The Supreme Court of South Carolina

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N O T I C E

In the Matter of Allan Riley Holmes, Petitioner.

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on Thursday, May 25, 2023, beginning at 9:30 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

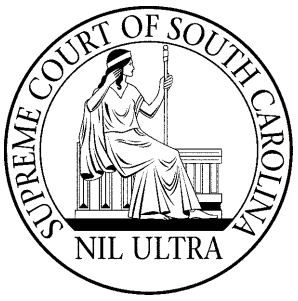
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

April 19, 2023

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 19, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

The State, Respondent,

v.

Mary Ann German, Appellant.

Appellate Case No. 2018-002090

ORDER

By opinion filed on April 5, 2023, the Court issued an opinion in the above matter. *State v. German*, Opinion No. 28149 (Howard Adv. Sh. No. 13 at 67). We hereby withdraw that opinion and substitute the attached opinion. The only change is the addition of a separate concurrence authored by Justice James, in which Justice Kittredge concurs.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ Kaye G. Hearn A.J.

Columbia, South Carolina
April 19, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Mary Ann German, Appellant.

Appellate Case No. 2018-002090

Appeal from Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 28149
Heard September 21, 2021 – Filed April 5, 2023
Re-Filed April 19, 2023

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

CHIEF JUSTICE BEATTY: Appellant was convicted of felony driving under the influence ("DUI") resulting in death and sentenced to eleven years'

incarceration. Before trial, Appellant moved to suppress evidence of her blood alcohol content ("BAC") obtained through a warrantless blood draw, which was taken pursuant to section 56-5-2946 of the South Carolina Code[1] while she was hospitalized after an automobile accident. Finding that section 56-5-2946 was constitutional as applied and unchanged by the holdings of *McNeely*[2] and *Birchfield*,[3] the trial court denied the motion to suppress. The court concluded that

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[1] Section 56-5-2946 provides in relevant part:

> (A) Notwithstanding any other provision of law, a person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].
>
> (B) The tests must be administered at the discretion of a law enforcement officer. The administration of one test does not preclude the administration of other tests. The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing. A person who is tested or gives samples for testing may have a qualified person of his choice conduct additional tests at his expense and must be notified of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial.

S.C. Code Ann. § 56-5-2946(A)–(B) (2018) (emphasis added).

[2] *Missouri v. McNeely*, 569 U.S. 141 (2013) (holding the natural metabolization of BAC does not create a per se exigency as an exception to the Fourth Amendment's warrant requirement).

[3] *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (holding warrantless breath tests, but not blood tests, are permitted as searches incident to arrest under the Fourth Amendment).

law enforcement had probable cause to suspect Appellant of felony DUI and properly obtained the blood draw pursuant to section 56-5-2946.

Appellant appealed her conviction based on the denial of her motion, and the court of appeals requested certification pursuant to Rule 204(b), SCACR. We agreed to consider whether the warrantless blood draw based on section 56-5-2946 violated Appellant's Fourth Amendment rights or her rights under the South Carolina Constitution and, in effect, whether section 56-5-2946 is constitutional.

We conclude section 56-5-2946 is facially constitutional but unconstitutional as applied in Appellant's case. However, we find the trial court did not err in denying Appellant's motion to suppress because law enforcement acted in good faith based on existing precedent at the time of the blood draw. We affirm Appellant's conviction.

I. FACTS

On July 9, 2016, Appellant and her husband were diverted from their vacation camping plans due to traffic and decided to pull off Highway 21 in Beaufort County. The couple decided to rest for the evening and have a few drinks at a bar, known locally as "Archie's." There, patrons offered the couple an all-you-can-drink bracelet for ten dollars as part of an event being held that night. The bar served "free pouring" liquor, and Appellant consumed a beer and four to six vodka drinks.

Around 12:30 a.m., Appellant drove their truck off the property. Upon leaving the parking lot, Appellant entered the road, ran the stop sign before Highway 21, and drove into the wrong side of the divided highway. Her truck collided with a sedan head-on, and, tragically, the other driver did not survive the collision.

Paramedics, firefighters, and police officers all responded to the collision. First responders extracted Appellant and her husband from the vehicle, and a responding officer noted an alcoholic odor emanating from each of them. The responding paramedics placed Appellant into an ambulance and noted an ethanol smell from Appellant. In response to paramedics' questions, Appellant heavily slurred her speech. One paramedic testified Appellant was intoxicated.

In the early morning hours of July 10, 2016, Appellant arrived at Beaufort Memorial Hospital by EMS on a backboard, and medical professionals expressed concern she had a serious head injury. However, Appellant's only ultimate injury was a laceration on the bottom of her foot. Later, Appellant became belligerent and

agitated. The emergency room physician testified that, based on her medical opinion, Appellant was intoxicated.

After arriving on the scene of the collision, a state trooper went to the hospital to obtain a blood draw from Appellant, who was the driver of the truck involved in the accident. Based on hearing information from other law enforcement officers, being at the scene himself, and observing Appellant at the hospital, the trooper suspected Appellant of felony DUI. He placed Appellant under arrest at the hospital around 2:00 a.m.

The trooper read Appellant her rights pursuant to the implied consent statute. However, instead of reading the felony DUI advisement of rights form, he read Appellant the advisement of rights form for misdemeanor DUI because he inadvertently "grabbed the wrong form." Regardless, Appellant resisted cooperation and refused to sign the paperwork detailing her rights. The emergency room physician declined to release Appellant for a breath test within the two-hour window to take Appellant to a police station for a breath test as required by law.[4] Because the trooper could not administer a breath test in the hospital, he ordered a blood draw while Appellant was in a hospital bed.[5] Appellant's BAC registered 0.275%.

