.W.3d 525 (Ark. 2005) (finding an exculpatory clause enforceable in part because the plaintiff had sought out the services of the defendant). Thus, the evidence in this case fails to support an inference that Mrs. Gladden lacked meaningful choice.

The dissent also places significance on the fact that the limitation of liability clause was not highlighted in comparison to the contract's other terms. However, the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term. *See Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670; *Williams*, 350 F.2d at 449. In this case, the contract consisted of one page, the heading of the limitation clause was in all capital letters and in bold, and the clause and its heading were in the same print as the contract's other terms. Thus, the record does not support a conclusion that the Gladdens lacked a meaningful choice whether to accept the terms of the contract.

CONCLUSION

Contractual limitation of a home inspector's liability does not violate South Carolina public policy as expressed by the General Assembly and, as a matter of

law, is not so oppressive that no reasonable person would make it and no fair and honest person would accept it. The circuit court's order granting summary judgment to Palmetto is

AFFIRMED.

TOAL, C.J., and KITTREDGE, J., concur. BEATTY, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE BEATTY, dissenting: I respectfully dissent and would reverse the grant of summary judgment given to Palmetto Home Inspection Services and remand the matter for further proceedings on the Gladdens' claims. For the reasons outlined below, I agree with the Gladdens that the limitation of liability provision in the home inspection contract was both unconscionable and violative of public policy.

A. Unconscionability

Courts generally must enforce contracts that are freely entered into according to their terms. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). However, "[i]f the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998).

The circuit court found as an initial matter that the home inspection contract was an adhesion contract.[4] This finding has not been disputed by the parties. "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007); *see also Lackey*, 330 S.C. at 394, 498 S.E.2d at 901 (observing adhesion contracts are agreements in which one party has virtually no voice in the formulation of the contract terms and language (citation omitted)). "Adhesion contracts, however, are not per se unconscionable." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. "Therefore, finding an adhesion contract is merely the beginning point of the analysis." *Id.*

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[4] It is noted in *Corbin on Contracts* that the modern approach to examining contracts of adhesion and exculpatory clauses is to treat them differently from other contracts. 7 Joseph M. Perillo, *Corbin on Contracts* § 29.10, at 415-16 (rev. ed. 2002). The trend is justified based on three considerations: "(1) there was not true assent to a particular term; (2) even if there was assent, the term is to be excised from the contract because it contravenes public policy; or (3) the term is unconscionable and should be stricken." *Id.* at 416 (footnote omitted).

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24-25, 644 S.E.2d at 668; *see also Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (same). In short, a challenged contractual provision is examined to determine whether it is unconscionable due to both (1) an absence of meaningful choice and (2) oppressive, one-sided terms. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* In analyzing the absence of meaningful choice, "[c]ourts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* In *Simpson*, this Court was careful to "emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

The Gladdens assert that, while the circuit court found this was an adhesion contract and there was a disparity in the bargaining power of the parties, the court nevertheless discounted this disparity based on the fact that Mrs. Gladden had once worked briefly as a real estate agent. The Gladdens contend the implication is that a real estate agent can never be a regular "consumer" of the services of a professional home inspector. Mrs. Gladden testified that she had once worked in the real estate business, but it was only for a few months and she never had her own listings before deciding the real estate business was not for her. We agree that her limited work in this area is not relevant under the circumstances.

The parties clearly did not have equal bargaining power. The contract was not even presented to Mrs. Gladden until *after* Palmetto's owner, Scot Roberts, had already performed his physical inspection of the premises, thus leaving Mrs. Gladden very little time to examine the document, and there is no indication that Roberts ever advised her of the presence of a limitation of liability clause, either prior to the inspection or at the time the contract was presented after the inspection was over. Although the circuit court found Mrs. Gladden could have selected another inspector, a consumer is left with no *meaningful* choice if the limitation

clause is prevalent throughout the industry,[5] especially where the consumer has a decidedly inferior bargaining position compared to the home inspector, who controls the contract terms by means of an adhesion contract that is oppressive and one-sided.

The limitation of liability provision did not stand out in the contract any more than the other provisions. All of the paragraphs begin with a heading in all capital letters, and the limitation provision was contained in one of five paragraphs that had headings in a bold font. Just looking at the document, this provision is no more noticeable than any other provision.

As to the circuit court's observation that a home inspection is not required by law, the Gladdens correctly note that home inspectors are licensed by the state and must meet certain standards. The purpose of these standards is to protect the public from unqualified inspectors. Moreover, an inspection is an essential part of most real estate purchases, and the need for a qualified inspector and the reliability of the inspector's professional judgment are crucial in these transactions. Roberts himself conceded that a home inspection is valuable to a client *because of the inspector's purported training, experience, and expertise*.[6]

The Gladdens cite *Lucier v. Williams*, 841 A.2d 907 (N.J. Super. Ct. App. Div. 2004), in which the New Jersey court held that a contractual limitation of liability provision in a home inspection contract limiting liability to the lesser of $500 or half of the inspector's fee was both (1) unconscionable and (2) against public policy.

As to the finding of unconscionability, the court in *Lucier* noted "[t]here is no hard and fast definition of unconscionability" and that it is "an amorphous concept." *Id.* at 911 (citation omitted). In analyzing whether to enforce a contract

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[5] Roberts testified that the contract he was using was based on one that was presented in a class regarding home inspections that he took in another state. He stated that, in the thousands of inspections he had performed, he could recall altering his contract only once—for an individual who was an engineer.

[6] Roberts gave Mrs. Gladden a business card, which stated he had "30+" years of experience and that he was licensed, bonded, and insured, yet Roberts testified that he had been a licensed home inspector for five and a half years.

term, the court stated it would look "not only to its adhesive nature, but also to 'the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the "adhering" party, and the public interests affected by the contract.'" *Id.* (citation omitted). The court stated particular attention was to be given to any inequality in the bargaining power and status of the parties, as well as the substance of the contract. *Id.* The court noted "contractual exemption from liability for negligence is rarely allowed to stand where the contracting parties are not on roughly equal bargaining terms." *Id.* (citation omitted).

In addition, the focus of the inquiry should be on whether the limitation is a reasonable allocation of risk between the parties or whether it runs afoul of the public policy disfavoring clauses that effectively immunize parties from liability for their own negligent acts. *Id.* at 911-12. "To be enforceable, the amount of the cap on a party's liability *must be sufficient to provide a realistic incentive to act diligently*." *Id.* at 912 (emphasis added). The court stated:

> Applying these principles to the home inspection contract before us, we find the limitation of liability provision unconscionable. We do not hesitate to hold it unenforceable for the following reasons: (1) the contract, prepared by the home inspector, is one of adhesion; (2) the parties, one a consumer and the other a professional expert, have grossly unequal bargaining status; and (3) the substance of the provision eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence.

Id. The court stated "the purchase of a home is usually the largest investment a person will make"; it may be made only once in a lifetime or infrequently. *Id.* "Home inspectors, on the other hand, conduct a volume operation," and "a major selling point of [their] service" is their knowledge about and experience in the industry, and the inspectors are uniquely aware of the cost of repairing major defects. *Id.* "The foisting of a contract of this type in this setting on an inexperienced consumer clearly demonstrates a lack of fair dealing by the professional." *Id.*

The court remarked that, "[i]n most cases, major defects will either not exist or, with due diligence and competence, they will be discovered and reported." *Id.* In evaluating the comparative repercussions to the parties, the court stated the impact of the professional's negligence upon the home buyer can be "monumental" when "considering issues such as habitability, health and safety, and financing obligations," and to allow little or no recovery for this professional negligence would "render the underlying purpose of the contract worthless" and provide "no meaningful incentive to act diligently." *Id.* at 913. Moreover, such an "excessively restricted damage allowance is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked." *Id.* The court concluded it would not enforce the limitation in such circumstances because it was "tantamount to an exculpation clause, and warrants application of the same policy considerations."[7] *Id.*

In *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005), the Supreme Court of Mississippi cited *Lucier* and held a limitation of liability clause in a home inspection contract was unconscionable. The court in *Pitts* defined unconscionability "as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party'" *Id.* at 558 (citation omitted). This is the same as the definition applied under South Carolina law. The court noted that "[c]lauses that limit liability are given strict scrutiny by this Court and are not to be enforced unless the limitation is *fairly and honestly negotiated and understood by both parties*." *Id.* at 556 (alteration in original) (citation omitted) (emphasis added).

In *Pitts*, as in the current appeal, the inspector provided the contract to the buyers "[i]mmediately following the completion of his inspection, but before

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[7] An exculpatory clause is defined as "[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act." *Black's Law Dictionary* 648 (9th ed. 2009). On its face, the provision on appeal here does not technically eliminate all liability, but it does limit any such liability to a return of the inspection fee. Because the fee is small in relation to the potential damages caused by the inspector's negligence, it is arguable that the provision functions to effectively eliminate all real liability. This is particularly true in light of a companion provision that requires arbitration because the arbitration fees are likely greater than any possible recovery. I find such terms to be oppressive and one-sided.

providing the Pittses with his report[.]" *Id.* at 554. Thus, there was virtually no time for reflection on the terms by the home buyers. The court found unconscionability existed under all the circumstances. *Id.* at 556. The court stated after consumers have considered the aesthetics, the amenities, and the price of a particular house, quite often the only issue left is the integrity of the structure, and the decision whether to spend thousands of dollars to proceed with the purchase "is largely based upon a satisfactory inspection report." *Id.* The court found if a purchaser "can establish duty, breach, causation, and damages, then they should be entitled to full legal redress." *Id.* "To do otherwise would allow home inspectors to walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct." *Id.*

The court stated not allowing the recovery of reasonably foreseeable compensatory damages does not provide a *meaningful* choice to homeowners and is unreasonably favorable to the home inspector. *Id.* at 557. If the home inspector's only consequence is to refund the fee, there is also no meaningful incentive to act diligently and the inspector will be immunized from the consequences of his own negligence. *Id.*

In addition, the court noted that when the limitation of liability clause is paired with an arbitration clause in the home inspection contract, a plaintiff is effectively denied *any* recovery because the mandatory arbitration process would require fees in excess of any possible recovery, and this was further evidence of unconscionability. *Id.* at 557-58. The court also noted a limitations period contained in the contract was evidence of unconscionability because it was shorter than the statutory limitations period. The court stated although this specific term (the time limit) was not argued by the Pittses, they had raised the issue of the unconscionability of the entire contract, which may be found when any terms are oppressive, and in reviewing the contract in its entirety, the court was entitled to consider the relation of all terms therein. *Id.* at 558.

Similarly, in the current appeal by the Gladdens, the contract contained a mandatory arbitration provision in addition to the limitation of liability provision. The interplay of these provisions would effectively leave a plaintiff with *no* recovery where the cost to arbitrate exceeds the potential recovery (return of the

inspection fee).[8] Further, the contract required the buyer to notify Palmetto of any discrepancies within a very short period (ten days).

In my opinion, a limitation of liability clause that routinely appears in contracts between commercial entities for the sale of goods, and thus is seen repeatedly by the parties, is distinguishable from a provision appearing in a contract for professional services concerning a purchase by a private individual that may be made only once in a lifetime. In such cases, particularly when the contract is not shown until *after* the inspection has taken place, no effort is made to point out the exclusion, there is a great disparity in the bargaining power of the professional service provider and the consumer, and there is a virtual exclusion of all liability for professional negligence, I believe there is an absence of *meaningful* choice and the terms are oppressive and one-sided, rendering the limitation clause unconscionable.

B. Public Policy

In addition to being unconscionable, I believe the limitation provision is violative of public policy.

"The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671; *see also Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 156-57 (1964) ("[A] contractual provision seeking to relieve a party to a contract from liability for his own negligence may or may not be enforceable, depending upon whether it is violative of public policy."). "Since such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." *Pride*, 244 S.C. at 619, 138 S.E.2d at 157; *see also McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 247-51, 612 S.E.2d 462, 464-67 (Ct. App. 2005) (same).

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[8] *Cf. Myers v. Terminix Int'l Co.*, 697 N.E.2d 277 (Ohio C.P. 1998) (holding an arbitration clause imposing an undisclosed nonrefundable filing fee on the consumer that was more than she had paid to have the defendant exterminate termites in her home was so one-sided as to oppress and unfairly surprise the consumer and was unconscionable and unenforceable).

"[O]ur decisions recognize the general principle that considerations of public policy prohibit a party from protecting himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or *where public interest requires the performance of a private duty*, or *when the parties are not on roughly equal bargaining terms*." *Pride*, 244 S.C. at 619-20, 138 S.E.2d at 157 (emphasis added). Expressions of public policy may be found in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004).

In evaluating the Gladdens' public policy argument, the circuit court observed that South Carolina law has allowed provisions limiting or exempting liability, citing *South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler). However, in *SCE&G*, the parties were commercially-sophisticated corporations and possessed relatively equal bargaining strength, and they had negotiated the terms over a period of several months. *Cf., e.g., Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343-44, 384 S.E.2d 730, 735-36 (1989) (stating the Court has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller").

The circuit court also opined that exculpatory clauses between private parties do not violate public policy, citing *Pride v. Southern Bell Telephone & Telegraph Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) and *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005). *Pride*, however, involved a matter that did not affect a public interest (a telephone company's negligence in a contract for the publication of advertisements in a phone directory). Further, the Court specifically included among those matters that may implicate public policy considerations, those situations "*where public interest requires the performance of a private duty*, or *when the parties are not on roughly equal bargaining terms*." *Pride*, 244 S.C. at 620, 138 S.E.2d at 157 (emphasis added). Thus, the fact that there are private parties involved is not singularly determinative of whether a question of public policy may arise. *McCune* involved a release of liability at a paintball range, where we found participation was voluntary and comparable to other cases involving inherently risky recreational activities for which such limitations had been upheld. The cases cited by the circuit court do not concern professional service contracts, where different policy

considerations exist because public policy is averse to allowing professional negligence to be insulated from liability by a contractual provision.

Lastly, the circuit court stated South Carolina law expressly allows a licensed home inspection company, such as Palmetto, to contractually limit the scope of its home inspection; consequently, a limitation on liability cannot violate public policy, citing S.C. Code Ann. § 40-59-500(4) (2011). This statute defines a "home inspection" and states in relevant part that "[t]he parties to a home inspection may limit or expand the scope of the inspection by agreement."

There is no question that an inspector may limit the physical scope of an inspection, i.e., what portions of the premises are to be inspected, but we find this is distinguishable from limiting the *amount of the inspector's liability* for professional negligence. Moreover, the Code further provides, "A home inspector shall disclose the scope and limitations, if any, of each inspection *before* performing a home inspection." *Id.* § 40-59-560(C) (emphasis added). In the current appeal, it is undisputed that Roberts did not present a contract to Mrs. Gladden until *after* he had already completed his entire inspection, so there can be no reliance on that provision here. In addition, Roberts does not argue that the Gladdens' claims concern matters that are outside the scope of what Roberts agreed to inspect.

In *Lucier v. Williams*, 841 A.2d 907 (N.J. Super. Ct. App. Div. 2004), the court found that the liability provision, in addition to being unconscionable, was "contrary to [the] state's public policy of effectuating the purpose of a home inspection contract to render reliable evaluation of a home's fitness for purchase and holding professionals to certain industry standards." *Id.* at 912. The court stated a home inspector provides a professional service because a home inspection "involves 'specialized knowledge, labor or skill and the labor or skill is *predominantly mental or intellectual*, rather than physical or manual.'" *Id.* at 914 (citation omitted). The home inspector is supposed to report all conditions that might cause the consumer costly repairs or maintenance, and the purpose of the inspection is to give the consumer a rational basis upon which to decline to enter into a contract to buy or to be relieved from a contractual commitment, or to offer a sound basis upon which to negotiate a lower price. *Id.* (citation omitted). The court stated limitation provisions in such circumstances are disfavored:

> With professional services, exculpation clauses are particularly disfavored. The very nature of a professional service is one in which

> the person receiving the service relies upon the expertise, training, knowledge and stature of the professional. Exculpation provisions are antithetical to such a relationship. It would be indeed a hollow arrangement if a physician could charge $100 for an office visit and then, if, due to negligence, a diagnosis is missed, resulting in a catastrophic illness or even death, the patient's only recourse would be a refund of $50 of the original $100 fee. Certainly, such a provision in a doctor-patient relationship would not be enforceable. Here, the home inspector held himself out as an expert and a professional. The disparity between the consequences of negligence to the home inspector and to the home buyer, like that between a physician and a patient, is very substantial.

Id. (internal citations omitted).

Lastly, as an alternative basis to the general public policy reasons addressed above, the court in *Lucier* looked to *express* statements of public policy and noted that its legislature now required home inspectors to be licensed and to meet certain qualifications as to experience and to pass an examination. *Id.* at 915. In addition, inspectors must also now maintain errors and omissions insurance. *Id.* The court concluded the limitation of professional negligence violated public policy, as contained in both judicial and legislative sources. *Id.* at 916.

Palmetto attempts to distinguish *Lucier* primarily on the basis that the South Carolina General Assembly, while requiring professional licenses for home inspectors, so far has not *required* home inspectors to carry professional liability insurance, and the buyer in *Lucier* did not use an attorney for the purchase. I find this argument unpersuasive. In *Lucier* the court discussed the licensing and insurance requirements as just *one* aspect of *express* public policy (as exhibited in relevant legislation). Prior to that discussion, the court engaged in an independent analysis of general public policy, the fact that contracts shielding professional negligence are generally disfavored in the law, and the need to protect the public from acts of professional negligence when making a home purchase. That analysis is certainly applicable here. *Cf.* Restatement (Second) of Contracts § 179 (1981) (stating the bases of public policies against the enforcement of terms may be derived by a court from (a) legislation relevant to such a policy or (b) the need to protect some aspect of the public welfare).