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[4] *See* S.C. Code Ann. § 56-5-2950(A) (2018) ("At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, *or for any other reason considered acceptable by the licensed medical personnel*, the arresting officer may request a blood sample to be taken . . . . A breath sample taken for testing must be collected *within two hours of the arrest*. Any additional test to collect other samples must be collected within three hours of the arrest." (emphasis added)).

[5] Pursuant to section 56-5-2946, if there is probable cause to believe an individual violated the felony DUI statute or is under arrest for felony DUI, he or she "*must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs." S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added); *see also State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) (holding in a felony DUI case, an officer need not offer a breath test as the first testing option, nor

The trooper was the only officer at the hospital, and neither he nor any other responding officer sought a warrant to collect the sample of Appellant's blood. He conceded on cross examination that his office had provided him with a number to reach a magistrate late at night and he had used the number before. He also admitted it was "[p]ossible" to obtain a warrant; however, he explained that he did not seek a warrant because he "was trained . . . when [he] came into law enforcement" that "if there's a felony DUI involving death, [he] [did] not need permission." He told Appellant, "like it or not, we are getting a blood draw."

Three months before trial, the court heard arguments on Appellant's motion to suppress evidence of the blood draw and its results. Appellant focused her argument on an as-applied challenge rather than a facial challenge to the constitutionality of the statute. Specifically, she believed there is a way to read the statute such that a person, who is suspected upon probable cause of committing felony DUI, must consent. However, Appellant maintained that, under the facts in this case, a search warrant was necessary and only a neutral and detached magistrate could determine probable cause for a search warrant. Conversely, the State argued that, under section 56-5-2946, the probable cause to arrest Appellant for felony DUI is sufficient to eliminate the need to obtain a warrant. The State waived its argument that the officer relied on the exceptions for a search incident to an arrest or exigent circumstances and, instead, relied solely on the felony DUI statute.

The court, finding the statute constitutional as applied, ultimately adopted the State's arguments and denied the motion to suppress. Appellant renewed the motion throughout trial, and this appeal followed.

II. STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

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must the officer obtain a medical opinion that such a test is not feasible before ordering a blood test or urine sample).

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id*. at 570, 549 S.E.2d at 597.

III. DISCUSSION

Appellant contends the trial court erred in denying her motion to suppress the BAC results because the warrantless blood draw violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Appellant further argues the warrantless blood draw violated her right against unreasonable invasions of privacy in South Carolina's Constitution. Additionally, Appellant avers the State waived any reliance on the exceptions for exigent circumstances and a search incident to an arrest. Even if preserved, Appellant maintains the State failed to prove an applicable exception that would justify the warrantless blood draw. Finally, Appellant contends any error in admitting the BAC results cannot be harmless.

In response, the State claims the trial court correctly denied Appellant's motion to suppress the BAC results. The State argues the warrantless search was reasonable because exigent circumstances existed and the search was a permissible search incident to a lawful arrest. The State further maintains the good-faith exception applies and, if the trial court erred, the error was harmless.

Initially, we note that our appellate courts have said that an operator of a motor vehicle in South Carolina is not required to submit to alcohol or drug testing. *Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 383, 848 S.E.2d 768, 773 (2020) (citing *S.C. Dep't of Motor Vehicles v. Nelson,* 364 S.C. 514, 522, 613 S.E.2d 544, 548 (Ct. App. 2005)). Both *Sanders* and *Nelson* involved suspended driver's licenses due to refusal to submit to an alcohol breath test. However, these cases are distinguishable from the case now before this Court because they involved civil penalties, not criminal convictions; they did not address the constitutionality of the statutes; and the decisions appear to be founded on statutory interpretation. Nonetheless, it is arguable that our appellate courts have spoken on the issue of mandatory alcohol and blood testing, even if some may view it as dicta. In any case, clarity of the law is needed.

A. Constitutionality under the Fourth Amendment to the U.S. Constitution

This Court has recognized that a blood draw is a search and seizure under the Fourth Amendment in a triad of cases dealing with our implied consent statutes. *See State v. Key*, 431 S.C. 336, 344, 848 S.E.2d 315, 318 (2020) (remanding the case for a determination of exigent circumstances which the State has the burden to establish); *State v. McCall*, 429 S.C. 404, 410, 839 S.E.2d 91, 93 (2020) (holding exigent circumstances justified the warrantless blood draw); *Hamrick v. State*, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019) (declining to address exigent circumstances where the good-faith exception justified the warrantless blood draw). Further, the United States Supreme Court has held a blood draw is a search under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Under the Fourth Amendment, people are free from unreasonable searches and seizures by their government. *McCall*, 429 S.C. at 409, 839 S.E.2d at 93. A warrantless search is unreasonable per se, unless it falls within a recognized exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014); *see also State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) (noting a warrantless search is *per se* unreasonable). The recognized exceptions to the warrant requirement are search incident to a lawful arrest, hot pursuit, stop and frisk, the automobile exception, the plain view doctrine, consent, and abandonment. *State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015). Three exceptions to the warrant requirement are considered here: search incident to a lawful arrest, consent, and exigent circumstances.

During the pretrial suppression hearing, the State argued that the blood draw was taken solely pursuant to section 56-5-2946 and expressly waived any reliance on the search incident to a lawful arrest and exigent circumstances exceptions. Accordingly, we decline to address these exceptions to the warrant requirement. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). In our analysis, we depend solely on the consent exception to the warrant requirement; however, we briefly discuss the other exceptions as they have developed.

South Carolina's implied consent statute provides in relevant part:

> [A] person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].

S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added). Although our jurisprudence already has considered our implied consent statutes, we have not yet directly addressed their constitutionality. In *McCall*, we reserved that question for a future case: "While we leave this question for another day, we do note numerous courts have cast doubt on the constitutionality of similar implied consent statutes." 429 S.C. at 413 n.3, 839 S.E.2d at 95 n.3. We address that question today.

Over the years, we have seen a jurisprudential movement, in both this Court and the United States Supreme Court, calling into question the constitutionality of implied consent statutes. In *Schmerber*, the United States Supreme Court recognized that, despite the usual need for a warrant, an officer might have reasonably believed there was an emergency and a blood draw was an appropriate search incident to an arrest. 384 U.S. at 770–71 (holding the case specific facts allowed a warrantless blood draw because the officer might have reasonably believed there was an emergency). However, years later, the United States Supreme Court held the dissipation of alcohol in the blood alone does not categorically create an exigent circumstance. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding the warrantless blood draw of a suspected drunk driver as an exigent circumstance requires a "case-by-case analysis under the totality of the circumstances"). In *McNeely*, the United States Supreme Court justified the previous holding in *Schmerber* with its specific facts. *Id*. at 152, 156.

More recently, in *Birchfield v. North Dakota*, the United States Supreme Court held a warrantless blood draw cannot be taken as a search incident to an arrest.[6] 579 U.S. 438, 476 (2016). The Court considered the more intrusive nature

[6] At oral argument, the State asked this Court to limit *Birchfield* to its facts—a misdemeanor DUI—as part of its argument that the blood draw was a valid search incident to arrest. In *Birchfield*, the United States Supreme Court held a breath test,

of a blood draw against the less intrusive breath test because a blood draw pierces the skin, takes a sample from the body, and preserves it indefinitely. *Id*. at 463–64, 474. Breath tests, the Court said, are permissible as searches incident to arrests because they have little physical intrusion, the test only reveals the amount of alcohol in the person's breath, and participation in the test is unlikely to enhance the arrestee's embarrassment. *Id*. at 461–63.

In 2019, the United States Supreme Court again revisited the doctrine of exigent circumstances when considering a challenge to an implied consent statute. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). There, the Court refined its holdings in *Schmerber* and *McNeely* to permit an exigent circumstances exception when, "(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id*. at 2537. The Court noted, "[B]oth conditions are met when a drunk-driving suspect is unconscious." *Id*. Yet, the Court made clear:

> We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Id. at 2539. However, in *Key*, we declined to place the burden of proving the absence of an exigency on the defendant:

> We cannot sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has

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but not a blood test, may be administered as a search incident to a lawful arrest. 579 U.S. at 476. We, however, decline to apply *Birchfield* to only misdemeanor DUI cases because the United States Supreme Court in no way limited its holding in *Birchfield* to only misdemeanor cases. In fact, the Court weighed the government's interest in preventing traffic fatalities with privacy interests in light of the "carnage" and "slaughter" caused by drunk drivers. *Id*. at 465. We believe the Court, in its analysis, considered the government's heightened interest in preventing felony DUIs.

> the sole burden of proving the existence of an exception to the warrant requirement.

431 S.C. at 348, 848 S.E.2d at 321 (internal citations omitted).

Similarly, this Court has seen a gradual movement in our case law governing South Carolina's implied consent statutes. First, in interpreting section 56-5-2946, we held an officer need not offer first a breath test before ordering a blood test for a felony DUI suspect. *State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005). We then declined to address the constitutionality of our implied consent statute in *Hamrick*, where the good-faith exception to the exclusionary rule applied. 426 S.C. at 655, 828 S.E.2d at 604–05. In *McCall*, we reserved the question of section 56-5-2946's constitutionality and held exigent circumstances otherwise justified the warrantless blood draw. 429 S.C. at 413, 839 S.E.2d at 95. Most recently, in *Key*, we ruled, even when the suspect is unconscious, the prosecution has the sole burden of proving exigent circumstances. 431 S.C. at 348, 848 S.E.2d at 321. Parting ways with the *Mitchell* Court, we remanded the case for that determination. *Id*. at 349, 848 S.E.2d at 321.

Notwithstanding the development in the law, we continue to recognize the wisdom of implied consent statutes and note their valid, remedial purposes. *See Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 848 S.E.2d 768 (2020) (affirming the suspension of a driver's license where the suspected driver refused to take a BAC test).[7] Drivers in South Carolina do not hold a right to operate motor vehicles but, instead, have a privilege subject to reasonable regulation. *Id*. at 382–83, 848 S.E.2d at 773. Valid purposes behind regulating conduct with implied consent statutes include obtaining best evidence of a driver's BAC and promoting traffic safety by removing dangerous drivers from the roads. *Id*. at 383, 848 S.E.2d at 773.