Moreover, South Carolina's extensive licensing, regulation, "certificates of authorization," and bonding requirements are evidence of express public policy and our General Assembly's desire to protect the public from unqualified home inspectors. These requirements negate any inference that home inspectors may insulate themselves from all liability for their professional negligence. I also disagree with the majority's assertion that the General Assembly's enactment of the Residential Property Condition Disclosure Act, which imposes liability on a seller who knowingly withholds information regarding defects, has any bearing on the question of an inspector's liability for his or her own negligence in failing to detect a defect. It is not hard to imagine a case where a property has very serious defects affecting health and safety, about which a seller, as a layperson, has no knowledge, but that could, *and should*, be detected by an inspector using his or her professional expertise. If it were otherwise, there would be no need to have an inspection performed by a trained and licensed professional.

Under South Carolina law, the state may impose statutory or regulatory requirements for the purpose of protecting the public interest. S.C. Code Ann. § 40-1-10(B) (2011). In such cases, the General Assembly may consider implementing a system of certification and may also establish licensing procedures. *Id.* § 40-1-10(C). In evaluating the appropriate level of regulation to impose, if any, the General Assembly examines, among other things, whether the service is required by a substantial portion of the population; whether the profession or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that the practitioner has met minimum qualifications; whether the professional or occupational associations do not adequately protect the public from incompetent, unscrupulous, or irresponsible members of the profession or occupation; and whether current laws that pertain to public health, safety, and welfare are generally inadequate to protect the public. *Id.* § 40-1-10(D).

The General Assembly has chosen to extensively regulate both the residential home business and home inspectors to protect consumers by requiring licensing, certificates of authorization, and surety bonds from practitioners in these fields. In 2000 the General Assembly enacted section 40-59-410, which requires a "residential business certificate of authorization" for firms engaging in the practice of residential home building, residential specialty contracting, and home inspecting. *Id.* § 40-59-410(A). Any qualifying firm must have "obtained an executed surety bond approved by the commission in the sum of fifteen thousand

dollars initially and as subsequently provided by regulation[.]" *Id.* § 40-59-410(B)(2). Home inspectors are also strictly regulated under South Carolina law. *See* 10 S.C. Code Ann. Regs. 106-4 (2012) (enumerating extensive qualifications for home inspectors, including experience, education, and licensing); South Carolina Department of Labor, Licensing and Regulation, at www.llr.state.sc.us (providing requirements and forms). This is indicative of the fact that the subject involves a public interest.

As stated in section 40-1-10(B) of the South Carolina Code, the state imposes statutory or regulatory requirements for the purpose of protecting the *public interest* where the unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public. S.C. Code Ann. § 40-1-10(B) (2011). It clearly has imposed these protective measures as to the residential home industry in general and as to home inspectors in particular. The state need not require insurance for professional negligence in order to conclusively establish the subject as one affecting the public interest. Indeed, there are other essential professions that similarly have no mandatory insurance requirement, yet professionals routinely acquire insurance for professional negligence for their own protection. Although not statutorily required, we note Roberts did, in fact, maintain an insurance policy of $300,000, and he held himself out to the public as being "bonded, licensed, and insured." The only purpose of such a representation would be to incur the reliance and trust of the public as to his professionalism and reliability.

Based on the foregoing, I believe the limitation of liability clause at issue here violates public policy. As a general matter, public policy is averse to allowing those committing professional negligence to insulate themselves from all liability by a contractual provision, especially where the clause is contained in an adhesion contract and the contract concerns a matter that affects the public interest. A home inspection is, for all practical purposes, a service that is a necessity in the purchase of real estate, and the consumer is given no opportunity here to pay an additional fee to protect himself against the inspector's possible negligence. *See, e.g., Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444-46 (Cal. 1963) (stating an exculpatory clause that affects the public interest cannot stand).

The limitation of liability provision also contravenes this state's express public policy as indicated in measures passed by the General Assembly that impose requirements as to experience, education, and licensing for home inspectors, as well as requirements for obtaining and maintaining bonds and

"residential business certificates of authorization" in order to ensure the competency of home inspectors and protect the public interest.

For all of the above reasons, I conclude the circuit court erred in granting the motion for summary judgment and would remand the matter for further proceedings on the Gladdens' claims.

HEARN J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tommy W. Berry, Sr. and Jo S. Berry, Appellants,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Respondent.

Appellate Case No. 2011-192812

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27237
Heard January 23, 2013 – Filed March 27, 2013

AFFIRMED

Howell V. Bellamy, Jr., and Howell V. Bellamy, III, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Appellants.

Bradley D. Churdar, of Charleston and William M. Taylor, Jr., of Columbia, for Respondent.

JUSTICE KITTREDGE: This is an appeal from the circuit court's order dismissing the action for lack of subject matter jurisdiction. We affirm.

I.

Appellants own property in North Myrtle Beach that is bounded by water on the west and north. In February 2007, Appellants applied to the Department of Health and Environmental Control ("DHEC") for a critical area permit to construct a replacement bulkhead. The permit application provided:

> The work, as proposed and shown on the attached plans, consists of constructing a *replacement bulkhead*. A 155' long wooden bulkhead will be removed and *replaced* with a vinyl bulkhead to be built in the *same location*.

(emphasis added). Appellants attached to the application a plat that depicted the replacement bulkhead being built in the same location as the existing bulkhead, which was located just underneath the cantilevered portion of the house.

In March 2007, DHEC issued Critical Area Permit No. OCRM-07-509 ("permit") to Appellants. The permit included the following special condition: "Provided the proposed bulkhead is placed in the *same location* as the existing bulkhead." (emphasis added).

In response to a complaint, DHEC Enforcement and Compliance Project Manager Sean Briggs inspected Appellants' property in July 2007. Briggs observed the replacement bulkhead was partially constructed in a different location along the northern property line and that fill dirt had been placed in the area between the house and new bulkhead. According to Briggs, the new bulkhead was constructed in the tidelands critical area 20' channelward of the house and in violation of the DHEC permit specifications.

DHEC issued Appellants various written warnings, including a Cease and Desist Directive and a Notice of Violation and Admission Letter. However, follow-up inspections revealed Appellants continued to alter the critical area and construct the replacement bulkhead in a different, unauthorized location. Accordingly, DHEC sent Appellants a Notice of Intent to Revoke the permit.

In January 2010,[1] Briggs again inspected Appellants' property. He observed that, since the last inspection and the issuance of the directive to cease construction, Appellants had marched forward with construction. According to Briggs, Appellants had covered the fill dirt with a concrete driveway and installed fencing, pilings, and landscaping materials, all within the critical area.

On April 20, 2010, DHEC issued an administrative order ("Revocation Order") revoking Appellants' permit based on Appellants' failure to construct the bulkhead in compliance with the permit conditions.

Thereafter, on April 26, 2010, DHEC issued a separate administrative enforcement order ("Enforcement Order") assessing against Appellants a civil penalty of $54,000[2] and requiring Appellants to restore the impacted portion of the critical area to its previous condition.[3]

Appellants sought review of the Enforcement Order by the South Carolina Board of Health and Environmental Control ("Board"). In a letter, the Board denied Appellants' request for a Final Review Conference. The letter informed Appellants that within thirty days, they could request a contested case hearing before the Administrative Law Court ("ALC") in accordance with the Administrative Procedures Act ("APA").

However, rather than requesting a contested case before the ALC, Appellants filed an action in circuit court seeking judicial review of the Enforcement Order de novo and requesting a final order "overturning [DHEC's] [Enforcement Order] and decision dated April 26, 2010, with prejudice[.]" Specifically, the complaint

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[1] According to DHEC, between August 2007 and February 2009, the parties attempted to negotiate a resolution but were unsuccessful because Appellants steadfastly maintained they built the bulkhead in accordance with the permit.

[2] Any person who violates a permit or any other requirement of the Coastal Zone Management Act ("CZMA") may be assessed a civil penalty of up to one thousand dollars per day of violation. S.C. Code Ann. § 48-39-170(C) (Supp. 2012).

[3] These two, separate orders were mailed to Appellants as enclosures in a single cover letter dated April 27, 2010.

alleged the circuit court had subject matter jurisdiction pursuant to section 48-39-180 of the South Carolina Code, which provides that any applicant whose permit application has been finally denied, revoked, or suspended may seek review in the circuit court.

In response, DHEC filed a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, contending the circuit court lacked subject matter jurisdiction. DHEC argued section 48-39-180 applies to permitting matters, not administrative enforcement orders such as the Enforcement Order that was the sole focus of Appellants' complaint.

Appellants opposed dismissal, focusing largely on the propriety of the bulkhead construction and maintaining they built the bulkhead as permitted. Appellants contended section 48-39-180 provides for judicial review of their permit revocation in the circuit court, and that pursuit of an administrative remedy is optional under the section.

The circuit court granted DHEC's motion to dismiss for lack of subject matter jurisdiction. The court found section 48-39-180 does not confer jurisdiction on the circuit court to review administrative enforcement orders issued by DHEC. Rather, the circuit court held such orders are administrative in nature and governed by the APA.[4]

Appellants now challenge the circuit court's order.[5]

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[4] Alternatively, the circuit court found it lacked jurisdiction because Appellants had not exhausted their remedies as required by the APA.

[5] After the circuit court's ruling, Appellants filed an action in the ALC seeking a contested case hearing. In response, DHEC moved to dismiss Appellants' action, asserting Appellants had not timely filed their petition based on S.C. Code Ann. section 44-1-60(G) (Supp. 2012), which provides that a permittee must seek a contested case hearing before the ALC within thirty days after the Board declines to schedule a final review conference. The ALC action has been held in abeyance pending resolution of this appeal. On appeal, Appellants now contend the doctrine of equitable tolling precludes dismissal of their pending ALC action. However, we do not address that argument, for the ALC action is not before this Court.

II.

"'The question of subject matter jurisdiction is a question of law.'" *Linda Mc Co. v. Shore*, 390 S.C. 543, 551, 703 S.E.2d 499, 503 (2010) (quoting *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007)). "This Court is free to decide questions of law with no particular deference to the lower court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted).

III.

Appellants argue the circuit court erred in holding it did not have subject matter jurisdiction to consider Appellants' challenge. We disagree.

Section 48-39-180 states:

> Any applicant whose permit application has been finally denied, revoked, suspended or approved subject to conditions of the department, or any person adversely affected by the permit, may obtain judicial review as provided in Chapter 23 of Title 1, or may file a petition in the circuit court having jurisdiction over the affected land for a review of the department's action "de novo". . . .

S.C. Code Ann. § 48-39-180.

Appellants are correct that, by its terms, section 48-39-180 enables an applicant whose permit has been finally revoked to seek judicial review of such revocation in circuit court. Appellants, however, did not challenge the Revocation Order in their complaint. The complaint filed in the circuit court challenges only the Enforcement Order, not the Revocation Order. Appellants' invocation of section 48-39-180 hinges on the conflation of the two separate and distinct orders issued by DHEC. Yet, Appellants' appeal to the Board and the circuit court encompassed *only* the Enforcement Order, as no specific mention of or objection to the Revocation Order was made. We are bound to hold Appellants to their complaint and lone challenge of the Enforcement Order. *See Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) ("This Court will not, under the guise of

liberal construction of the pleadings, write into the complaint allegations that are not presented.").

Having determined Appellants' challenge does not fall within section 48-39-180, we find the circuit court was correct in holding this administrative enforcement matter is governed by the APA.

Whenever DHEC determines that any person is in violation of a permit or any CZMA, DHEC may assess a civil penalty and may issue an order requiring such person to comply with the permit, including requiring restoration. S.C. Code Ann. § 48-39-170(C). "Matters brought under this procedure are administrative in nature and are, therefore, governed by the procedures of the APA." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010). In *Hill*, we stated:

> [R]eview of the agency's enforcement order and its imposition of civil fine is an administrative matter that falls squarely within the ambit of a contested case as defined in the APA. It is a proceeding in which the rights, duties, and privileges of a party are required to be determined by an agency after the opportunity for a hearing.

Id.

Under the APA, persons aggrieved by an agency decision are entitled to seek review of the decision by means of a contested case hearing before the ALC. The ALC sits as the adjudicatory body in all contested cases involving DHEC. *See* S.C. Code Ann. § 1-23-600(A) (Supp. 2012) ("An administrative law judge *shall* preside over all hearings of contested cases . . . involving [DHEC] . . . .").[6] This administrative process is consistent with the legislative purpose. *See* Act No. 387,

[6] The procedures for DHEC decisions giving rise to contested cases are set forth in section 44-1-60 of the South Carolina Code. The initial DHEC decision is the staff decision. *Id.* § 44-1-60C). If the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision. *Id.* § 44-1-60(F). A permittee aggrieved by the final agency decision may file a contested case hearing request with the ALC within thirty days after the Board declines to schedule a final review conference. *Id.* § 44-1-60(G).

§ 53, 2006 S.C. Acts 387 ("This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.").

Appellants' circuit court complaint involved only the administrative matter, which falls squarely within the ambit of the APA. Pursuant to the APA, the ALC had exclusive jurisdiction to entertain Appellants' narrow challenge of the Enforcement Order and the circuit court lacked subject matter jurisdiction to hear Appellants' claim. Accordingly, the circuit court's order is affirmed.[7]

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur.

[7] In light of our holding, we need not address the circuit court's alternative finding that it lacked subject matter jurisdiction because Appellants failed to exhaust their administrative remedies. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive). *But see Ward v. State*, 343 S.C. 14, 17, 538 S.E.2d 245, 248 n.5 (2000) (noting the failure to exhaust administrative remedies goes to the prematurity of the case, not subject matter jurisdiction).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Lee Brown, Appellant,

v.

Peoplease Corporation and ARCH Insurance Company, c/o Gallagher Bassett Services, Inc., Respondents.

Appellate Case No. 2011-196726

Appeal From The Workers' Compensation Commission

Opinion No. 5082
Heard October 16, 2012 – Filed February 13, 2013
Withdrawn, Substituted and Refiled March 27, 2013

AFFIRMED

Preston F. McDaniel, of the McDaniel Law Firm, of Columbia, for Appellant.

Weston Adams, III, and Helen Faith Hiser, both of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents.

SHORT, J.: In this workers' compensation case arising out of an automobile accident, Thomas Brown appeals, arguing: (1) the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred by (a) not

granting him lifetime medical care for his lower back problems, (b) not raising the compensation rate to $591.73, and (c) not writing its order; and (2) the court of appeals erred by denying Brown's motion for leave to present additional evidence to the Workers' Compensation Commission (the Commission) pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We affirm.

FACTS

On May 2, 2008, a passenger vehicle collided with the truck Brown was driving. At the time of the accident, Peoplease Corporation employed Brown to drive a truck for Bulldog Trucking, and Brown had been working for the company for approximately 16 weeks. After the accident, doctors treated Brown for pain in the cervical region of his neck and performed two surgeries on his neck. Brown's diabetes also worsened following the accident, and he is now insulin dependent.

Brown filed a Form 50 on July 13, 2010, seeking an award for permanent and total disability benefits with lifetime medical care for his neck, back, and arm pain from the accident. Peoplease Corporation and Arch Insurance Company, c/o Gallagher Bassett Services, Inc., (collectively, Respondents) admitted Brown sustained a compensable injury by accident arising out of and in the course of his employment; however, they denied Brown sustained injuries to his lower back and arms.

On October 22, 2010, the single commissioner heard the matter. In his order, the commissioner noted the only issues before him were a determination of Brown's entitlement to a disability award and the resulting average weekly wage and compensation rate to be applied. He determined Brown is permanently and totally disabled based on the combination of his cervical injury and the aggravation of his underlying diabetes; however, he found no specific medical report tied Brown's lumbar (lower back) problems to his injury at work. Therefore, he ordered Respondents to provide Brown with lifetime, causally-related medical treatment for his cervical spine and diabetes. The commissioner also found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. Thus, he calculated the average weekly wage based on the salary and income a top producer for Bulldog would make per year. This amounted to $38,500 per year, resulting in an average weekly wage of $740.38 and a compensation rate of $493.84.

Brown appealed to the Appellate Panel, arguing the commissioner erred in not awarding him (1) lifetime medical care for his lower back and legs and (2) a higher average weekly wage and compensation rate. The Appellate Panel heard the matter on March 21, 2011. Thereafter, it affirmed the single commissioner's factual findings and conclusions of law. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). "Where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

LAW/ANALYSIS

I. Lifetime Medical Care

Brown argues the Appellate Panel erred in denying him lifetime medical care for his lower back problems. We disagree.

This court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of

evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* This court may not substitute its judgment for that of the agency's as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* at 339, 513 S.E.2d at 845. When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Id.* The Appellate Panel has the final determination of witness credibility and the weight to be accorded the evidence. *Id.*

In his order, the commissioner stated that *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984), "calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases." *See id.* at 471, 313 S.E.2d at 41 (noting the back is "a much more complicated area of the body," which requires "a higher degree of expertise than was presented to determine the degree of . . . loss of use"). He then found Brown presented "no specific medical report that ties the lumbar [lower back] problems to the injury at work."