Moreover, the distinction between a categorical exception and a general exception to the Fourth Amendment informs our judgment. The United States Supreme Court has recognized a limited class of categorical exceptions to the warrant requirement. *McNeely*, 569 U.S. at 150 n.3. The two types are distinguished

[7] We also recognize the United States Supreme Court in *Birchfield* noted the general validity of implied consent statutes. 579 U.S. at 476–77. The *Birchfield* Court called only a warrantless blood draw as a search incident to an arrest into question.

by whether or not the exception requires a factually specific inquiry on a case-by-case basis. *Id*. Categorical exceptions, including the automobile exception[8] and the search incident to a lawful arrest exception,[9] do not require "an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." *Id*. On the other hand, general exceptions require case-by-case inquiries and analyses. *Id*.

Consent operates as a general exception because it demands a fact-specific determination of whether the suspect invoked her consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("Similar considerations lead us to agree [] that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

In analyzing the constitutionality of section 56-5-2946, we must also consider the difference between as-applied and facial constitutional challenges. "The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (quoting 16 C.J.S. *Constitutional Law* § 153, at 147 (2015)) (holding petitioner could only make an as-applied challenge because petitioner did not attack the acts as a whole and this Court has a preference to remedy constitutional infirmities in the least restrictive way possible). "The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

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[8] *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("We therefore interpret *Carroll* [*Carroll v. United States*, 267 U.S. 132 (1925)] as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

[9] *See, e.g.*, *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

"One asserting a facial challenge claims that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Doe*, 421 S.C. at 502, 808 S.E.2d at 813 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015). Under a facial challenge, "a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id.* at 418 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). Conversely, "[i]n an 'as-applied' challenge, the party challenging the constitutionality of the statute claims that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.'" *Doe*, 421 S.C. at 503, 808 S.E.2d at 813 (citation omitted).

Returning to the question presented, we recognize an implied consent statute cannot allow what the Fourth Amendment prohibits. Therefore, to satisfy the requirements of the United States Constitution, a warrantless blood draw pursuant to section 56-5-2946 generally must rely on the consent exception[10] to the warrant requirement.[11]

The Fourth Amendment requires a finding that consent be given voluntarily under the totality of the circumstances. *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Durades*, 929 F.2d 1160 (7th Cir. 1991); *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding consent as an exception to the warrant requirement must be voluntarily given). We further recognize that a valid finding of consent requires a suspect to be able to refuse or revoke consent. *See State v. Bruce*, 412 S.C. 504, 511, 772 S.E.2d 753, 756 (2015) (holding a suspect did not object to an officer picking up keys to access a car during a search to which the suspect consented); *State v. Prado*, 960 N.W.2d 869, 879–80 (Wis. 2021) (noting a person has a constitutional right to refuse

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[10] *But see Mitchell*, 139 S. Ct. at 2531 (recognizing exigent circumstances almost always allows a warrantless blood test).

[11] Despite the State's insistence that section 56-5-2946 is constitutional as a search incident to an arrest, we find, fundamentally, it must rely on consent. As *Birchfield* made clear, a blood draw cannot be constitutional as a search incident to an arrest, and we decline to limit *Birchfield* to its facts. *See supra* n.6.

a warrantless search). Consequently, implied consent cannot justify a categorical exception to the general warrant requirement.

Here, the trial court unconstitutionally applied section 56-5-2946 to the warrantless search of Appellant's blood. Because the statute is not unconstitutional in all its applications, Appellant brings an as-applied challenge to its constitutionality. As applied, the trial court should have conducted an inquiry into Appellant's consent to determine whether her Fourth Amendment rights were violated. Several cases from other jurisdictions, among others,[12] have followed and applied this reasoning, often recognizing statutes as invalid when they do not fall within an exception to the warrant requirement.

In *Prado*, the Supreme Court of Wisconsin found Wisconsin's incapacitated driver provision unconstitutional beyond a reasonable doubt because it did not fit within any recognized exceptions to the warrant requirement. 960 N.W.2d at 878. There, the court distinguished the exigent circumstances exception and the consent exception to the Fourth Amendment's warrant requirement. *Id*. at 879. Turning to consent, the court made the following finding:

> In the context of warrantless blood draws, consent "deemed" by statute is not the same as actual consent, and in the case of an incapacitated driver the former is incompatible with the Fourth Amendment. Generally, in determining whether constitutionally sufficient consent is present, a court will review whether consent was given in fact by words, gestures, or conduct. This inquiry is fundamentally at odds with the concept of "deemed" consent in the case of an incapacitated driver

[12] *See, e.g.*, *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017) ("In recent years, a multitude of courts in our sister states have interpreted their respective—and similar—implied consent provisions and have concluded that the legislative proclamation that motorists are deemed to have consented to chemical tests is insufficient to establish the voluntariness of consent that is necessary to serve as an exception to the warrant requirement."); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) ("[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent.").

> because an unconscious person can exhibit no words, gestures, or conduct to manifest consent.

Id. (internal citations omitted). The court further recognized that "[t]he concept of a statutory per se exception to the warrant requirement violates both *McNeely* and *Birchfield*," as we agree today. *Id*. at 880; *supra* nn.6 & 7. Although the Wisconsin court considered the constitutionality of the incapacitated driver provision, distinguishable from our statute, here, Appellant had the ability to exhibit and effectuate words, gestures, and conduct to manifest her opposition to the search. Seeing as the court was concerned about unconscious drivers not having the ability to evince consent, there exists no greater manifestation than when the suspect is conscious.