Brown argues the commissioner overlooked or disregarded the undisputed evidence in the record that his lower back problems were caused by and stemmed from the accident. In support of his argument, Brown submits that on July 6, 2008, two months after the accident, he went to the emergency room complaining of lower back pain. The report notes, "History obtained from patient." The admission notes state Brown indicated he was in an automobile accident two months prior to when he developed the pain, and he does a lot of heavy lifting at work, which he thinks exacerbated the pain. However, he denied any back pain when a nurse assessed him. Brown's back was x-rayed, and the hospital discharged him with a lumbosacral strain and prescribed him Percocet, a drug for pain.

On July 10, 2008, Brown saw Dr. Abu-Ata, who noted Brown told him he was in a car accident two months prior, and afterwards, he started having neck and back pain. Brown told Dr. Abu-Ata "he had x-rays for his spine that were negative."

Dr. Abu-Ata "did a nerve conduction study/EMG for him that was normal and that showed no evidence of cervical or lumbosacral peri-radiculopathy." He then scheduled Brown for a magnetic resonance imaging (MRI) of his cervical spine and lower back. The lower back MRI revealed "mild to moderate degenerative disc disease at L3-4." However, the cervical spine MRI indicated Brown had "moderately severe degenerative disc/osteophyte disease of the cervical spine," and Dr. Abu-Ata gave him an emergency referral to Dr. Scott Boyd, a neurosurgeon.

On August 4, 2008, Dr. Boyd determined Brown had cervical stenosis and scheduled him for an anterior cervical discectomy and fusion on September 2, 2008. In February 2010, Dr. Boyd performed a second cervical fusion on Brown. In relation to his claim for workers' compensation, Brown sent Dr. Boyd a letter that stated:

> Is it your opinion to a reasonable degree of medical certainty that the problems that [Brown] has with his neck and back and his need for medical care either stem directly from the automobile accident of May 2, 2008[,] or the accident aggravated and caused to become symptomatic a pre-existing conditions [sic] in his neck and back which resulted in the need for medical care?

Dr. Boyd checked "yes" and signed the letter. However, Dr. Boyd also signed a note excusing Brown from work, which stated: "Mr. Brown is having *back* surgery 09/02/08. He will be out of work until approximately 3 weeks after surgery." (Emphasis added.) Brown's first cervical fusion was on September 2, 2008. Therefore, Respondents contend Dr. Boyd interchangeably used the word "back" to refer to Brown's "neck." Further, Dr. Leonard Forrest did an independent medical evaluation of Brown, and although he notes Brown told him "his neck-related symptoms have always been worse than the low back related symptoms," he stated he did "not see any studies of a lumbar spine." He also stated that although Brown's back problems "certainly seem[] to be related to the motor vehicle accident for the same reason as noted above, [it] has not been evaluated adequately at this point."

Brown's doctors did not perform any surgeries or procedures on his lower back, and the only treatment given to Brown for his lower back was the Percocet given to him at the emergency room. Brown also testified he has not had any surgery or

medical treatment to his lower back. When asked about his lower back pain, Brown stated, "[I]t starts from the back of my neck and goes down and then sometimes it varies also. . . . it feels different all the time. I really couldn't pinpoint [it] in particular." Hence, even Brown could not specifically testify he experienced lumbar pain. Also, although "back" pain is referred to in the record, the only medical evidence specifically relating to Brown's lower back pain is the emergency room visit. Therefore, we find the few medical references in the record are insufficient to prove a causal link, and the substantial evidence in the record supports the Appellate Panel's decision that Brown presented no medical evidence that related his lumbar problems to the accident.

II. Compensation Rate

Brown argues the Appellate Panel erred in not raising his compensation rate to $591.73. We disagree.

Section 42-1-40 of the South Carolina Code provides four alternative methods for the commission to use to calculate the average wage. S.C. Code Ann. § 42-1-40 (Supp. 2012); *see Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The primary method of calculation requires that the "'[a]verage weekly wage' must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40 (Supp. 2012). However, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (Supp. 2012). "'The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity.'" *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002) (quoting *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

Brown alleged that at the time of the accident, his weekly wages were $589.69, which resulted in a compensation rate of $393.14. However, he sought a deviation in the calculation of his average weekly wage. He presented evidence that he worked for Boyd Brothers Trucking prior to working for Peoplease, and based on his income as reported on his W-2, he had an average weekly wage of $887.55 with a resulting compensation rate of $591.73. Brown also testified he thought

Bulldog was going to pay him a rate of fifty cents per mile; however, he could not identify who at Bulldog told him that. Monica Reese, corporate counsel for Peoplease, testified she reviews every employment contract and completes the Form 20 for every workers' compensation claim. She testified she reviewed the payroll of all sixty similarly-situated drivers and determined Brown's wages would be approximately $26,000 for the year. She testified the high end of the salary that drivers could earn is forty-two cents per mile, which is approximately $38,500 per year. She did not know of anyone who would have told Brown he would make fifty cents per mile.

Additionally, Brown submitted paystubs he alleged showed Bulldog was paying him $1.00 per mile. However, the paystubs indicate the payment on the check was calculated at a "Rate" of "$1.00" for "*Hours*" of work. (Emphasis added.) Even at the hearing before the Appellate Panel, Brown's counsel stated: "[I]n our Pre-hearing Brief we submitted copies of his check and on his check – the four or five copies of the check we submitted it said that he was making $1.00 dollar an *hour*." (Emphasis added.) The commissioner asked him if that was correct, and counsel stated: "Excuse me, $1.00 dollar a *mile*." (Emphasis added.) He then continued to say, "But in other words not only does it support my client's testimony that he was going to make $.50 cents an *hour* . . . ." (Emphasis added.) Therefore, the evidence does not support Brown's argument the record contains evidence showing Bulldog was paying him one dollar per mile.

The commissioner noted Brown presented no documentary evidence to support his testimony that Bulldog promised him fifty cents per mile, and he did not identify the exact person that told him that at the time of employment. Nevertheless, the commissioner found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. As a result, the commissioner determined the fair average weekly wage was $740.38 with a resulting compensation rate of $493.84. Therefore, the commissioner assumed Brown would eventually earn the highest amount a driver in his situation could earn and took into account possible future earnings and wage increases in calculating his average weekly wage. We find no error.

III. Order

Brown argues the Appellate Panel erred in not writing its own order. We disagree.

On April 1, 2011, Judicial Director Virginia Crocker emailed a letter to all counsel, stating the Appellate Panel "has considered the matter and find[s] a full affirmation of the Single Commissioner's Decision and Order." The letter requested counsel for Respondents "prepare a proposed order with copies for each Party; and submit to the Judicial Department within thirty (30) days of this notice." It also requested the order "recite[] the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." Further, the letter stated "the Commissioners reserved the right to modify and/or delete any or all portions of the submitted decision and order."

We find no merit to Brown's argument. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 292 (2011) (noting the "Appellate Panel of the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained therein in full"); *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 295, 705 S.E.2d 472, 474 (Ct. App. 2011) (discussing without comment the single commissioner's receipt of the claimant's proposed order).

IV. Motion for Remand

Brown argues this court erred in denying his motion for leave to present additional evidence to the Workers' Compensation Commission pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We disagree.

Section 1-23-380 of Administrative Procedures Act provides that a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" of the agency decision by filing a petition for review in the court of appeals. S.C. Code Ann. § 1-23-380 (Supp. 2012).[1] Section 1-23-380(3) provides that pursuant to the filing of a petition for review, the party may also apply to the court for leave to present additional evidence, and the court may order the additional evidence to

[1] This section was amended in 2006 to provide for review by an administrative law judge and appeal to the court of appeals instead of the circuit court. 2006 Act No. 387, § 2, eff. July 1, 2006. Because this case began in 2010, Brown's appeal was to this court.

be taken before the agency if "it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." S.C. Code Ann. § 1-23-380(3) (Supp. 2012).

Brown filed his notice of appeal with this court on July 28, 2011. The same day, Brown also filed with this court a motion for leave to present additional evidence to the Workers' Compensation Commission and to stay the appeal pending the remand to the Commission. In his memorandum in support of his motion, Brown sought to introduce a photocopy of a card he found while going through his records, which he claimed someone gave him when he applied with Bulldog. The back of the card states: "Run Legal: 50¢ per loaded mile." Brown asserted the additional evidence was material because, in making his decision, the commissioner relied on the lack of documentary evidence to support Brown's testimony. By order dated November 2, 2011, this court denied Brown's motion, finding Brown "presented no good reasons for his failure to present the evidence during the hearing before the single commissioner and the Appellate Panel."

In ruling on an application to submit additional evidence, this court should consider two factors: (1) the materiality of the additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. S.C. Code Ann. § 1-23-380(3) (Supp. 2012). After reviewing the record, we find this court correctly determined the additional evidence Brown sought to offer is not material. Additionally, we find this court correctly determined Brown presented no good reason for failing to present the evidence at the hearing before the commissioner and the Appellate Panel. Therefore, this court correctly denied Brown's motion. *See Byers v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 243, 245, 407 S.E.2d 653, 654-55 (1991) (finding the decision to hear additional evidence under section 1-23-380(e), prior to the statute's amendment, was "a matter within the sound decision of the trial judge" and the appellate court's proper standard for review was "whether the circuit judge committed an error of law in remanding the case to the Commission to hear additional evidence"); *id.* (stating that "[i]n ruling on an application under subsection (e), the [c]ircuit [c]ourt should have considered two factors: the materiality of the additional evidence and the existence of a good reason for the failure to introduce such evidence at the original hearing"); *id.* (finding any additional evidence the petitioner sought to offer was not material to the Commission's determination and holding the trial judge was

controlled by an error of law in making his determination on the materiality of the additional evidence).

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

D. Michael Taylor, Appellant,

v.

Aiken County Assessor, Respondent.

Appellate Case No. 2011-204370

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 5103
Heard December 13, 2012 – Filed March 27, 2013

REVERSED AND REMANDED

D. Michael Taylor, pro se, for Appellant.

W. Lawrence Brown, of Aiken, for Respondent.

WILLIAMS, J.: D. Michael Taylor ("Taylor"), appearing pro se, appeals the Administrative Law Court's (ALC) finding that Taylor lacked standing to challenge the 2010 property appraisal and tax assessment for a property he purchased on September 7, 2010. Taylor argues that he has standing despite not owning the property on December 31, 2009, when the tax was levied. We reverse and remand.

FACTS / PROCEDURAL HISTORY

On September 7, 2010, Taylor purchased real property located in Aiken County at a foreclosure sale. The same day, Taylor emailed the Aiken County Tax Assessor ("Assessor") to "protest the appraised fair market value and resulting assessment of the referenced property for tax year 2010." In response, the Assessor reduced the property's market value for the 2011 tax year but did not reduce the market value or assessment for the 2010 tax year. Taylor appealed to the Aiken County Board of Assessment Appeals ("Board"), arguing that his property's value for the 2010 tax year should also be reduced. The Board denied the appeal because Taylor was not the property owner at the time the Assessor levied the 2010 tax.

Taylor appealed to the ALC. The ALC found that Taylor lacked standing to appeal the property tax assessment for the 2010 tax year because he did not own the property as of December 31, 2009, the date the 2010 tax was assessed. This appeal followed.

STANDARD OF REVIEW

"Tax appeals to the ALC are subject to the Administrative Procedures Act." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73, 715 S.E.2d 877, 880 (2011). "The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE*, 395 S.C. at 74, 715 S.E.2d at 880.

LAW/ANALYSIS

Taylor argues the ALC erred in determining that he lacked standing to appeal the valuation and assessment for the 2010 tax year for property he purchased on September 7, 2010. We agree.

In the instant case, the ALC determined that Taylor lacked standing to appeal the 2010 assessment because he was not the owner of the property as of December 31, 2009. Relying upon section 12-37-610 of the South Carolina Code (Supp. 2012),

the ALC determined that Taylor was "not the person legally liable for payment of the taxes for the year 2010." Thus, the ALC reasoned that "he [wa]s not the 'property taxpayer' as defined by the statute."

As recognized by the ALC, our resolution of this issue hinges on whether Taylor is a "property taxpayer" as defined by the applicable sections of the South Carolina Code. If Taylor is a property taxpayer, he has standing as a matter of statutory right. *See Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012) ("Standing may be acquired: (1) through the rubric of 'constitutional standing'; (2) under the 'public importance' exception; or (3) by statute.") "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Id.* at 194, 728 S.E.2d at 44. Therefore, we look to the language of the controlling statutes to determine if Taylor has standing.

Section 12-37-610 states that:

> Each person is liable to pay taxes and assessments on the real property that, as of December thirty-first of the year preceding the tax year, he owns in fee, for life, or as trustee, as recorded in the public records for deeds of the county in which the property is located . . . .

The South Carolina Revenue Procedure Act ("SCRPA")[1] provides that "[i]n years when there is no notice of property tax assessment, the property taxpayer may appeal the fair market value . . . and the property tax assessment of a parcel of property at any time." S.C. Code Ann. § 12-60-2510(A)(4) (Supp. 2012). Under the SCRPA, "'[p]roperty taxpayer' means a person who is liable for, or whose property or interest in property, is subject to, or liable for, a property tax imposed by this title." S.C. Code Ann. § 12-60-30(22) (Supp. 2012).

As noted above, the relevant question is whether Taylor is a property taxpayer. We are mindful that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in a statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. "When a statute's terms are clear and unambiguous on their face, there is no

[1] *See* S.C. Code Ann. §§ 12-60-10 to -3390 (Supp. 2012).

room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* at 498, 640 S.E.2d at 459. Additionally, under South Carolina law, "[r]evenue laws are generally construed in favor of the taxpayer and against the taxing authority." *Clark v. S.C. Tax Comm'n*, 259 S.C. 161, 169, 191 S.E.2d 23, 26 (1972) (internal quotation marks omitted).

Looking to the plain and ordinary meaning of the SCRPA's provisions, we find that section 12-60-2510(A)(4) allows a property taxpayer to appeal the fair market value and resulting assessment of property at any time in years when a new countywide assessment is not taking place. Turning to the language of section 12-60-30(22), we interpret the definition of property taxpayer to include individuals fitting into two categories: (1) "a person who is liable for . . . any property tax imposed by this title"; and (2) "a person . . . whose property or interest in property[] is subject to . . . a property tax imposed by this title." S.C. Code Ann. § 12-60-30(22).

In the instant case, we find that Taylor qualifies as a property taxpayer under this second category as a person whose property is subject to the property tax. Pursuant to section 12-49-10 of the South Carolina Code, unpaid property taxes become a lien upon the real property at the time when they are assessed. *See* S.C. Code Ann. § 12-49-10 (2000) ("All taxes, assessments and penalties legally assessed . . . shall be a first lien in all cases whatsoever upon the property taxed, the lien to attach at the beginning of the fiscal year during which the tax is levied."). Accordingly, Taylor's interest in the property is subject to the 2010 tax by virtue of this lien.

Therefore, giving the words of section 12-60-30(22) their plain and ordinary meaning, we find the clear and unambiguous terms of the statute provide subsequent property owners, whose properties are "subject to . . . a property tax" by virtue of a tax lien, with the right to appeal their property's valuation and resulting tax assessment. Accordingly, we find that Taylor, as a property taxpayer within the definition provided by section 12-60-30(22), has standing to appeal the valuation and assessment of the property purchased at foreclosure sale on September 10, 2010.

Even if we considered the statute's terms ambiguous, we find our rules of statutory construction would necessitate allowing Taylor the right to appeal. "All rules of statutory construction are subservient to the one that the legislative intent must

prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Sonoco Prod. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) (internal quotation marks omitted). The legislative intent behind section 12-60-2510(A)(3)-(4) is to provide property owners who are subject to a property tax with an avenue to appeal the valuation and resulting assessment. We find this legislative intent is defeated by interpreting this statute to afford an appeal only to property owners as of the date when the assessment was levied but to disallow appeals from subsequent owners. *See Ray Bell Constr. Co. v. Sch. Dist. of Greenville Cnty.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("[T]he courts will reject [a] meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention."). We do not believe the General Assembly intended such a result. Therefore, we construe the statute to provide subsequent owners, who ultimately bear the economic burden of the overvalued taxes, with the ability to appeal such an assessment. *See id.* ("If possible, the court will construe the statute so as to escape the absurdity and carry the [legislature's] intention into effect.").

Because Taylor satisfies the statutory definition of property taxpayer, section 12-60-2510(A)(4) provides him the right to appeal the assessment of his property "at any time." Accordingly, the ALC erred in finding that Taylor lacked standing to appeal the valuation and tax assessment for the 2010 tax year of the property he purchased on September 7, 2010.

CONCLUSION

Based on the foregoing, we find the ALC erred in finding Taylor lacked standing to appeal the assessment of the property taxes. Accordingly, the order of the ALC is

REVERSED AND REMANDED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory Brown, Respondent,

v.

Willie Brown, Jr., Charles Brown, Joe Brown, Nellie Brown Boyd, Vivian Brown Dowdy, First Federal, and First Financial Holdings, Inc., Defendants,

Of whom Willie Brown, Jr., Charles Brown, Joe Brown, Nellie Brown Boyd, and Vivian Brown Dowdy are the Appellants.

Appellate Case No. 2012-206508

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 5104
Heard January 17, 2013 – Filed March 27, 2013

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

Gerald D. Jowers, of Columbia, for Appellants.

John E. Schmidt, III, Schmidt & Copeland, LLC, of Columbia, for Respondent.

FEW, C.J.: Gregory Brown brought this action for partition of real property that he and his five siblings owned together, and for an accounting of expenses he paid to preserve the property. The master-in-equity ordered the five siblings to pay Gregory their share of the expenses, partitioned the property by sale rather than in kind, and awarded Gregory attorney's fees and costs. The siblings appeal those decisions. We affirm the accounting decision, reverse the partition decision, vacate the award of fees and costs, and remand.

I. Facts and Procedural History

Willie Brown Sr. died in June 2005, leaving a will that devised all his assets to his six children. The will named Gregory as the estate's personal representative. The estate's assets included personal property and two parcels of real property—the Clarkson property and the Dry Branch property. The Clarkson property is bounded on two sides by public roads. The Dry Branch property is landlocked but can be accessed using an easement over an adjoining piece of land. Acting in his capacity as personal representative, Gregory executed deeds in 2006 conveying equal, undivided shares of the Clarkson and Dry Branch properties to himself and his siblings.

As personal representative, Gregory managed the estate's income, property, and expenses. Although the estate received some income from various sources, it did not have sufficient funds to pay all its expenses. The siblings gave Gregory money to help pay the estate's expenses.

In 2005, before Gregory conveyed the properties, he began paying the taxes, mortgage debt, and utility bills with his own money. He continued to do this for several years after he and his siblings took title to the properties. He also performed maintenance on the properties, for which he charged his siblings a fee. The parties have been unable to agree on how much, if anything, the siblings owe Gregory for their share of these expenses.

For several years, the parties attempted unsuccessfully to reach an agreement on how to divide the real properties among them. In 2009, Gregory filed a complaint asking the court to partition the properties either in kind or by sale. He also asked for an accounting of how much money his siblings owed him for their share of the expenses he incurred on the properties. The master conducted a trial and issued an order. As to the accounting cause of action, the master ordered each sibling to pay

Gregory $5,171.15 as his or her share of the expenses. As to partition, the master determined that equitably dividing the properties into smaller parcels would be impracticable, and therefore he ordered the properties be sold at a public sale. Finally, the master ordered each sibling to pay Gregory $3,583.88 as his or her share of Gregory's attorney's fees and costs. The siblings filed a motion to alter or amend the judgment or for a new trial. The master denied the motion.

II. Accounting

In making his accounting decision, the master refused to consider anything he found unrelated to the expenses of the Clarkson and Dry Branch properties. The siblings argue the master erred by not taking several things into account.

First, the siblings claim the funds they gave Gregory were contributions for the estate's expenses and for the parties' shared expenses related to owning the properties. The master found the contributions were purely for estate expenses, which meant the probate court had exclusive jurisdiction over any dispute about the contributions. *See* S.C. Code Ann. § 62-1-302(a)(1) (2009) (providing the probate court exclusive original jurisdiction over all subject matter related to estates of decedents). We find the master correctly determined the siblings' payments were contributions for estate expenses, not contributions toward their share of their expenses as owners of the properties. Gregory testified some of his siblings "contributed their equal portion for the burial expenses, which was agreed upon." Vivian testified, "Ever since we started this our disagreement with Greg has been how much we actually owe him for the expenses of the estate, and even though I'm hearing otherwise today, that's what I thought we were here for . . . ." She also testified the siblings offered to help Gregory with bills he had to pay as the personal representative of the estate.

Second, the siblings claim Gregory converted several items of personal property from the estate to which they were entitled under the will. They argue the master should have reduced their liability to Gregory by the value of their interests in the items. We find the master properly declined to consider the personal property. A dispute over conversion of estate property would be for the probate court to decide. *See* § 62-1-302(a)(1). To the extent the siblings are arguing the conversion occurred after they became owners of the personal property, the master found the evidence did not support the conversion claim. Gregory testified he is holding the items for safekeeping because several things had been stolen from Mr. Brown's

house after he died. Given the conflicting characterizations of Gregory's intent regarding the personal property, the master's finding contains an implicit determination that Gregory's testimony was credible. We find no error in the master's choice to believe Gregory over his siblings. *See Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) (stating the broad standard of review in equitable actions "does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses" (citation and quotation marks omitted)).

The siblings assert two additional errors that we do not address. They argue the master erred in considering releases they signed because the releases were never made part of the record below. The master considered the releases as an alternative basis for his ruling. Our decision to affirm the ruling for the reasons described above makes it unnecessary to address this argument. *See Fesmire v. Digh*, 385 S.C. 296, 315 n.10, 683 S.E.2d 803, 814 n.10 (Ct. App. 2009) (declining to address appellant's arguments because court's decision on other issues disposed of the appeal). The siblings also argue the master should have taken into account money Gregory received from third parties while acting as personal representative, as well as the value of scrap metal a family acquaintance removed from the properties and sold. This argument is not preserved because the master did not rule on it and the siblings did not raise it in their motion to alter or amend. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating that when a party has raised an issue or argument to the court, but the court did not rule on it, a party must file a motion to alter or amend in order to preserve it for appellate review).

III. Partition

A trial court may partition jointly held property in kind, by allotment, or by sale. S.C. Code Ann. § 15-61-50 (2005). When "partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest," the court may order the property sold and divide the proceeds according to the parties' rights in the property. *Id.* As the party seeking partition by sale, Gregory has the burden of proving that partition in kind is not practicable or expedient. *Anderson v. Anderson*, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989).

Under Rule 71(f)(1), SCRCP, a court may issue a writ of partition to five "commissioners," whose duty is "fairly and impartially, according to the best of

their judgment, to make partition of the premises described in the complaint among the parties entitled thereto, according to their several rights." If the commissioners conclude the property cannot be "fairly and equally divided between the parties interested therein without manifest injury to them, or some one of them," the commissioners must make a special return of the property to the court, along with an appraisal of the property's value, and offer the court their opinion as to whether the property should be allotted to one or more of the parties or sold at public auction. Rule 71(f)(3). At that point, the court chooses between partitioning the property by allotment or by sale. *Id.*; Rule 71(f)(4).

A court is not required to follow this procedure in every partition case. It may "dispense with the issuing of a writ of partition when, in the judgment of the court, it would involve unnecessary expense to issue such writ." S.C. Code Ann. § 15-61-100 (2005); *accord* Rule 71(f)(5); *see also Tedder v. Tedder*, 115 S.C. 91, 98, 104 S.E. 318, 320 (1920) ("Appellants err in their contention that the issuance of a writ in partition is necessary to determine whether partition in kind is practicable. In many, perhaps in most, cases, the court is quite as capable of deciding that issue correctly upon testimony as commissioners in partition would be after viewing the premises; and [the statute now codified as section 15-61-100] expressly gives the court the power to do so.").

In this case, the master found "needless expense would be incurred by issuance of a writ," and he partitioned the properties by sale. The master made this determination on the following basis:

> Because the parties have not agreed on a partition in kind; because valuation and partition in kind is rendered highly difficult in view of the fact that a large tract of the property is landlocked with access by an exclusive easement making all but one of the parcels created by a subdivision unmarketable and undevelopable because all but one would lack a legal right of access; and because there is not adequate evidence to allow valuation of the respective properties, I find . . . that partition in kind is not practicable or expedient . . . .

We find the reasons the master gave do not support his decision.

The master's first reason was that the parties did not agree on how to divide the properties in kind. However, their disagreement is precisely what caused Gregory to file this partition action. The fact that the parties failed to resolve the matter themselves is not a reason to find that issuing a writ of partition would involve unnecessary expense.

The master's second reason was that "valuation and partition in kind is rendered highly difficult in view of the fact that a large tract of the property is landlocked with access by an exclusive easement making all but one of the parcels created by a subdivision unmarketable and undevelopable because all but one would lack a legal right of access." This finding is based on Gregory's testimony about the Dry Branch property. He testified, "I have learned . . . that the county will not approve land that's landlocked to be subdivided." This statement is not sufficient to support the master's finding. Gregory made the statement in self-interest, and nothing in the record supports its reliability. Gregory never identified how or from whom he "learned" that the county would not allow division, and the record contains no evidence of an ordinance, rule, or other authority supporting Gregory's testimony. Even if the county had such a policy in place, it would not preclude a state court from exercising its statutory authority to partition the property in kind. *See City of N. Charleston v. Harper*, 306 S.C. 153, 157, 410 S.E.2d 569, 571 (1991) ("Power granted pursuant to state law can be restricted only by state law. A local government may not forbid what the legislature expressly has licensed, authorized, or required.").

Moreover, the Clarkson property is not landlocked, and there is no evidence of any restrictions on subdividing the Clarkson property. Even if Gregory's testimony about the Dry Branch property is accurate, that fact alone is not a sufficient reason to find that issuing a writ of partition for the Clarkson property would involve unnecessary expense.

The master's last reason was that the record did not contain sufficient evidence to determine the value of the properties. He made no findings as to the value of either parcel or what commissioners would cost. It is not possible for the master to determine that issuing a writ of partition would involve unnecessary expense without making an assessment of the cost of issuing the writ, comparing that cost to an estimate of the values of the properties, and explaining on the record his comparison and the reasons it supports his determination that the expense is "unnecessary."

Even when considered together, the reasons the master gave do not support his unnecessary expense finding. Therefore, we reverse and remand to the master to revisit this issue. On remand, the master may issue a writ of partition, or, if he again determines that doing so would involve unnecessary expense, he must make sufficiently detailed findings supporting that determination.

IV. Attorney's Fees and Costs

The master awarded Gregory attorney's fees and costs pursuant to South Carolina Code section 15-61-110 (2005), which allows a court to make such an award in a partition action. The course of the proceedings on remand will likely affect the master's opinion on whether an award will still be warranted, how much to award, and who should pay. We vacate the award and do not address the parties' arguments on this issue. *See Fesmire*, 385 S.C. at 315 n.10, 683 S.E.2d at 814 n.10.

V. Conclusion

We **AFFIRM** the master's decision on the accounting cause of action, **REVERSE** the master's decision on the partition cause of action, and **VACATE** the award of attorney's fees and costs. We **REMAND** for the master to revisit the issues of partition and attorney's fees and costs.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jessica Caldwell, Respondent,

v.

Amy Wiquist, Appellant.

Brian Caldwell, Respondent,

v.

Amy Wiquist, Appellant.

Appellate Case No. 2012-207208

Appeal From Beaufort County
Marvin H. Dukes III, Special Circuit Court Judge

Opinion No. 5105
Heard January 17, 2013 – Filed March 27, 2013

REVERSED AND REMANDED

W. Toland Sams, of Sams & Sams, P.A., of Beaufort, for Appellant.

Colden R. Battey Jr., of Harvey & Battey, P.A., of Beaufort, for Respondents.

PIEPER, J.: This appeal arises out of personal injury claims resulting from a car accident. On appeal, Appellant Amy Wiquist argues that the trial court erred in denying her motions to set aside default judgment because: (1) the affidavits failed to comply with statutory requirements; (2) service by publication violated Wiquist's due process rights; (3) evidence of fraud or collusion existed; (4) the *Yates v. Gridley*, 16 S.C. 496 (1882), line of cases should be overruled; and (5) the orders of service by publication did not comply with section 15-9-740 of the South Carolina Code (2005). We reverse and remand.

FACTS

Respondents Jessica Caldwell and Brian Caldwell were in an automobile accident that they allege was caused by Wiquist's negligent operation of her vehicle. While their vehicle was stopped in traffic, it was struck by the vehicle operated by Wiquist. Prior to filing suit, the Caldwells engaged in settlement negotiations with Wiquist's insurance company, GEICO. The Caldwells filed individual complaints alleging personal injuries and requesting punitive damages and provided copies of the complaints to GEICO. The Caldwells delivered the filed civil action coversheets, summonses, and complaints to the Beaufort County Sheriff's Department (BCSD) for service upon Wiquist. The BCSD executed affidavits of non-service stating that it had been unable to complete service on Wiquist at her last known address that was listed on the traffic collision report, providing the explanation: "ADDRESS VACANT." The Caldwells did not attempt to serve Wiquist with the summonses and complaints by mail directed to the address for Wiquist that was listed on the traffic collision report.

The Caldwells filed affidavits requesting service by publication. The Clerk of Court for Beaufort County entered orders of service by publication. The Caldwells filed affidavits stating that notice of the actions had been published in *The Island Packet* and *The Beaufort Gazette*. The Caldwells filed affidavits of default and moved for default judgments. On September 22, 2011, the court scheduled default hearings for October 3, 2011, and the Caldwells mailed notice of the hearings to Wiquist's last known address as listed on the traffic collision report. Wiquist did not appear at the default hearings. By virtue of an order entered on October 4, 2011, the trial court awarded to Jessica Caldwell $15,000 in actual damages and $5,000 in punitive damages. By virtue of an order entered on October 4, 2011, the trial court awarded to Brian Caldwell $85,000 in actual damages and $15,000 in punitive damages.

Wiquist received notice of the default hearings on October 4, 2011, after the mailed notice of the hearings was forwarded to her then-current address by the United States Postal Service. Upon receipt of the notice, Wiquist's counsel contacted the Caldwells' counsel to inform him of Wiquist's representation and to request copies of the default judgments. Wiquist moved to set aside the default judgments, and the court entered orders denying the motions. Wiquist did not file Rule 59(e), SCRCP motions to alter or amend the judgments. The cases have been consolidated for purposes of appeal.

STANDARD OF REVIEW

"The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Melton v. Olenik*, 379 S.C. 45, 50, 664 S.E.2d 487, 489-90 (Ct. App. 2008). "An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." *Id.* at 50, 664 S.E.2d at 490.

LAW/ANALYSIS

Wiquist alleges that the orders of service by publication did not comply with section 15-9-740. Where a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party, this court has held that the trial court is "without authority to overrule the finding of the clerk of court." *Montgomery v. Mullins*, 325 S.C. 500, 505-06, 480 S.E.2d 467, 470 (Ct. App. 1997). "[I]n the absence of fraud or collusion, the decision of the officer ordering service by publication is final." *Id.* at 506, 480 S.E.2d at 470.

However, Wiquist argues the affidavits requesting service by publication failed to comply with statutory requirements. Wiquist also argues her case is distinct from *Yates*,[1] *Montgomery*, and *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000), because those cases involved affidavits that "included at least *some* facts concerning efforts to locate the defendant." We agree.

[1] Wiquist filed a motion to argue against precedent prior to oral arguments. This court denied the motion.

Initially, we note that Wiquist asserts that the *Yates* line of cases should be overruled. This court has "no authority to overrule Supreme Court precedent." *Blyth v. Marcus*, 322 S.C. 150, 155 n.1, 470 S.E.2d 389, 392 n.1 (Ct. App. 1996). Thus, we decline to address Wiquist's argument that the *Yates* line of cases should be overruled.

Moreover, this case can be distinguished from *Yates*, *Montgomery*, and *Wachovia Bank*. Section 15-9-710 of the South Carolina Code (2005) addresses the conditions permitting service by publication and provides, in pertinent part:

> When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of probate may grant an order that the service be made by the publication of the summons in any one or more of the following cases: . . .
>
> (3) when the defendant is a resident of this State and after a diligent search cannot be found; . . . .

In *Yates*, the affidavit requesting service by publication provided, in pertinent part: "[T]he above defendants, are non-residents of this [State], but are residents of the State of New York, and . . . their post-office is unknown to deponent, and cannot be ascertained, notwithstanding due diligence has been employed, nor can they be found in this State after due search for them." 16 S.C. at 498-99.

Similarly, the *Montgomery* court discussed the plaintiff's "petition . . . for an order of publication alleging that he had been unable to locate the [defendants] after due diligence and requesting that he be allowed to serve them by publication." 325 S.C. at 503, 480 S.E.2d at 468-69. However, instead of determining the sufficiency of the claims of due diligence listed in the petition requesting service

by publication, the *Montgomery* court affirmed the trial court's dismissal of the plaintiff's suit because the plaintiff did not effectuate service by publication within a reasonable time after the order of publication was filed. *Id.* at 506, 480 S.E.2d at 470.

More recently, the *Wachovia Bank* court affirmed the master's refusal to set aside service of process despite the fact that the petition requesting service by publication contained an untrue statement that the "Sheriff for Georgetown County did attempt service upon said defendant" when, in fact, "service was only attempted by a private process server." 341 S.C. at 428, 535 S.E.2d at 130 (internal quotations omitted). Our supreme court reviewed the petition requesting service by publication and affidavit of non-service together, finding: "It is clear from reading the two documents together that the petition is inaccurate, but that the process server's affidavit reflects due diligence by her." *Id.*

Contrary to the affidavits in *Yates*, *Montgomery*, and *Wachovia Bank*, Wiquist asserts the affidavits requesting service by publication in the instant matter are facially defective. Here, the Caldwells' affidavits requesting service by publication provide, in pertinent part: "The Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County, and it is necessary and proper to serve her by publication." Section 15-9-710 permits service by publication when a defendant cannot be found within the State, but the Caldwells' affidavits requesting service by publication only provide that Wiquist could not be served in Beaufort County and contain no information regarding whether or not she could be found in the State. The affidavits requesting publication are defective on their face because they state the Caldwells tried to serve a non-resident of Beaufort County only in Beaufort County.[2] Furthermore, the affidavits requesting service by publication do not contain any statements regarding the due diligence undertaken and, in fact, do not even contain the phrase "due diligence."

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[2] As an aside, we note the affidavits requesting service by publication stated that Wiquist could not be served in Beaufort County, yet service was published in *The Island Packet* and *The Beaufort Gazette*. Both news publications were distributed primarily in Beaufort County. A plaintiff who has no other remedy than to effectuate service by publication is more likely to reach a defendant not located in the county by publishing service in a publication with a broader distribution area.