Further, in *Williams v. State*, the Supreme Court of Georgia reiterated, "[T]his [c]ourt plainly distinguished compliance with the implied consent statute from the constitutional question of whether a suspect gave *actual consent* for the state-administered testing." 771 S.E.2d 373, 376 (Ga. 2015). There, because the trial court did not determine whether the defendant gave his consent under the exception, the Supreme Court of Georgia vacated the judgment and remanded the case to determine the voluntariness of the consent under the totality of the circumstances. *Id*. at 377.

Additionally, in *State v. Yong Shik Won*, the Supreme Court of Hawaii found, "[I]n order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given." 372 P.3d 1065, 1080 (Haw. 2015). In considering Hawaii's implied consent law, the court further found, "[A] person may refuse consent to submit to a BAC test under the consent exception, and the State must honor that refusal." *Id*.

Again, analyzing consent, the Supreme Court of Nevada, in *Byars v. State*, found the exigent circumstances exception did not justify the warrantless blood draw. 336 P.3d 939, 944–45 (Nev. 2014). The state, there, argued consent was implied from the driver's decision to drive on Nevada's roads. *Id*. However, the court held consent cannot be irrevocable by electing to drive on Nevada's roads. *Id*. Further, the implied consent statute allowing for an officer to use force to obtain a blood sample could not be read constitutionally because it does not allow a driver to withdraw consent and, thus, is not given voluntarily. *Id*. at 946.

Turning to the instant case, we conclude Appellant did not consent to the warrantless blood draw while hospitalized on the night of the accident. First, the state trooper acknowledged that he could have procured a warrant, yet he decided to order the blood draw without one. As he testified, he relied solely on what he thought section 56-5-2946 authorized. Second, Appellant refused to sign the implied consent form the state trooper presented to her, even though it was the wrong form. Appellant's signature was marked, "refused to sign." Third, Appellant, by her actions, did not impliedly consent. She became belligerent and was obstinate with hospital personnel. Fourth, when ordering the blood draw, the state trooper told Appellant, "like it or not, we are getting a blood draw." Under the totality of the circumstances, by her actions, Appellant refused to consent to the warrantless search. Because the state trooper proceeded anyway and section 56-5-2946 does not exist as a separate exception to the general warrant requirement, the blood draw was an unreasonable search and seizure under the Fourth Amendment.

Although we find section 56-5-2946 unconstitutional as applied to Appellant, we conclude this section is facially constitutional. "Finding a statute or regulation unconstitutional as applied to a specific case does not affect the facial validity of that provision." *Travelscape v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011). Faithful to our standard of review, we recognize that an officer legally can obtain a warrant or the suspect's consent to request a blood draw, pursuant to the Fourth Amendment's mandates. Exigent circumstances also justify a warrantless blood draw in the proper case. *Mitchell*, 139 S. Ct. at 2531. Additionally, breath tests do not intrude greatly into the body, they do not reveal more than one piece of information, and they do not cause more embarrassment than what is inherent in an arrest. *Birchfield*, 579 U.S. at 462–63. Accordingly, we recognize the continued validity of section 56-5-2946, as it authorizes implied consent for breath tests.

B. Constitutionality under the South Carolina Constitution

Appellant maintains the State violated her right against unreasonable invasions of privacy. We agree.

The South Carolina Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and

> particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (emphasis added). We have interpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more "heightened"—protection than that provided by the United States Constitution. *State v. Weaver*, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) (holding ultimately the search in question met the automobile exception to the warrant requirement and did not violate the more expansive right to privacy); *see also State v. Brown*, 423 S.C. 519, 533, 815 S.E.2d 761, 769 (2018) (Beatty, C.J., dissenting) (noting the heightened protection afforded by the state constitution and finding it protected petitioner from the warrantless search of his cell phone). "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 625 n.13 (1997). "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). "South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context." *Id*. at 644, 541 S.E.2d at 841.

In the context of medical treatment, we held the State violates the right of privacy when a prison inmate would be forced to take medication solely for the purpose of facilitating execution. *Singleton v. State*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993). Further, we declared, "An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions." *Id*.

In *Forrester*, this Court considered whether the right against unreasonable invasions of privacy requires informed consent to government searches. Although we held in *Forrester* that South Carolina's right against unreasonable invasions of privacy did not require informed consent on the part of the suspect before government searches,[13] we noted the drafters of the constitution were concerned with

[13] Ultimately, in *Forrester*, we reversed the court of appeals and found that an officer exceeded the scope of Forrester's consent when he searched the contents of her

the emergence of new technology increasing the government's ability to conduct a search. *Id*. at 647–48, 541 S.E.2d at 842–43. Specifically, we recognized the special committee to study the constitution, in drafting the provision, both intended for it to cover electronic surveillance and recognized it would have a far greater impact. *Id*. at 647, 541 S.E.2d at 842. Later, we explained in *Weaver*:

> The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met.

374 S.C. at 322, 649 S.E.2d at 483.

In *State v. Counts*, this Court again had an opportunity to expand the analysis in *Forrester* and *Weaver*. In *Counts*, the petitioner argued the "knock and talk" technique done without probable cause or reasonable suspicion violated article I, section 10. 413 S.C. 153, 162, 776 S.E.2d 59, 65 (2015). We looked to other jurisdictions with similar rights against unreasonable invasions of privacy for guidance. *Id*. at 170–71, 776 S.E.2d at 69. However, we did not find a persuasive basis to require an officer to tell a citizen of his or her right to refuse consent to a search. *Id*. at 171, 776 S.E.2d at 69. Continuing the development of the law, we noted there must be some analysis of the privacy interests involved when a warrantless search is made: "Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence." *Id*. at 172, 776 S.E.2d at 69. In applying the new rule, we upheld the trial court's denial of petitioner's motion to suppress because the findings of fact established law enforcement's reasonable suspicion to conduct the "knock and talk." *Id*. at 173, 776 S.E.2d at 70.