South Carolina courts have repeatedly required strict compliance with publication statutes. Our supreme court in 1885 considered a publication statute when determining whether a non-resident minor had properly been made a party to an action. *Riker v. Vaughan*, 23 S.C. 187, 189 (1885). The *Riker* court noted that the minor defendant acknowledged service, but found that the failure of the plaintiff to procure an order for service by publication, the only statutory mode by which a non-resident minor could be made a party defendant to an action, was a fatal defect rendering service incomplete. *Id.* In 1911, our supreme court was asked to determine whether an order for publication that was endorsed on the back by the clerk of court prior to the actual service by publication was void when the clerk signed the order for publication on the front after the service by publication was effectuated. *Du Bose v. Du Bose*, 90 S.C. 87, 89, 72 S.E. 645, 646 (1911). The *Du Bose* court noted the "rule that the statutory requirements as to constructive service by publication must be strictly carried out" and held that, despite the clerk's endorsement on the back of the order of publication, the order of publication was invalid because it had not been signed on the front as required by the publication statute. *Id.*

In a later decision regarding an appeal of an action brought in both North Carolina and South Carolina, our supreme court determined the affidavit requesting publication was "fatally defective, under the North Carolina law, on its face, in that it does not show that due diligence was used to find the defendant." *Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324, 121 S.E. 779, 779-80 (1924). The *Ray* court noted the applicable statute required a showing of due diligence in order to secure the order of publication. *Id.* In support of its decision, the *Ray* court noted multiple North Carolina cases that had approved the holding in *Wheeler v. Cobb*, 75 N.C. 21 (1876), where the Supreme Court of North Carolina held that the service of summons by publication was fatally defective and did not conform to the requirements of the statute because the affidavit requesting service by publication failed to allege that the defendant could not, after due diligence, be found within the state. *Id.* at 325, 121 S.E. at 780. In a 1955 case involving an affidavit requesting service by publication, the Supreme Court of North Carolina determined the affidavit was defective because it failed to state that the defendant "could not, after due diligence be found in the State of North Carolina." *Nash Cnty. v. Allen*, 85 S.E.2d 921, 923 (N.C. 1955). The *Nash* court stated its decisions "uniformly hold that where service of [the] summons is made by publication, the requirements of the statute must be strictly followed" and "that everything necessary to dispense

with personal service of [the] summons must appear by affidavit." *Id.* at 924. Moreover, "[a]n affidavit on which publication is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State." *Id.*

Furthermore, we canvassed other jurisdictions and found those courts similarly require strict compliance with publication statutes. The Fourth Circuit affirmed the West Virginia district court's finding that service by publication on nonresident defendants was duly made when the affidavit requesting service by publication, the order of publication, and the posting and publishing of the order was done "in strict conformity with the statute." *Sheffey v. Davis Colliery Co.*, 219 F. 465, 469 (4th Cir. 1914). The California Court of Appeals voided default judgments where the affidavit requesting service by publication contained "no statement concerning their residences nor efforts to find them . . . except the bald conclusion that they 'cannot be located to serve with process.'" *Cavin Mem'l Corp. v. Requa*, 85 Cal. Rptr. 107, 113 (Cal. Ct. App. 1970). The *Cavin Memorial* court stated:

> To obtain jurisdiction of a defendant by publication it is elementary that the affidavit for order of publication must comply with the provisions of [the statute]. Affidavits devoid of averments of facts showing that due diligence was exercised to make service have consistently been held to be insufficient, and orders for service by publication based (upon such affidavits) have uniformly been held to have been beyond jurisdiction and void.

Id. (internal quotations and citations omitted). The Supreme Court of Florida voided a judgment against a defendant where the affidavit requesting service by publication failed to provide that "diligent search and inquiry have been made to discover the residence of the defendant" or "that the residence of the defendant as distinguished from the address is unknown," as was required by the applicable publication statute. *McGee v. McGee*, 22 So. 2d 788, 789-90 (Fla. 1945) (internal quotations omitted). The *McGee* court stated that "[s]tatutes authorizing constructive service of process must be strictly construed and exactly followed to give the court jurisdiction to enter a final judgment." *Id.* at 789.

Similarly, the Court of Special Appeals of Maryland noted that "there must be a strict compliance with the statutes and rules on constructive service; compliance is

jurisdictional, and if any essential statutory step is omitted, the decree rendered on such service is void." *Sanders v. Sanders*, 278 A.2d 615, 618 (Md. Ct. Spec. App. 1971). In addition, the Supreme Court of Mississippi struck an affidavit requesting service by publication where the affidavit failed to meet the publication statute's requirements that the affidavit either (1) list the street address of the defendant, or (2) aver that after diligent search and inquiry the street address could not be ascertained. *McDuff v. McDuff*, 173 So. 2d 419, 420 (Miss. 1965). The *McDuff* court noted it had "repeatedly held that the statutory method of giving notice to either a non-resident defendant, or a resident defendant temporarily out of the state, must be strictly complied with, or that the full equivalent thereof be adhered to." *Id.* at 420-21.

While not controlling, we find these cases persuasive. Based on the foregoing, we find the affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state. It is the existence of this factual basis that our appellate courts have found make the order for service by publication unreviewable, absent fraud or collusion. Accordingly, the trial court erred as a matter of law in denying Wiquist's motions to set aside default judgment because the affidavits requesting service by publication did not meet the statutory requirements, and were therefore, facially defective.

Furthermore, our decision to reverse the trial court's refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits. To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *See Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (citation omitted)); *Melton*, 379 S.C. at 54, 664 S.E.2d at 492 (stating that Rule 55(c), SCRCP, permitting the setting aside of a default, should be "liberally construed to promote justice and dispose of cases on the merits" (internal quotations and citations omitted)). Federal courts recognize the same policy. *See Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010) ("We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits."); *Tazco, Inc. v. Dir., Office of Workers Comp. Program, U.S. Dep't of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) (noting "[t]he law disfavors default judgments as a general matter").

Wiquist also argues that because the affidavits requesting service by publication were void of any reference to due diligence, service by publication violated her due process rights. The United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. The Supreme Court of the United States "has not hesitated to approve of resort to publication as a customary substitute in [a] class of cases where it is *not reasonably possible or practicable* to give more adequate warning." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 658 (1950) (emphasis added). "Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.* "[S]ervice by publication is constitutionally insufficient where actual notice by mail is feasible." *United States v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991). "If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process." *Montgomery v. Scott*, 802 F. Supp. 930, 935 (W.D.N.Y. 1992).

However, "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Constitutional arguments are no exception to the preservation rules . . . ." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). Though Wiquist mentioned due process in her motions to set aside default, a review of the trial court's orders denying Wiquist's motions to set aside default indicate the court did not make an explicit ruling regarding any due process argument. In fact, the orders do not use the words "due process" or mention the constitution at all. Additionally, Wiquist failed to file Rule 59(e) motions. Therefore, this issue is unpreserved for our review and we decline to reach the constitutional question. *See Morris v. Anderson Cnty.*, 349 S.C. 607, 611, 564 S.E.2d 649, 651 (2002) (discussing the court's firm policy of declining to reach constitutional issues unless necessary to the resolution of an appeal).

Finally, Wiquist claims the trial court erred in denying her motion to set aside default judgment because there was at least some evidence suggesting the possibility of fraud or collusion. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). "[W]here an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (citation omitted)). A review of the record reveals that Wiquist did not raise the issue of fraud or collusion to the trial court. In fact, the trial court specifically found in its orders denying Wiquist's motions to set aside the default judgments that Wiquist "makes no allegation of either fraud or collusion as ground for invalidating the order of publication. Furthermore, the Court finds as a matter of fact that there was no fraud or collusion in obtaining the order of publication." Wiquist failed to file Rule 59(e) motions. Therefore, this issue is unpreserved for our review.

CONCLUSION

Based on the foregoing, we reverse the trial court's denial of Wiquist's motions to set aside default and remand for further proceedings consistent with this opinion.

Accordingly, the trial court's decision is hereby

REVERSED and REMANDED.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Miranda C., a minor under the age of fourteen (14) years, by her Guardian ad Litem, Susan Renee Courtney, Respondent/Appellant,

v.

Nissan Motor Co., Ltd. and Nissan North America, Inc., Appellants/Respondents.

Appellate Case No. 2011-190226

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5106
Heard September 12, 2012 – Filed March 27, 2013

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., and Brian P. Crotty, of Nelson Mullins Riley & Scarborough, LLP, and Joel H. Smith, Courtney C. Shytle, Angela G. Strickland, and Kevin J. Malloy, of Bowman and Brooke, LLP, all of Columbia; for Appellants/Respondents.

John S. Nichols, of Bluestein, Nichols, Thompson and Delgado, LLC, of Columbia; Ronnie Crosby and Mark D. Ball, of Peters, Murdaugh, Parker, Eltzroth and Detrick, PA, of Hampton; and Rodney C. Jernigan, Jr., of

Jernigan Law Firm, PA, of Florence; for Respondent/Appellant.

WILLIAMS, J.: In this defective-design products liability action, Appellants/Respondents Nissan Motor Co., Ltd. and Nissan North America, Inc. (collectively, Nissan) appeal the circuit court's denial of its post-trial motion for judgment notwithstanding the verdict (JNOV) based on Respondent/Appellant Miranda C.'s (Miranda) failure to prove a feasible alternative design as required by *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010). On cross-appeal, Miranda argues the circuit court erred in granting Nissan's alternative request for a new trial. In addition, Miranda claims the circuit court erred in denying her motion to invalidate a special interrogatory, in which the jury found Miranda failed to prove a feasible alternative design in her case against Nissan. We affirm.

FACTS/PROCEDURAL HISTORY

This defective-design products liability action comes before this court after a Florence County jury rendered a verdict against Nissan for $2,375,000, which was subsequently set aside by the circuit court in the wake of the supreme court's ruling in *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010). In setting aside the verdict and granting a new trial, the circuit court found its failure to charge the jury on the necessity of proving a feasible alternative design was reversible error. The following facts and procedural history are relevant to the resolution of this appeal.

On the morning of February 11, 2007, nine-year-old Miranda was riding in the back seat of her parents' 2000 Nissan Xterra (Xterra). As her father attempted to make a left turn into their church parking lot, the Xterra was struck by an oncoming vehicle on the right rear passenger side. Upon impact, one of the body frame mount brackets punctured the fuel tank, resulting in a fire that caused injuries to Miranda and her mother.

As a result of Miranda's injuries, her mother filed suit on her behalf against Nissan alleging strict liability, negligence, and breach of warranty. In her complaint, Miranda alleged Nissan was liable "in failing to design and build the 2000 Nissan Xterra XE with sufficient body integrity and structure to protect the fuel system in

a reasonably foreseeable collision thereby exposing raw gasoline to ignition sources" and for "failure to use reasonable care to design a crashworthy vehicle."

Following extensive discovery, the parties tried the case over the course of nine days. During trial, the circuit court and the parties discussed whether Miranda was required to prove the existence of a feasible alternative design. Despite Miranda's contention that such proof was not required, two experts testified extensively on her behalf regarding their proposed alternative designs. In response, Nissan attempted to discredit Miranda's experts' theories by proving their designs were nothing more than "ideas" or "concepts" that had yet to be tested and proven.

At the conclusion of the evidence, the circuit court denied Nissan's request to charge the jury on the necessity of establishing a feasible alternative design as a requisite element of Miranda's case. The parties and the circuit court agreed to submit seven special interrogatories to the jury. The interrogatories included six special interrogatories regarding whether Miranda had proven strict liability and negligence, and if so, the amount of damages Miranda was entitled to for her injuries. The seventh interrogatory[1] pertained to whether Miranda had proven a feasible alternative design that would have prevented her injuries. Nissan requested the seventh interrogatory be submitted with the other interrogatories.

The circuit court denied Nissan's request, stating,

> I think the best way to do it is . . . to ask them to answer the interrogatory with regard to the alternative design after the fact. . . . It keeps them from debating about something that's not a necessary element for recovery, and they could get it confused. So I think that it's a good idea to do that, for judicial economy and it gives the appellate courts more information to rule on it without remanding it for another trial.

[1] This interrogatory stated as follows: "Has Plaintiff proven, by a preponderance of the evidence, that a safer feasible alternative design was available at the time the 2000 Nissan Xterra was manufactured and that such design would have prevented Plaintiff's injuries?"

Despite Nissan's objection that the jury "might not be happy with [them] at that point," the circuit court concluded proof of a feasible alternative design was not required; therefore, the interrogatory would not be submitted before the verdict was rendered. Miranda's counsel reiterated the circuit court's ruling in his closing when counsel stated, "And then the last question after you've signed [the verdict form] is just a question—really, it doesn't have anything to do with the front side. But it's a question about whether or not the plaintiff had proven a feasible alternative design, essentially, something that could have prevented that."

During the circuit court's general charge to the jury on what a plaintiff must prove in a design defect case, it did not differentiate between the consumer expectations test and the risk-utility test. The court did, however, charge the jury under both tests.[2] In charging the jury, the circuit court did not include the necessity of proving a feasible design alternative pursuant to the risk-utility test based on its conclusion that feasible alternative design was not a required element of proof in a design defect case.

Prior to sending the jury out for deliberations, the circuit court informed the jury it would be answering one additional interrogatory after the verdict was returned that was irrelevant to the deliberations of the case and to the verdict. After three and a half hours of deliberation, the jury returned a verdict for $2,375,000 against Nissan. After individually polling the jury members, the circuit court stated,

> I'm once again going to have to ask you to assist us in one regard and to answer this interrogatory which says, has the plaintiff prove[n] by [a] preponderance of the evidence that a safer, feasible alternative design was

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[2] The circuit court's charge included the following:

> Then you should decide whether the particular product involved in this case had a tendency for causing damage beyond those dangers which an ordinary user with common knowledge of the product's characteristics would anticipate. You should also consider whether the dangers associated with the use of the product outweigh the usefulness of the product, the cost involved for added safety, the likelihood of potential seriousness of the injury, and the obviousness of the danger.

> available at the time the 2000 Nissan Xterra was manufactured and such design would have prevented the plaintiff's injuries. Just answer that simply yes or no. And it has to be unanimous.

Neither party objected to the content of the interrogatory or the extent of the court's instructions. After three minutes, the jury returned to the courtroom. The jury responded "no." The circuit court then excused the jury and granted the parties ten days to file post-trial motions.

Nissan submitted a post-trial motion requesting the circuit court grant it JNOV pursuant to Rule 50(b), SCRCP, or in the alternative, a new trial pursuant to Rule 59(a), SCRCP. Miranda also submitted a post-trial motion requesting the circuit court disregard the jury's response to the seventh interrogatory on the grounds that it was submitted after the jury returned its verdict and was not accompanied by sufficient instructions on what constituted a feasible alternative design.

The circuit court held a hearing on August 13, 2010, and orally denied both parties' motions. Three days later, the supreme court issued its decision in *Branham*, wherein the supreme court concluded "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." 390 S.C. at 220, 701 S.E.2d at 14. After receiving supplemental briefs as to the effect of *Branham* on the circuit court's ruling, the circuit court held a second hearing on January 4, 2011.

After hearing from both parties, the circuit court denied Nissan's motion for JNOV but granted Nissan's motion for a new trial. The circuit court acknowledged *Branham*'s declaration that the risk-utility test, which requires proof of a feasible alternative design, was the sole test for a defective-design products liability case. The circuit court applied *Branham* retroactively based on its conclusion that the supreme court's decision merely recognized a new remedy to vindicate existing rights. As a result, the circuit court issued an order, in which it concluded its decision not to charge the jury on proof of a feasible alternative design was reversible error and required the grant of a new trial. Both parties appealed to this court.

LAW/ANALYSIS

In its appeal, Nissan claims that because proof of a feasible alternative design is a required element in a design defect case, the circuit court erred when it denied its motion for JNOV after the jury found that Miranda failed to prove a feasible alternative design. In her cross-appeal, Miranda claims the circuit court erred in refusing to invalidate the post-verdict interrogatory finding she had not proven a feasible alternative design. In addition, Miranda avers the circuit court improperly granted Nissan a new trial because the verdict was rendered pursuant to the consumer expectations test, which was the law in South Carolina at the time of trial. Moreover, she claims the circuit court charged the jury under both the consumer expectations test and the risk-utility test without objection; therefore, the two-issue rule and law of the case permit the jury verdict to stand. We address each argument in turn.

A. Application of *Branham*

To resolve this appeal, we must first determine whether the supreme court's decision in *Branham*, issued after the trial of this case, should be applied retroactively or prospectively. We conclude the holding in *Branham* applies to the instant case.

In *Branham*, the plaintiff, Jesse Branham, sustained serious injuries after being thrown from the backseat of a 1987 Ford Bronco II when the driver overcorrected, causing the Bronco to rollover. 390 S.C. at 208-09, 701 S.E.2d at 8. Branham brought two design defect claims against Ford Motor Company, one based on a defectively designed seatbelt sleeve and one based on a defectively designed stability system. *Id.* at 209, 701 S.E.2d at 8. Ford denied liability and, among other things, asserted the driver's negligence caused the accident. *Id.* A Hampton County jury found the driver and Ford liable and awarded Branham $16,000,000 in actual damages and $15,000,000 in punitive damages. *Id.*

On appeal, one of Ford's claims was that Branham failed to prove a reasonable alternative design pursuant to the risk-utility test. *Id.* at 218, 701 S.E.2d at 13. Ford asserted that because South Carolina law requires a risk-utility test in design defect cases to the exclusion of the consumer expectations test, Branham's failure to prove a reasonable alternative design entitled Ford to a directed verdict on Branham's claims. *Id.*

In resolving Ford's appeal, the supreme court acknowledged that our courts have traditionally employed the consumer expectations test and the risk-utility test to determine whether a product was unreasonably dangerous as a result of a design defect. *Id.* However, the supreme court concluded the consumer expectations test, while appropriate in a manufacturing defect case, was ill-suited in the design defect context. *Id.* at 220, 701 S.E.2d at 14. In support of its adoption of the risk-utility test for design defect cases, the supreme court stated,

> We hold today that the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design. . . .
>
> . . . .
>
> We believe the rule we announce today in design defect cases adheres to the approach the trial and appellate courts in this state have been following. In reported design defect cases, our trial and appellate courts have placed their imprimatur on the importance of showing a feasible alternative design. . . .
>
> . . . .
>
> In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.

Id. at 220-25, 701 S.E.2d at 14-16. Having concluded the risk-utility test would now be the sole test for proving a design defect, the supreme court held Branham produced evidence of a feasible alternative design at trial sufficient to withstand a directed verdict motion. *Id.* at 219, 701 S.E.2d at 13-14. Notwithstanding the existence of ample evidence to sustain a directed verdict motion on Branham's design defect claim, the supreme court reversed and remanded for a new trial pursuant to the risk-utility test based on other prejudicial trial errors. *Id.* at 225-26, 701 S.E.2d at 17.

Turning to the instant case, we recognize that in South Carolina, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citation and quotation marks omitted). "Prospective application is required when liability is created where formerly none existed." *Hupman v. Erskine Coll.*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984). As a common rule, judicial decisions in civil cases are presumptively retroactive. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95-96 (1993) (discussing the "presumptively retroactive effect" of civil decisions); *see also* 20 Am. Jur. 2d *Courts* § 150 (2013) ("[I]t is said that, unlike legislation, which is presumptively prospective in operation, judicial decisions are presumptively retrospective.").

Based on our reading of *Branham*, we conclude the supreme court intended for its decision to apply retroactively to all pending design defect cases, including the instant case. In *Branham*, the supreme court's pronouncement on the applicability of the risk-utility test was not a break from precedent. To the contrary, its decision "adhere[d] to the approach the trial and appellate courts in this state have been following."[3] *Branham*, 390 S.C. at 222, 701 S.E.2d at 15. The supreme court

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[3] The supreme court cited the following judicial decisions in support of this statement: *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) (adopting the risk-utility test); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 176-77, 246 S.E.2d 176, 178 (1978) (affirming verdict in favor of plaintiff by noting that plaintiff presented evidence of a design alternative); *Mickle v. Blackmon*, 252 S.C. 202, 234-35, 166 S.E.2d 173, 187-88 (1969) (discussing a manufacturer's decision to use one type of inferior material as a component part one year, but a superior material the following year—that is, a design alternative); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995) (affirming defense verdict and noting that plaintiff failed to present evidence of a feasible alternative design); *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct. App. 1990) (affirming a defense directed verdict and noting that plaintiff's expert failed to discuss design alternatives); *Gasque v. Heublein, Inc.*, 281 S.C. 278, 283, 315 S.E.2d 556, 559 (Ct. App. 1984) (affirming a plaintiff's verdict and noting in detail the existence of alternative design evidence).

recognized no new right or cause of action; rather, it affirmed that the risk-utility test would be the *exclusive* test for design defect cases. Because the supreme court chose to abandon the consumer expectations test for the risk-utility test in design defect cases, we believe *Branham* applies retroactively.[4] *See Carolina Chloride, Inc.*, 391 S.C. at 433-34, 706 S.E.2d at 503 (finding judicial decision should be applied retroactively when it created no new right or cause of action; rather, it abandoned former test and restated the focus for what a landowner must prove to entitle him to damages in an inverse condemnation action); *Osborne v. Adams*, 346 S.C. 4, 12-13, 550 S.E.2d 319, 323-24 (2001) (finding retroactive application of case law clarifying which professional relationships created a non-delegable duty in common law negligence cases was appropriate because case law neither created a new cause of action nor abolished any existing immunities).

B. JNOV

Having found proof of a feasible alternative design was a required element in accordance with *Branham*, we next turn to whether the jury's post-verdict finding that Miranda failed to prove a feasible alternative design entitled Nissan to JNOV. We hold it does not.

We also note federal district court cases have concluded evidence of a feasible alternative design is a required element of proof in a design defect case. *See Disher v. Synthes (U.S.A.)*, 371 F. Supp. 2d 764, 771-72 (D.S.C. 2005) (applying South Carolina law and concluding "it is 'crucial' that a plaintiff also demonstrate that a 'feasible,' or workable, design alternative exists" and "[w]ithout evidence of a feasible design alternative or that the requisite risk-utility analysis has been conducted, plaintiff cannot establish this required element of product defect as a matter of law"); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 495 (D.S.C. 2001) (noting that failure to provide evidence of a feasible design alternative is "fatal to a product liability case" under South Carolina law).

[4] As highlighted by Nissan in its brief, counsel for Miranda also represented Branham in Branham's appeal before the supreme court. Branham specifically argued in his petition for rehearing that the supreme court declare its decision only applied prospectively based on fairness and justice to the parties. Despite Branham's argument, the supreme court denied his petition for rehearing.

Nissan sets forth several reasons as to why the special interrogatory, submitted to the jury after the verdict, was binding on the parties as a matter of law. First, Nissan highlights the following colloquy as evidence that the parties agreed to jointly craft a special interrogatory specifically addressing proof of a feasible alternative design.

> **Court:** We had mentioned earlier on in pretrial matters that you all were going to propose a verdict form. Have you all had an opportunity to do that?
>
> **Nissan:** We've got something put together. Why don't we talk this afternoon when trial is done. We'll get you something in the morning, if that's all right.
>
> **Court:** Very good.
>
> **Miranda:** We could exchange things back and forth and see if we could come up with an agreement. . . . It may very well be—if we thought about it, that—and I always think about this after trials. And assuming one side is going to get a verdict, some of these issues that if they potentially craft the verdict form correctly, that they may – maybe if there's an appeal, it will answer it without having to come back for a retrial, if there's some way we could do that.
>
> **Court:** Certainly, I have no objection. I really prefer more interrogatories that give[] the necessary information. . . .

We agree that Miranda never objected during this dialog to submitting this special interrogatory to the jury; instead, as evidenced by the aforementioned colloquy, all parties readily agreed to this procedure. What is in dispute, however, is the significance of the interrogatory and what effect it would have on the case in the event the supreme court decided proof of a feasible alternative design was not only a factor, but a requirement, in design defect cases. Based on our review of the

record, we find the circuit court's decision, and the parties' acquiescence, to submit this special interrogatory after the verdict to be improper.

Our supreme court has previously held that "[i]t is improper in a law case to submit factual issues to a jury in the form of non-binding 'advisory interrogatories.'" *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006). Because neither the parties nor the court agreed that the response to this interrogatory would be dispositive on the issue of liability, we find the foregoing pronouncement from *Erickson* governs the resolution of this issue. Consequently, we refuse to condone the procedure employed by the court in this instance.

The following supports our conclusion that this interrogatory was not intended to bind the parties as a matter of law on the issue of liability. First, the circuit court ruled that a feasible alternative design was not a separate requirement in a design defect case; rather, it was simply a factor to be considered on the issue of whether the Nissan Xterra was defectively designed. It was on this ground that the circuit court instructed the jury that the interrogatory was neither relevant to the verdict nor to the deliberations of the case, and as a result, the court agreed to issue the interrogatory to the jury only *after* it had returned its verdict. When the circuit court informed the jury it would need to answer this final interrogatory, it gave no explanation, foundation, or attendant instructions on the interrogatory, save its statement that the jury was required to answer "yes" or "no" and the jury's decision had to be unanimous. The lack of adequate instructions, the timing of the interrogatory's submission, and the jury's three-minute deliberation prior to answering the interrogatory lead us to the inescapable conclusion that the jury followed the court's instructions when it answered the seventh interrogatory. *See Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 426 n.3, 537 S.E.2d 279, 284 n.3 (2000) (Pleicones, J., dissenting) ("Juries are presumed and bound to follow instructions of the trial judge.").

Second, the record contains no statement by the circuit court or the parties that a "no" response from the jury would be dispositive if the supreme court held proof of a feasible alternative design was a requirement in *Branham*. This lack of testimony in the record is also supported by the circuit court's refusal to grant Nissan's JNOV motion after *Branham* was published. We believe the circuit court's denial of Nissan's motion in the wake of *Branham* indicates neither the parties nor the circuit court intended for the answer to this interrogatory to be dispositive on the issue of liability.

While Nissan would assert otherwise, we find Miranda's counsel's closing argument instructive. During closing, Miranda's counsel told the jury the special interrogatory "doesn't have anything to do with the front side" of the verdict form. Because the front page of the verdict form contained questions relating to the issue of defect, we cannot infer that Miranda agreed to the submission of the interrogatory, which directly dealt with the issue of defect, knowing it was not only relevant, but dispositive on the issue of design defect. Last, the record lacks any jury argument that Miranda met or did not meet a "requirement" of a feasible alternative design, and the parties did not request argument on this issue after the verdict and response to the seventh interrogatory. We hold these omissions are inconsistent with an intention that the jury's answer on this issue would be dispositive.[5] Accordingly, we affirm the circuit court's decision to deny Nissan's motion for JNOV.

C. New Trial

Miranda contends on cross-appeal that the circuit court erred in granting a new trial to Nissan because the jury was permitted to consider the consumer expectations test at the time it rendered its decision. Based on our conclusion that *Branham* applies retroactively, the validity of the consumer expectations test at the time of trial is of no import. Thus, we disagree and find the circuit court properly granted a new trial.

The circuit court's decision to grant or deny a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

Prior to the supreme court's decision in *Branham*, our courts traditionally employed the consumer expectations test and the risk-utility test to determine whether a product was unreasonably dangerous as a result of a design defect.

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[5] Because we find the jury's response to the feasible alternative design interrogatory was not dispositive, we decline to address Miranda's argument that the circuit court erred in denying her motion to invalidate this interrogatory. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

Branham, 390 S.C. at 218, 701 S.E.2d at 13. However, the supreme court clarified in *Branham* that the sole test in design defect cases was the risk-utility test with its requiring proof of a feasible alternative design. *Id.* at 220, 701 S.E.2d at 14.

Miranda argues that in *Branham*, the majority and dissent acknowledged consideration of the consumer expectations test as a basis for liability was proper at the time of Miranda's trial. We disagree.

In *Branham*, the majority acknowledged Branham's argument that he met both tests and that the jury was charged on both tests. *Id.* at 219, 701 S.E.2d at 13. However, the majority concluded the relevant inquiry and dispositive question was whether Branham produced evidence of a feasible alternative design. *See id.* The majority highlighted evidence presented at trial that satisfied the risk-utility factors and concluded, "[w]hether this evidence satisfies the risk-utility test is ultimately a jury question. But it is evidence of a feasible alternative design, sufficient to survive a directed verdict motion." *Id.* at 219, 701 S.E.2d at 13-14. In addition, the dissent agreed with the majority that the risk-utility test is the appropriate test in design defect cases; however, it concluded the court could effectuate the same result under the existing statutory framework by interpreting the consumer expectations test in the specific context of design defect cases. *Id.* at 244-45, 701 S.E.2d at 27-28. We do not believe these conclusions, by either the majority or the dissent, expressly condoned the use of the consumer expectations test at the time of Branham's trial. Thus, we find Miranda's argument on this ground unavailing.

Finally, Miranda argues that because the circuit court charged the jury on both the consumer expectations test and the risk-utility test and the jury did not specify which theory it applied to find Nissan liable, the two-issue rule and the law of the case doctrine require reinstatement of the jury's verdict. We disagree.

First, the two-issue rule and, thus, the law of the case doctrine, do not apply here because those doctrines apply when a party does not challenge an issue *on appeal* where there has been an opportunity to do so. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (holding that under the two-issue rule "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case"). Further, as set forth above, the jury's verdict cannot be supported by the consumer expectations test for a finding of liability based on the supreme court's holding in *Branham*. While Nissan may not have challenged the circuit court's decision to generally incorporate the consumer expectations test into its jury

charge, *Branham* had not yet been decided at the time and Nissan would not have had grounds for such an objection. As such, Nissan's failure to object to the inclusion of the consumer expectations test does not require reinstatement of the verdict. Because the circuit court did not properly instruct the jury on the law, we find its instructions were not only deficient, they were prejudicial to Nissan; thus, the circuit court properly granted the parties a new trial.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Krystal Chisolm, Appellant,

v.

South Carolina Department of Motor Vehicles, Respondent.

Appellate Case No. 2011-196890

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Published Opinion No. 5107
Heard November 13, 2012 – Filed March 27, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

Frank L. Valenta Jr., Linda Annette Grice, and Philip S. Porter, all of the South Carolina Department of Motor Vehicles, of Blythewood, for Respondent.

PIEPER, J.: Krystal Chisolm appeals the administrative suspension of her driver's license. On appeal, Chisolm argues the Administrative Law Court (ALC) erred by (1) interpreting the term "refusal" in section 56-5-2951 of the South Carolina Code (Supp. 2012) in accordance with the State Law Enforcement

Division's (SLED) policies and procedures, and (2) finding she refused the breath test. We reverse.

FACTS

On May 19, 2010, Officer Dyar Archibald arrested Chisolm for driving under the influence. Officer Archibald pulled Chisolm over because he had received a call that Chisolm's cousin, a passenger in her vehicle, was "banging on cars." While speaking with Chisolm's cousin, Officer Archibald noticed that Chisolm seemed to be impaired. Chisolm took three field sobriety tests: the one-legged stand, the walk and turn, and the horizontal gaze nystagmus test. Officer Archibald testified that Chisolm failed the one-legged stand, but that he did not consider the walk and turn a failure. Chisolm also failed the horizontal gaze nystagmus test which, according to Officer Archibald, indicated that Chisolm had alcohol in her system. However, this test did not measure the amount of alcohol in Chisolm's system.

Once Officer Archibald transported Chisolm to the police station, he administered a breath test. Chisolm blew into the DataMaster, the breath test instrument, for approximately one minute and fifty-three seconds. Officer Archibald testified that there was a steady tone while Chisolm blew, meaning air was going into the instrument. However, Officer Archibald also testified that the instrument "just didn't read it." No evidence was presented that the DataMaster's failure to register Chisolm's breath sample resulted from her own fault by faking or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting prohibited substances during the observation period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to a constructive refusal. Even though Officer Archibald testified that Chisolm blew into the instrument and gave a steady tone, he also testified that Chisolm did not give an "accurate sample," which he considered to be a refusal. As a result, Officer Archibald reported that Chisolm refused to submit to a breath test. Officer Archibald asked Chisolm to take the test again and Chisolm agreed. However, according to Officer Archibald, the DataMaster would not let Chisolm take the test again because it registered an inadequate sample after the first blow. Because the records indicated Chisolm refused the breath test, the South Carolina Department of Motor Vehicles (the Department) suspended her driver's license.

Subsequently, Chisolm requested an administrative hearing before the South Carolina Office of Motor Vehicle Hearings (OMVH) to challenge her license

suspension. Chisolm argued her suspension was unjustified because (1) there was no probable cause to arrest, and (2) she never refused to give the sample required by law and provided an adequate test sample.[1] The hearing officer sustained Chisolm's license suspension, finding that Chisolm refused the breath test because Chisolm's breath test results did not provide a registerable sample.

Chisolm appealed her license suspension to the ALC. The ALC affirmed, solely relying on SLED Policy 8.12.5(F)(4)(i) that provides, "[a] refusal to submit to a breath test can occur in any of the following ways: . . . i. The subject . . . does not blow an adequate sample, as determined by the instrument." This appeal followed.

STANDARD OF REVIEW

"The [OMVH] is authorized to hear contested cases from the Department." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011). As a result, the OMVH is an agency pursuant to the Administrative Procedures Act (APA). *Id.* Appeals from the OMVH are taken by the ALC. *Id.* When reviewing a decision of the ALC, section 1-23-610(B) of the South Carolina Code (Supp. 2012), governs this court's standard of review, providing:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;

[1] Chisolm does not raise any issues regarding probable cause to this court on appeal.

(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

LAW/ANALYSIS

Chisolm argues the ALC erred in determining a refusal takes place pursuant to section 56-5-2951 when the breath test instrument "determines" a provided sample is inadequate. According to Chisolm, a refusal only takes place when the test subject actually refuses the conscious act of blowing into the instrument, and the ALC erred in interpreting the SLED polices and procedures in a manner that is contrary to section 56-5-2951. Chisolm contends she never "refused" within the meaning of section 56-5-2951; thus, the suspension of her license was unjustified. We reverse.

"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." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quotation marks omitted). This court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks omitted).

"Being licensed to operate a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 595, 654 S.E.2d 284, 288 (Ct. App. 2007). "The privilege may be revoked or suspended for any cause relating to public safety, but it cannot be revoked arbitrarily or capriciously." *Id.* "A person who drives a motor vehicle in [South Carolina] is considered to have given consent to chemical tests of his breath . . . ." S.C. Code Ann. § 56-5-2950(A) (Supp. 2012).

"The Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to [a breath] test . . . ." § 56-5-2951(A).

> The requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both, and (5) refuse to submit to alcohol and drug testing.