Turning to the instant case, we find the provision in our state constitution is implicated when law enforcement obtains a warrantless blood draw. As the United States Supreme Court recognized in *Schmerber v. California*, there is a constitutional right to privacy in one's blood. 384 U.S. 757, 767 (1966). Because blood draws intrude upon an individual's privacy to a much higher degree, the Court

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pocketbook beyond a visual inspection in violation of her right against unreasonable invasions of privacy. *Id*. at 648, 541 S.E.2d at 843.

distinguished a blood draw from a breath test in Fourth Amendment jurisprudence precisely. *Birchfield*, 579 U.S. at 463–64. Blood tests require piercing the skin and the extraction of a part of the person's body, and a blood test provides law enforcement with a preservable sample that contains a person's DNA and other medical information besides the BAC reading. *Id*. at 464. The drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches, and a blood test's process certainly is one of the most invasive government searches a suspect may encounter.

Although the state trooper had, at a minimum, a reasonable evidentiary basis to believe Appellant committed the felony DUI before obtaining the blood draw, Appellant refused consent to the search. In *Counts* and *Forrester*, we held law enforcement was not required to inform the suspect of the right to refuse consent prior to a search; however, had Counts or Forrester nevertheless refused consent, law enforcement would have needed to obtain a warrant to proceed with the search. Because Appellant clearly refused her consent by refusing to sign the implied consent form and she acted inconsistently with consent, the state trooper needed to obtain a warrant to legally proceed with the blood draw under the South Carolina Constitution. Because he ordered the blood draw despite Appellant's refusal, he violated Appellant's right to be free from an unreasonable invasion of privacy.

Nevertheless, we still must closely scrutinize "unwarranted medical intrusions" to effectuate the protection of South Carolina's right against unreasonable invasions of privacy. *Singleton*, 313 S.C. at 89, 437 S.E.2d at 61. At bottom, implied consent, as referred to in the impaired driver statutory scheme, is non-existent outside of matters involving the civil suspension or revocation of driver's licenses. There is no constitutionally approved, statutory per se implied consent to a blood draw. Law enforcement's demand for a warrantless blood test must be founded on an approved exception to the warrant requirement of the Fourth Amendment. A mandatory and forced blood draw is patently distinct from other modes of DUI investigation and, consequently, violates the South Carolina Constitution when administered without a warrant.

C. Good faith

Even though the warrantless blood draw violated Appellant's rights under the Fourth Amendment and our state constitution, the State asserts the exclusionary rule should not apply because law enforcement acted in good faith. We agree.

The exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). "[T]he sole purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v. United States*, 564 U.S. 229, 246 (2011). The rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id*. at 238. In *Davis*, the United States Supreme Court concluded the officers who conducted the search did not violate Davis's Fourth Amendment rights "deliberately, recklessly, or with gross negligence." *Id*. at 240. Where there is no misconduct and no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

In *Hamrick*, we held the good-faith exception to the exclusionary rule applied and BAC evidence from the blood test was admissible. 426 S.C. at 653, 828 S.E.2d at 604. The warrantless blood draw occurred on November 14, 2011, two years before the Supreme Court's ruling in *McNeely*. *Id*. at 643, 828 S.E.2d at 598. Because the law seemed to support the existence of exigent circumstances before the *McNeely* ruling, we ruled the officers acted lawfully based on a reasonably good-faith belief. *Id*. at 654, 828 S.E.2d at 604.

Here, Appellant's blood was drawn in the early morning hours of July 10, 2016 pursuant to section 56-5-2946, which had not been directly called into question in this state until *McCall*, over three years later.[14] At the time, *McNeely* only declined to create a categorical exigency in every DUI case. *Birchfield*, though it most seriously calls into question the validity of implied consent, was only released three weeks before the blood draw in this case and dealt only with a blood draw as a search incident to arrest. When Appellant's blood was drawn, the state trooper reasonably relied on section 56-5-2946 and did not violate Appellant's rights deliberately, recklessly, or with gross negligence. At trial, the state trooper testified he was trained to not seek a warrant before a blood draw in the situation of a felony DUI. He relied on this training when making the decision to draw Appellant's blood that night.

[14] *McCall* was heard on May 30, 2019 and filed on February 5, 2020.

Therefore, we hold the good-faith exception applies because of the state trooper's reasonable reliance on section 56-5-2946 and its uncertain validity at the time.[15] Although the state trooper violated Appellant's rights under both the Fourth Amendment and South Carolina's Constitution, exclusion is not warranted. We are confident law enforcement will take care to use section 56-5-2946 in accordance with what the South Carolina Constitution and the Fourth Amendment require.[16]

IV. CONCLUSION

The state trooper violated Appellant's rights under the Fourth Amendment and South Carolina's Constitution when he obtained the blood draw under section 56-5-2946 without a warrant. However, the state trooper acted in good faith based on the law existing at the time.