S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 523, 613 S.E.2d 544, 549 (Ct. App. 2005). The legislature gave SLED authority to make policies, procedures, and regulations to administer the provisions of the implied consent statute. *See* S.C. Code Ann. § 56-5-2950(E) & (J) (Supp. 2012). Specifically, subsection 56-5-2950(A) states that a "breath test must be administered . . . pursuant to SLED policies." § 56-5-2950(A). The burden is on the Department to prove that Chisolm refused the breath test. *See McCarson*, 391 S.C. at 149, 705 S.E.2d at 431 (noting in a license revocation proceeding, the burden of proving that the driver was lawfully arrested or detained for DUI was on the Department).

Prior to determining the meaning of the word "refusal," we note the procedures in conducting a breath test. Pursuant to SLED policies, after the required twenty minute observation period, the officer will prepare the DataMaster instrument for the breath test. SLED Policies & Procedures § 8.12.5(J) & (K) (2009).[2] Thereafter, the officer starts the instrument, and:

> The instrument will display, "PLEASE BLOW", at the time for the subject to blow. The test operator will ensure a new mouthpiece is placed on the breath tube, unless a refusal has already occurred. The subject may use the same mouthpiece in the event the test is aborted

[2] SLED's policies and procedures are available at: http://www.sled.sc.gov/documents/impliedconsent/polproc/8125/200902108125.pdf (last visited March 15, 2013).

> and must be started again. The subject is given approximately two minutes to provide an acceptable breath sample. . . . The subject will provide a continuous breath sample, acceptable to the instrument, containing a minimum of approximately one and one half liters. "PLEASE BLOW" will display until an adequate sample is obtained or time expires.

SLED Policies & Procedures § 8.12.5(L)(2)(f)(i).

> If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No". If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. . . . If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An " INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.). In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated.

SLED Policies & Procedures § 8.12.5(L)(2)(f)(vii) (emphasis added).

The South Carolina Code does not define "refusal." However, SLED's policies and procedures provide several examples of when a refusal can occur. For example, a refusal can occur if the subject refuses to cooperate, delays the administration of the test, ingests prohibited substances during the observation, or intentionally causes the instrument to have an error. SLED Policies & Procedures § 8.12.5(F)(4)(b), (d), (f), & (j). At issue in this case is the SLED policy that defines "refusal" as occurring when a person "does not blow an adequate sample, as determined by the instrument." SLED Policies & Procedures § 8.12.5(F)(4)(i).

Thus, for the breath test to be administered "pursuant to SLED policies," as required by section 56-5-2950(A), a subject who blows an inadequate sample "as determined by the instrument" can be deemed by the officer administrating the test to have refused the breath test. *See id*.

Here, the ALC affirmed the suspension of Chisolm's license, finding the record contains evidence that "the machine determined that the breath sample of [Chisolm] was not measurable, and thus inadequate." The ALC further found the "facts of this case conform to the criteria for determining a refusal pursuant to SLED policy 8.12.5, and the Hearing Officer properly found that [Chisolm] refused to submit to a breath test."

A plain reading of the statute at issue, as opposed to the SLED policies and procedures, provides that the Department may suspend a driver's license when a person refuses to submit to a breath test. *See* § 56-5-2951(A) ("The Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to [a breath] test . . . ." (emphases added)). We also recognize that the legislature authorized SLED to promulgate policies and procedures for administering breath tests. *See* § 56-5-2950(A), (E), & (J). *See Ahrens v. State*, 392 S.C. 340, 348-49, 709 S.E.2d 54, 58 (2011) (noting the legislature has the right to vest administrative officers and bodies discretion to promulgate rules and regulations; however, an agency may not make rules and regulations that conflict with or change the statute that confers such authority).

An appellate court may reverse the decision of the ALC if it is affected by an error of law or is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *S.C. Dep't of Motor Vehicles v. Blackwell*, 389 S.C. 293, 295, 698 S.E.2d 770, 771 (2010) (quoting S.C. Code Ann. § 1-23-610(B) (Supp. 2008)). "Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe the Legislature promulgated section 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest." *McCarson*, 391 S.C. at 148, 705 S.E.2d at 431 (emphasis added).

As cited above, SLED policies and procedures include a specific protocol for when the instrument does not register the breath sample. *See* SLED Policies & Procedures § 8.12.5 (L)(2)(f)(vii). The DataMaster will display "PLEASE BLOW" until an adequate sample is obtained or time expires. SLED Policies &

Procedures § 8.12.5 (L)(2)(f). If time expires, the DataMaster will ask the officer whether the subject refused, in which event the officer must answer "Yes" or "No." SLED Policies & Procedures § 8.12.5 (L)(2)(f)(vii). A "Yes" will print as a refusal, while a "No" will print "INCOMPLETE SUBJECT TEST." *Id*. The policies and procedures provide that a "No" should be entered only if the subject failed to provide an acceptable breath sample through no fault of his or her own. *Id*. Thus, the failure of a driver to supply a registerable breath sample does not automatically result in a refusal, as the officer has discretion to determine whether there was a refusal and has the option to conduct a second breath test. Our courts have not been presented with the question of whether a driver's inability to provide a registerable breath sample may result in a "refusal" pursuant to section 56-5-2951; therefore, we look to other jurisdictions for guidance.

We start with the proposition that when the breath test instrument emits a steady tone, the steady tone is an indication that the instrument is receiving a breath sample. *See Kurosak v. Comm'r of Pub. Safety*, 402 N.W.2d 826, 828 (Minn. Ct. App. 1987) ("A tone sounds when an adequate sample is blown into the machine."); *Quick v. Com., Dep't of Transp., Bureau of Driver Licensing*, 915 A.2d 1268, 1270 (Pa. Commw. Ct. 2007) ("The breath testing instrument emits a steady tone during a continuous breath, but beeps during intermittent breathing."). Other jurisdictions have upheld the suspension of a driver's license based on the subject's refusal to submit to a breath test when, unlike the present case, the driver <u>failed</u> to produce a steady tone into the breath instrument. In *Walker v. State*, the officer administering the breath test testified that an air sample flowing into the instrument will generate a steady tone, but that the subject did not blow into the machine as he was instructed, was puffing his cheeks to act like he was blowing, and never made a steady tone. 586 S.E.2d 757, 759 (Ga. Ct. App. 2003).[3] The officer testified that

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[3] In regards to breath samples, Georgia's implied consent statute requires:

> No more than two sequential series of a total of two adequate breath samples each shall be requested by the state; provided, however, that after an initial test in which the instrument indicates an adequate breath sample was given for analysis, any subsequent refusal to give additional breath samples shall not be construed as a refusal for purposes of suspension of a driver's license

he did hear a brief "ping" tone, but he never heard a "long constant tone." *Id*. at 759-60. The officer determined that the subject was deliberately failing to provide adequate air for the machine to evaluate, and thus, he registered the subject's failure to properly blow into the machine as a refusal. *Id*. at 760. On appeal, the court affirmed the trial court's determination that the defendant refused a breath test for the failure to properly blow into the breath test instrument, noting that the officer has the discretion to determine whether a subject is faking it. *Id*. at 762.

Likewise, in *State v. Householder*, the Ohio Court of Appeals affirmed the trial court's determination that the invalid breath sample was based on the driver's failure to sufficiently blow into the instrument. 908 N.E.2d 987, 992 (Ohio Ct. App. 2009).[4] The court relied on the officer's testimony that if the DataMaster

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> under Code Sections 40-5-55 and 40-5-67.1. Notwithstanding the above, a refusal to give an adequate sample or samples on any subsequent breath, blood, urine, or other bodily substance test shall not affect the admissibility of the results of any prior samples. An adequate breath sample shall mean a breath sample sufficient to cause the breath-testing instrument to produce a printed alcohol concentration analysis.

Ga. Code Ann. § 40-6-392 (West 2012).

[4] The Ohio statute on refusing a breath sample provides:

> (5)(a) If a law enforcement officer arrests a person for a violation of [the Ohio DUI statutes], the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is

starts beeping, then the driver is not blowing into the machine correctly and not giving an adequate sample. *Id*. at 988-89. The officer also explained that the instrument "went from a steady tone, to a beep, back to a steady tone," indicating

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> not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (B) of section 4511.192 of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. Divisions (A)(3) and (4) of this section apply to the administration of a chemical test or tests pursuant to this division.
>
> (b) If a person refuses to submit to a chemical test upon a request made pursuant to division (A)(5)(a) of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A law enforcement officer who acts pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is immune from criminal and civil liability based upon a claim for assault and battery or any other claim for the acts, unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Ohio Rev. Code Ann. § 4511.191 (West 2012).

that the reason for the invalid sample was a "discontinued blowing pattern." *Id*. at 989.

Similarly, the Oregon Court of Appeals reinstated the revocation of a license based on a refusal, where the hearing officer determined that the subject feigned an inability to take the test. *Gilliam v. Oregon Dep't of Transp.*, 36 P.3d 509, 510 (Or. Ct. App. 2001). Specifically, the officer testified that he told the subject to blow into the Intoxilyzer machine and generate a steady tone. *Id*. at 509. However, the subject did not generate a steady tone; rather, he would blow and then stop for a second after the tone started. *Id*. Based on this conduct, the officer determined that the subject "did not appear to be trying to blow hard" and that he thought the subject was toying with the machine. *Id*. at 510. Accordingly, the court affirmed the officer's decision to press the button to indicate that the subject refused the test. *Id*. at 510.

In addition, the Missouri Supreme Court undertook an analysis to define "refusal," explaining:

> There is no mysterious meaning to the word "refusal". In the context of the implied consent law, it simply means that an arrestee, after having been requested to take the breathalyzer test, declines to do so of his own volition. Whether the declination is accomplished by verbally saying, "I refuse", or by remaining silent and just not breathing or blowing into the machine, or by vocalizing some sort of qualified or conditional consent or refusal, does not make any difference. The volitional failure to do what is necessary in order that the test can be performed is a refusal.

Spradling v. Deimeke, 528 S.W.2d 759, 766 (Mo. 1975).[5] A Connecticut court has held that the determination of a refusal is required to be supported by substantial evidence, finding:

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[5] The Missouri implied consent statute provides that if: "a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed

> [W]here it is undisputed that the motorist submitted to the chemical alcohol test, the fact that he failed to provide an adequate breath sample does not automatically constitute refusal within the meaning of [the statute]. Such refusal must be supported by substantial evidence. A conclusory statement by the arresting officer that the driver has failed to provide an adequate breath sample and has, therefore, refused, does not constitute such evidence.

Bialowas v. Comm'r of Motor Vehicles, 692 A.2d 834, 841 (Conn. App. Ct. 1997).[6]

Furthermore, a Pennsylvania court was faced with a set of facts similar to the case at bar. The court was asked to determine if the subject refused the breath test after she attempted to blow into the machine and the machine did not register a sample; she also wanted to take the test again. *See Bomba v. Com., Dep't of Transp.*,

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pursuant to section 577.020, then evidence of the refusal shall be admissible." Mo. Ann. Stat. § 577.041 (West 2012).

[6] The Connecticut statute governing a refusal to submit a breath test provides:

> (b) If any such person, having been placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test . . . .

Conn. Gen. Stat. Ann. § 14-227b(b) (West 2012).

Bureau of Driver Licensing, 28 A.3d 946, 948 (Pa. Commw. Ct. 2011).[7] In *Bomba*, the officer administrating the breath test, Officer Lawniczak, testified that the subject, Heather Bomba, "attempted to give one breath sample" that "was insufficient." *Id*. According to Officer Lawniczak, the breathalyzer machine "allows a two-minute window to provide an adequate breath sample; if an adequate breath sample is not provided within the two-minute timeframe, the machine prompts the operator to report whether a refusal has occurred." *Id*. (emphasis added). Officer Lawniczak testified he instructed Bomba to "blow with one steady breath until . . . told to stop." *Id.* However, Officer Lawniczak explained Bomba gave "a series of short breaths, not one continuous breath." *Id*. After two minutes had elapsed, the breathalyzer instrument prompted the officer to report whether there had been a refusal, and Officer Lawniczak pressed the "yes" button. *Id*. Officer Lawniczak admitted that Bomba "may have asked to retake the breath test," but the officer stated that she is only required to give one test. *Id*. As a result, Bomba's license was suspended. *Id*. 947. Bomba appealed and the trial court reversed her license revocation, finding Bomba's "initial, unequivocal and unqualified consent to the breath test, her subsequent inability to perform it properly, despite attempting to do so and her immediate request to re-take the breath test, do not amount to a refusal under these circumstances." *Id.* at 949.

On appeal, the appellate court affirmed the determination that Bomba did not refuse the breath test and reinstated her license. *Id*. at 951. The court reasoned that Bomba "made one attempt to provide a breath sample. When it was not successful, she immediately asked to try again. PennDOT offered no evidence that [Bomba] was attempting to delay the testing process or was intentionally producing an inadequate sample." *Id*. at 950. Furthermore, in upholding the trial court's determination that Bomba did not refuse the breath test, the court explained:

> Refusal cases are highly fact-sensitive. The crucial, determinative factor we glean from the cases is whether PennDOT's evidence shows that the licensee deliberately

[7] The Pennsylvania statute governing refusal of a breath test provides, "[i]f any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person." 75 Pa. Cons. Stat. Ann. § 1547 (b.1) (1) (West 2012).

> tried to delay or undermine the testing process. Such evidence was simply not present in this case. Rather, the evidence showed, and the trial court found, that [Bomba] made a good faith, but unsuccessful, attempt to provide a breath sample and immediately requested to attempt the test a second time.

Id. at 951.[8]

A review of the record and video recording reveals that Chisolm wanted to take the breath test, blew into the DataMaster, and the instrument produced a steady tone for an extended period of time that indicated sufficient air was going into the instrument. Officer Archibald testified that he is trained to listen for a steady tone when administering a breath test. Unlike the officers' testimonies in *Walker*, *Householder*, and *Gilliam*, here, according to Officer Archibald, Chisolm's breath test produced a steady tone, indicating that Chisolm was doing what she was supposed to do and that air was going into the instrument. Even though the machine ultimately did not register Chisolm's breath sample, at no time did the machine indicate that she was not blowing an adequate sample, as evidenced by the steady tone. Additionally, like *Bomba*, Chisolm consented to the breath test, attempted the test, and asked to take a second test. No evidence was presented by the Department, which carries the burden of proof, that Chisolm's failure to register a breath sample resulted from her own fault by faking or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting

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[8] We also note that other jurisdictions have determined that a physical inability or medical condition that inhibits a driver's ability to perform a breath test does not constitute a "refusal." *See Call v. Kansas Dep't of Revenue*, 831 P.2d 970, 972 (Kan. Ct. App. 1992) (stating that the Kansas implied consent statute provides that the "[f]ailure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs"); *Vill. of Elkhart Lake v. Borzyskowski*, 366 N.W.2d 506, 509 (Wis. Ct. App. 1985) ("A person is deemed not to have refused the test if it is shown that the refusal was due to a physical inability to submit to the test as a result of physical disability or disease unrelated to the use of alcohol or controlled substances.").

prohibited substances during the observation period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to a constructive refusal. Furthermore, we find it significant that when Officer Archibald offered Chisolm the opportunity to take the test for a second time, and she agreed to do so, the instrument would not allow for another test. This evidence also suggests Chisolm was not attempting to thwart the test.

Officer Archibald testified that he had "no clue" why the instrument would not register her sample, that the DataMaster "just didn't read it," and the instrument "didn't come up with any errors." Despite the officer's testimony that he did not know why her breath sample would not register, Officer Archibald pressed "yes" when prompted by the DataMaster to answer whether Chisolm refused the breath test. Thus, Officer Archibald decided that Chisolm refused even though he did not know why the instrument would not register her breath sample.[9] Under these circumstances, Officer Archibald's decision to press "yes," notwithstanding his own testimony, caused the instrument to print a refusal, and the decision was an arbitrary and capricious act and a manifest abuse of his discretion resulting in Chisolm's license being revoked arbitrarily. *See Peake*, 375 S.C. at 595, 654 S.E.2d at 288 (noting that while the license to operate a motor vehicle is a mere privilege that is always subject to revocation or suspension for any cause related to public safety, it cannot be revoked arbitrarily or capriciously).

Here, we have a situation where the ALC relied on, as its sole basis to affirm the hearing officer's determination of refusal, the component of SLED policies and procedures that state an inadequate sample is furnished "as determined by the instrument." We recognize that the policies and procedures state that a refusal can occur when the instrument determines there is not an adequate sample. However, the policies do not mandate a refusal in all circumstances where an adequate

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[9] We find problematic Officer Archibald's statement that he had "no clue" why the DataMaster would not register a test result in light of his observations of Chisolm's continued and steady blow into the machine. If the prosecution does not know why the machine did not register the breath sample, we question how a citizen would know, especially in light of the difficulty in obtaining the software underlying the DataMaster based on its proprietary nature. *See* S.C. Code Ann. 56-5-2934 (Supp. 2012) (stating SLED is required to "produce all breath testing software in a manner that complies with any and all licensing agreements").

sample is not registered, particularly in instances, like here, where the determination of a refusal would be arbitrary and capricious.

The policies provide the officer with discretion to determine whether the subject's failure to blow an acceptable breath sample was a refusal. We also note that SLED's policies and procedures provide that "INVALID SAMPLE DETECTED," "DETECTOR OVERFLOW DETECTED," or "INTERFERENCE DETECTED" readings by the instrument are not alone a refusal situation. *See* SLED Policies & Procedures § 8.12.5(L)(2)(f)(iv)-(vi).

Similarly, if an acceptable breath sample is not provided in the two-minute period, the DataMaster prompts the officer to make a determination about whether the subject refused the test. SLED's policies and procedures are designed for the officer to determine whether a test subject's inability to register a sample was based on the fault of the subject or any attempt to thwart the test. Moreover, the policy specifically provides that a "NO" can be entered "if the subject failed to provide an acceptable breath sample through no fault of his/her own." SLED Policies & Procedures § 8.12.5(L)(2)(f)(vii). Thus, the instrument's failure to register a test report in and of itself, absent other facts, does not end the inquiry in determining whether the subject refused the breath test.

The record indicates Chisolm did not refuse to take the test and the Department did not produce any evidence indicating that she was trying to fake or thwart the test, be uncooperative, act unruly, delay the administration of the test, ingest prohibited substances during the observation period, fail to cooperate with the officer's instructions, or behave in any manner that would amount to a constructive refusal. We find it fundamentally unfair under the facts herein to label as a refusal a situation where Chisolm blew for such an extended length of time with a steady tone by the instrument, absent any allegations of fault by Chisolm or any attempt to fake or thwart the test. Based on the facts and circumstances of this case, Officer Archibald's decision to enter a refusal, in light of his own testimony, was arbitrary and capricious, and the State failed to meet its burden of producing evidence to support Officer Archibald's determination of refusal.

Based on the foregoing, the ALC's decision to sustain the hearing officer's determination of a "refusal" is arbitrary and capricious. Accordingly, the order of the ALC is hereby

REVERSED.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Greer, Respondent,

v.

Shawn P. Humble, Appellant.

Appellate Case No. 2012-207550

Appeal From Greenville County
Letitia Verdin, Circuit Court Judge

Published Opinion No. 5108
Heard December 13, 2012 – Filed March 27, 2013

REVERSED

Randall Scott Hiller, of Greenville, for Appellant.

Daniel Roper Hughes, of Duggan & Hughes, LLC, of Greer, for Respondent.

PIEPER, J.: This appeal arises out of Appellant Shawn Humble's driving under the influence (DUI) arrest. On appeal, Humble argues the circuit court erred in reversing the municipal court's dismissal of the DUI charge because (1) the affidavit required by subsection 56-5-2953(B) of the South Carolina Code (Supp. 2012) is deficient on its face, and (2) the circuit court ignored the finding of the municipal court that Respondent City of Greer's (the City) efforts to maintain the video recording equipment in an operable condition were not reasonable. We reverse.

FACTS

On February 25, 2011, Humble was pulled over by Officer Jim Williams. Upon Humble's DUI arrest, Officer Williams, the arresting officer, submitted an affidavit certifying that the video recording equipment was inoperable at the time of the arrest and stating that reasonable efforts had been made to maintain the equipment in an operable condition. Specifically, the affidavit provided "[a]t the time of the defendant's arrest, or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition."

Humble moved to dismiss his DUI charge on the grounds that (1) Officer Williams failed to comply with the video recording requirements of subsection 56-5-2953(B), and (2) Officer Williams' affidavit was insufficient. A hearing was held before the municipal court. Recognizing the affidavit did not state which reasonable efforts had been taken, the City elicited oral testimony from Officer Williams in an attempt to supplement the affidavit. Humble objected to the oral testimony. According to Officer Williams, the video recording system used by the City has an eight-gigabyte memory card and is built into the car mirror. When the video recording system malfunctions, there is no warning and there is no "real-time" indication of a malfunction. Officer Williams testified that the City occasionally has problems with the video recording equipment in the patrol cars and that the protocol when a problem arises is to contact Digital Ally, a company that services video recording equipment for the City. Further, he testified that an officer has no reason to doubt he or she has a recording until the officer attempts to upload the images from the data card. Officer Williams testified that his department contacts Digital Ally every time they have a problem and that he has attempted to remedy the problem with his patrol car. Officer Williams also testified that he had ongoing problems with his patrol car. Humble provided the municipal court with the City's maintenance log. An entry on February 14, 2011, provides:

> Caller (Jim Williams) stated that they have been having persistent issues in two of their vehicles . . . since they were installed over a year ago. He stated that they are having persistent issues in these 2 cars with mirrors

> locking up and green screen issues. He stated that 1 of these cars is on its 4th mirror and has had the I/O box replaced and the CF card replaced, problem persists. We have also sent them the RFI chokes and V2 mirrors . . . . He said they have talked to ITS about sending out a tech to look at the system, but they were told they would have to pay for a service call and didn't feel they should have to pay since the problems were present since day 1. Customer would like someone to come out and identify and fix the problem. Notified Larry Dado who will be contacting ITS. UPDATE: 2/16/2011-LD spoke with Officer Jim Williams @ Greer. I advised that since ITS did not install the unit, they would be willing to come onsite . . . however . . . they would charge to do.

The municipal court granted Humble's motion to dismiss, finding that Officer Williams' affidavit "was deficient on its face, and that the supplemental testimony did not cure the deficiency." Specifically, the municipal court determined Officer Williams' testimony demonstrated that the City reacts quickly to each malfunction, but that "the City only reacts." The municipal court also found that there was no evidence showing any steps taken by the City to keep the video recording equipment operable or "indicating the system is maintenance free, and therefore in need of no maintenance." As to the activity log, the municipal court recognized that Officer Williams asked the manufacturer to send someone to fix the problem, but that "[t]he log indicates the City did not wish to pay for the on-site visit. The visit did not occur." The court further found that the City "may not have known the precise cause of the problem; but the City knew of an on-going problem, specifically with the camera in the vehicle at the incident site. I found that to be unreasonable."

The City appealed to the circuit court, arguing that section 56-5-2953 does not require routine or scheduled maintenance to constitute reasonable efforts to maintain the video recording equipment in an operable condition. A hearing was held before the circuit court, and the circuit court found that as a matter of law the municipal court narrowly construed the statute and erred in dismissing the case. This appeal followed.

STANDARD OF REVIEW

In a criminal appeal from the municipal court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. S.C. Code Ann. § 14-25-105 (Supp. 2012); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011). In criminal appeals from the municipal court, the circuit court is bound by the municipal court's findings of fact if there is any evidence in the record which reasonably supports them. *See Rogers v. State*, 358 S.C. 266, 269 n.1, 594 S.E.2d 278, 279 n.1 (Ct. App. 2004). The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Moreover, "[q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

LAW/ANALYSIS

Humble argues the circuit court erred in reversing the municipal court's dismissal of Humble's DUI charge because the affidavit required by subsection 56-5-2953(B) is deficient on its face. We agree.

Initially, we note that the record before this court consists of the municipal court's return, the transcript of oral arguments before the circuit court, the circuit court's order, Officer Williams' affidavit, and the City's maintenance log. No tape or transcript from the municipal court is included in the record on appeal. Additionally, neither party challenged the accuracy of the return in reciting the factual findings of the municipal court. Thus, we base our review upon those facts in the municipal court's return. *See State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (stating it is error for an appellate court to consider facts not included in the magistrate's return).

The City argues Humble did not raise the issue of the deficient affidavit to the circuit court; thus, the City argues the issue is unpreserved. However, Humble objected to the municipal court's supplementation of the affidavit by oral testimony and moved to dismiss his charge because the affidavit is deficient. The municipal court ruled that the affidavit is deficient on its face, and the City did not appeal this finding. Furthermore, at the hearing before the circuit court, the City conceded the

affidavit is deficient on its face. *See State v. Bryant*, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (stating an issue conceded in the trial court could not be argued on appeal). Additionally, Humble explained to the circuit court that he objected to the supplementation of the affidavit, that the affidavit is deficient on its face, and that the City failed to appeal the municipal court's finding that the affidavit is deficient. For the foregoing reasons, we find Humble's issue is preserved for review.

Having determined the issue is preserved for review, we must next determine whether the affidavit is deficient on its face. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks omitted). The court should look to the plain language of the statute when interpreting a statute. *Binney v. State*, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009).

Effective February 10, 2009, the legislature amended the affidavit requirement of subsection 56-5-2953(B). *See* Act No. 201, 2008 S.C. Acts 1684. Prior to the amendment, the statute only required an officer to state reasonable efforts had been made to maintain the equipment in an operable condition. *See* S.C. Code Ann. § 56-5-2953(B) (2006) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest . . . was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition . . . ." (emphasis added)). The amended statute, applicable to this case, now requires an officer to state which reasonable efforts had been made to maintain the equipment in an operable condition. *See* S.C. Code Ann. § 56-5-2953(B) (Supp. 2012) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest . . . was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition . . . ." (emphasis added)).

Here, Officer Williams' affidavit provides "[a]t the time of the defendant's arrest, or probable cause determination, the video equipment in the vehicle I was operating

was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition." We find that the circuit court erred in reversing the municipal court's dismissal because the affidavit is deficient on its face. Even though there is no procedure in section 56-5-2953 either preventing or allowing a timely amendment of the affidavit, the statute requires an affidavit stating which reasonable efforts were made to maintain the equipment in an operable condition. The affidavit Officer Williams provided the municipal court does not state which reasonable efforts were made; thus, the City failed to comply with the plain requirements of section 56-5-2953. Furthermore, the City conceded that the affidavit is deficient on its face. Strictly construing the statute in favor of Humble, the City failed to comply with the plain wording of the statute, as the affidavit did not provide which reasonable efforts were made to maintain the video recording equipment in an operable condition. *See Roberts*, 393 S.C. at 346, 713 S.E.2d at 285 (stating a law enforcement agency's failure to comply with the provisions of section 56-5-2953 is fatal to the prosecution of a DUI case); *State v. Johnson*, 396 S.C. 182, 191-92, 720 S.E.2d 516, 521-22 (Ct. App. 2011) (noting the legislature intended strict compliance with section 56-5-2953). A supplemental affidavit was never filed, and the oral testimony presented at trial to supplement the affidavit is insufficient to meet the affidavit requirements of the statute. Consequently, the only affidavit submitted in the record is the one the City conceded is deficient. Therefore, we reverse the circuit court's order because the affidavit does not provide an excuse for noncompliance with section 56-5-2953, as required by the statute. *See Roberts*, 393 S.C. at 349-50, 713 S.E.2d at 287 (holding an unexcused noncompliance with section 56-5-2953 mandates dismissal of a DUI charge).

Second, Humble argues the circuit court erred in reversing the municipal court's finding that the City's efforts to maintain the video recording equipment in an operable condition were not reasonable. Even if the deficiency of the affidavit on its face alone does not mandate dismissal, we agree the circuit court erred in reversing the municipal court's finding that the City's excuse was not reasonable.

A person who operates a vehicle while under the influence of alcohol "must have his conduct at the incident site and the breath test site video recorded." S.C. Code § 56-5-2953(A) (Supp. 2012). Subsection 56-5-2953(B) provides exceptions that excuse noncompliance with the mandatory video recording requirement:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition . . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2012) (emphasis added).

Furthermore, as discussed in *Roberts*, it is instructive that the legislature has not mandated videotaping in other criminal contexts:

> Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

393 S.C. at 349, 713 S.E.2d at 286.

In *Roberts*, the supreme court found that an unexcused failure to video record the defendant's conduct in a traffic stop underlying a DUI prosecution, which resulted from a town's failure to request additional video cameras from the South Carolina Department of Public Safety (DPS) for installation in its patrol cars, warranted dismissal of the case. 393 S.C. at 349-50, 713 S.E.2d at 287. The court found that

the legislature intended for a dismissal of a DUI case unless law enforcement could justify its failure to produce a video recording of a DUI arrest. *Id*. at 348, 713 S.E.2d at 286. The court further found that the town's prolonged failure to request additional video cameras from the DPS for installation in its patrol cars was not a valid reason for a failure to produce a video recording of the defendant's conduct during the underlying traffic stop. *Id*. at 349, 713 S.E.2d at 287. The court held that an unexcused noncompliance with section 56-5-2953 mandates dismissal of a DUI charge. *Id*. at 349-50, 713 S.E.2d at 287.

A plain reading of subsection 56-5-2953(B) requires the arresting officer to submit a sworn affidavit certifying that the video recording equipment at the time of the arrest was in an inoperable condition and stating which reasonable efforts had been made to maintain the equipment in an operable condition. *See* § 56-5-2953(B). A court reviewing the affidavit must determine whether the efforts listed in the affidavit were or were not reasonable. Thus, what is considered to be reasonable efforts varies by the facts and circumstances of each case. *See Roberts*, 393 S.C. at 347, 713 S.E.2d at 285 (holding under the specific facts of the case that the town failed to satisfy any of the statutory exceptions that excuse noncompliance with the mandatory videotaping requirements of section 56-5-2953). Moreover, the legislature's decision to amend the statute from only requiring the affidavit to state reasonable efforts were made, to requiring which reasonable efforts were made, evidences a legislative intent to require specific facts in the affidavit to allow a reviewing court to make a determination of whether the law enforcement agency provided a valid reason for failing to produce a videotape.

Here, in reversing the municipal court, the circuit court found that the municipal court construed the language of section 56-5-2953 too narrowly and that "the City's system of promptly reacting to unsuccessful uploads constitutes *reasonable* efforts to maintain the system in an operable condition." The circuit court also found "[n]owhere in the statute does the Legislature require that the City conduct routine or scheduled maintenance."

The circuit court erred by failing to consider the municipal court's factual finding that the City knowingly used malfunctioning video equipment in the patrol car and failed to fix or attempt to fix the malfunction because the City did not want to pay for repairs. Additionally, the circuit court did not find that the factual findings in the municipal court's return were error; rather, the circuit court employed only a legal analysis in determining the municipal court erred in dismissing Humble's

DUI charge. *See Rogers*, 358 S.C. at 270, 594 S.E.2d at 280 (noting that "the circuit court, sitting in its appellate capacity, may not engage in fact finding").

In determining that the City did not provide which reasonable efforts it made to maintain the video recording equipment in an operable condition, the municipal court specifically found that Officer Williams "asked the manufacturer to send someone out to find and fix the problem. The log indicates the City did not wish to pay for the on-site visit. The visit did not occur. I found that unreasonable."

Based upon the return that was provided to this court, we find the record supports the decision of the municipal court that the City did not establish that reasonable efforts were made to maintain the video recording equipment in an operable condition. *See Brown*, 358 S.C. at 387, 596 S.E.2d at 41 (stating it is error for an appellate court to consider facts not included in the magistrate's return). Specifically, the maintenance log shows that Officer Williams knew the video recording equipment was having problems for at least a year. The maintenance log also provides that ten days before the day Humble was pulled over, the video recording equipment in the patrol car in question was reported as malfunctioning to the manufacturer. The record further reflects that the manufacturer advised the City that the service call would be pursued, but the City refused to pay for an on-site visit to repair the video equipment. The City was advised of a corrective action to repair the video equipment and elected not to pursue it. Thus, the City was generally aware of persistent problems in the equipment in Officer Williams' patrol car for over a year, but the City knowingly allowed the defective equipment to be used in that patrol car. Consequently, the City's decisions to merely report the malfunction in the video equipment and refuse to pay for the repairs, while continuing to use the defective equipment, did not constitute reasonable efforts to maintain the video recording equipment in an operable condition.

Furthermore, the supreme court's holding in *Roberts* supports a determination that the City's efforts in this case were not reasonable. We recognize the situation here is not the same situation as in *Roberts* dealing with the lack of video equipment in a patrol car. Nonetheless, we believe the reasoning in *Roberts* that an unexcused noncompliance with section 56-5-2953 mandates dismissal of a DUI charge is applicable to this case. As discussed above, the specific problem with the equipment was known ten days before the day Humble was pulled over. While Officer Williams testified the City contacts Digital Ally every time there is a problem and he attempted to remedy every problem he had with his patrol car, we

agree with the municipal court that merely noting needed repairs, while refusing to pay for any repairs, is insufficient to establish an excused noncompliance with the statute. The focus here should have been on the specific equipment at issue, not equipment in general. Otherwise, defective equipment could be knowingly used under the guise of a general policy of repair or maintenance efforts. Fairness suggests that a prosecutorial entity be precluded from knowingly utilizing defective equipment in the prosecution of criminal cases. Thus, the City's decision to merely report the malfunction in the video equipment while refusing to pay for the repairs and continuing to use the defective equipment is not a valid reason for failing to produce a video recording of Humble's conduct. *See Roberts*, 393 S.C. at 349, 713 S.E.2d at 287 (holding the town's prolonged failure to request additional video cameras from the DPS for installation in its patrol cars was not a valid reason for a failure to produce a video recording of the defendant's conduct during the underlying traffic stop).

Contrary to the circuit court's reasoning, dismissal of Humble's DUI charge does not set precedent that only routine maintenance and preventative measures constitute reasonable efforts. Rather, the determination of whether reasonable efforts were made to maintain the video equipment in an operable condition is a determination to be made on a case-by-case basis. To borrow a quote from Michel de Montaigne, we find that in its most basic sense, the municipal court merely found "saying is one thing and doing is another."[1] Quite simply, the statute requires reasonable efforts. The municipal court essentially found as a fact that saying something is broken while refusing to pay for a repair visit is not enough. The "reasonable efforts" language of the statute requires some "doing," and refusing to pay for repair visits evades the intent of the statute and is not "doing" enough to constitute reasonable efforts to maintain the video equipment in an operable condition. We find the limited record before us supports the decision of the municipal court and, thus, the circuit court erred in reversing the municipal court.

[1] Michel de Montaigne, Essays, bk. 2, ch. 31 (1580).

CONCLUSION

Accordingly, we reverse the circuit court and reinstate the municipal court's order of dismissal.

REVERSED.

FEW, C.J., and WILLIAMS, J., concur.