Despite its unconstitutional application here, section 56-5-2946 remains facially constitutional. We recognize a suspect may consent to chemical testing, and even revoke consent, as section 56-5-2946 contemplates. Additionally, we acknowledge the lower privacy interests at stake in breath analyses under the statute. Our holding today only invalidates the law enforcement practice of obtaining blood samples for BAC testing when a warrant has not been obtained, no other exceptions to the warrant requirement justify the search, and the suspect neither consents nor revokes her consent.

AFFIRMED.

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[15] Because we find the good-faith exception to the exclusionary rule applies, we do not need to address the State's harmless error argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address petitioner's remaining issues when the first issue was dispositive).

[16] "Responsible law enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis*, 564 U.S. at 241 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

Acting Justice Kaye G. Hearn, concurs. FEW, J., concurring in a separate opinion. JAMES, J., concurring in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE FEW: I concur in result. The Court is deciding this case by addressing the wrong issue. The question before us is not whether the implied consent statute is unconstitutional, but rather whether the State demonstrated the consent exception applies to excuse the Fourth Amendment's warrant requirement. German's implied consent is one circumstance to be considered in answering that question. I believe the consent exception does apply, and thus, I agree the trial court did not err in denying German's motion to suppress. I firmly disagree that our implied consent statute is unconstitutional, even as applied to German.

As I wrote for a unanimous Court in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), "pursuant to South Carolina's implied consent statute," a defendant in a felony driving under the influence case "is deemed by law to have consented to have his blood drawn by virtue of driving a motor vehicle in South Carolina." 426 S.C. at 654, 828 S.E.2d at 604. Under our implied consent law—subsections 56-5-2950(A) and 56-5-2946(A) of the South Carolina Code (2018)—German impliedly consented to the warrantless blood draw conducted in this case. German's motion to suppress the results of the blood draw, however, was based on the Fourth Amendment. Under the Fourth Amendment, the fact the implied consent law required her to consent before she was allowed to drive does not alone answer the question of whether the consent exception excused the otherwise applicable requirement the officer obtain a search warrant. Rather, German's implied consent is one circumstance a court must consider in determining whether the blood draw was a reasonable search and seizure under the Fourth Amendment. *See State v. Alston*, 422 S.C. 270, 288, 811 S.E.2d 747, 756 (2018) ("The existence of voluntary consent is determined from the totality of the circumstances." (quoting *State v. Provet*, 405 S.C. 101, 113, 747 S.E.2d 453, 460 (2013))). If the consent exception does not apply, that does not make the implied consent statute unconstitutional; it simply means the State failed—on the unique facts of this or any case—to demonstrate the consent exception excused the warrant requirement, and therefore, the search was unreasonable under the Fourth Amendment. *See id.* ("When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary." (quoting *Provet*, 405 S.C. at 113, 747 S.E.2d at 460)); *State v. Frasier*, 437 S.C. 625, 638, 879 S.E.2d 762, 769 (2022) (stating warrantless searches are unreasonable under the Fourth Amendment unless an exception to the warrant requirement applies). Thus, the question before this Court is a Fourth Amendment question, not a question of the constitutionality of the implied consent statute.

In this case, the trial court erred by failing to consider the totality of circumstances affecting whether German consented to a search and seizure without a warrant. The majority has now done that and concluded the consent exception does not apply. I would find under the totality of circumstances in this case the consent exception does apply.

First, I would put great weight on implied consent. *See generally Mitchell v. Wisconsin*, 588 U.S. ___, ___,139 S. Ct. 2525, 2532-33, 204 L. Ed. 2d 1040, 1045-46 (2019) (explaining the Supreme Court's historical approval of "many of the defining elements" of implied consent statutes). German—like all adults who hold a driver's license in South Carolina—is an adult. She made a voluntary decision to accept the privilege of driving in this State in exchange for granting consent to have her blood drawn under the circumstances of this case.

Second, I would put little weight on the fact German was agitated and drunk in the emergency room. The officer testified German was "very belligerent, and was giving the hospital personnel a very hard time." The treating physician testified, "I remember [German] because she was extremely belligerent and rude to staff." The physician said German stuck out in her memory "because she was trying to bite nurses, spitting at us, yelling at us, cursing at us." This disruptive behavior does not indicate a lack of consent, but rather, is typical of someone who is extremely drunk. The fact a suspect is agitated, belligerent, and extremely drunk does not affect the person's capacity to consent to a search. *See United States v. Watters*, 572 F.3d 479, 483 (8th Cir. 2009) (recognizing intoxication is a circumstance to be considered as to whether consent is voluntary, "but intoxication alone does not render consent invalid"); *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986) (noting "the mere fact that one has taken drugs, or is intoxicated, or mentally agitated, does not render consent involuntary"). Importantly, German was not intoxicated when she voluntarily granted consent under the implied consent law.

Third, the officer read German a form stating, as the officer described it, "she doesn't have to take the test or give the samples." As the majority explains, the officer read German the wrong form. Under the Fourth Amendment, however, the error weighs in favor of a finding of voluntary consent because the "correct" form does not

indicate the suspect may refuse the test.[17] The fact the officer told German she did not have to allow the blood draw—which the officer was not required to do under the Fourth Amendment—is important in the totality of circumstances affecting whether the consent exception applies. *See Frasier*, 437 S.C. at 638, 879 S.E.2d at 769 ("Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis." (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058, 36 L. Ed. 2d 854, 875 (1973); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001))); *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841 ("The lack of [a] warning [that a suspect may refuse consent] is only one factor to be considered in determining the voluntary nature of the consent." (citing *State v. Wallace*, 269 S.C. 547, 552, 238 S.E.2d 675, 677 (1977))); *Wallace*, 269 S.C. at 552, 238 S.E.2d at 677 ("[K]nowledge of the right to refuse consent to search is merely another factor to be considered in the 'totality of the circumstances' in determining the voluntariness of the consent to search." (citing *Schneckloth*, 412 U.S. at 248, 93 S. Ct. at 2058, 36 L. Ed. 2d at 875)).

As to the fact German did not sign the form, there is no evidence she "refused" to sign it. Rather, the evidence indicates she was too unruly to even realize she was being asked to sign it. The officer testified "she really didn't want to listen . . . and there was no way she was going to sign this paperwork." He explained it is his policy to write "refused to sign" when confronted with such disruptive behavior. Nobody testified German actually refused to sign. For all we know, she did not sign the form because she believed doing so was unnecessary in light of the implied consent law. It is not for this Court to speculate as to her reasons for not signing the form. In any event, when a suspect actually refuses to sign such a form, the refusal does not by itself invalidate the implied consent. It is only part of the totality of the circumstances a court must consider in determining whether the State has demonstrated voluntary consent under the Fourth Amendment.

Fourth, the phlebotomist who actually drew the blood testified German "was willing to have the blood drawn." I would put the most weight on this fact, that when the officer told German "like it or not, we are getting a blood draw," she willingly gave

[17] The "correct" form under the felony DUI statute provides, "Pursuant to Section 56-5-2946, you must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol [or] drugs . . . ." Rec. on Appeal at 349, *State v. McCall*, 429 S.C. 404, 839 S.E.2d 91 (2020) (No. 2015-001097).

the sample. At the actual time of the blood draw, therefore, she gave no indication she refused the test. This compelling fact tips the totality of the circumstances and—in my view—requires a finding that she voluntarily consented to the blood draw.

In summary, German made a voluntary decision to grant consent for a Fourth Amendment search and seizure when she accepted a license to drive in this State. In the emergency room the night of the incident, she was told she did not have to allow the blood draw, but she willingly did so. There is nothing in this record that indicates German withdrew or revoked the consent she impliedly gave. Under the totality of the circumstances, I would find German voluntarily consented to have her blood drawn and the consent exception excused the warrant requirement.

The majority wrongly focuses on the constitutionality of the implied consent law. Our implied consent statute should be read to place implied consent into the Fourth Amendment analysis as one circumstance indicative of voluntary consent. Reading the statute in this way, we fulfill our obligation to interpret our statutes as constitutional, if possible. *See State v. Ross*, 423 S.C. 504, 514-15, 815 S.E.2d 754, 759 (2018) (recognizing we must construe statutes as constitutional if possible and finding a way to read a subsection of the Sex Offender Registry Act as constitutional (citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999))).

JUSTICE JAMES: I concur in Chief Justice Beatty's well-reasoned opinion in all respects except for section III.B., in which he addresses Article I, section 10 of the South Carolina Constitution. Because the analysis of constitutionality under the Fourth Amendment to the United States Constitution resolves this appeal, there is no need to address the heightened protection afforded by Article I, section 10.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Russell Levon Johnson, Respondent.

Appellate Case No. 2021-000425

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Marion County
William H. Seals Jr., Circuit Court Judge

Opinion No. 28150
Heard September 14, 2022 – Filed April 19, 2023

REVERSED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, and Solicitor Edgar Lewis Clements III, of Florence, for Petitioner.

Lara Mary Caudy, of Columbia, for Respondent.

JUSTICE JAMES: Respondent Russell Levon Johnson was indicted in Marion County on charges of kidnapping and criminal domestic violence in the first degree.

The events leading to the indictment began in Marion County and progressed over the course of approximately thirteen hours into Dillon and Marlboro Counties, then back to Marion County. The trial court admitted evidence of Johnson's alleged acts of domestic violence in Dillon and Marlboro Counties and denied Johnson's request for a limiting instruction. Johnson was acquitted of kidnapping but was convicted of criminal domestic violence in the first degree. The court of appeals reversed Johnson's conviction, holding the trial court erred in failing to issue a limiting instruction. *State v. Johnson*, 432 S.C. 652, 855 S.E.2d 305 (Ct. App. 2021). We reverse the court of appeals and reinstate Johnson's conviction.

I.

Johnson dated and lived with Tonya Richburg (Victim) for four years. In 2016, the couple separated, and Victim moved to Marion County. Shortly thereafter, Johnson came to Victim's home unannounced. Johnson said he wanted to talk and asked if Victim would ride to the store with him. Victim agreed. When Victim's phone rang during the drive, Johnson took the phone and removed its battery. Johnson also removed the battery from his phone and told Victim, "You don't have to worry about this phone because nobody's gone get in contact with you or me."

Victim asked Johnson to take her home. Johnson refused and told Victim they were going to Dillon so he could get some wine. Johnson eventually stopped at a wooded area in Dillon County. There, Johnson accused Victim of stealing from him and cheating on him. When Victim denied these accusations, Johnson drove to a nearby store. He purchased a beer and drove into Marlboro County, drinking and snorting cocaine along the way.

Once in Marlboro County, Johnson stopped in another wooded area. He retrieved a "long metal stick" from his trunk and proceeded to stab Victim. He then pulled Victim from the car, threw her on the ground, and began kicking and punching her. Johnson also struck Victim in the back of the head with a hammer. When Victim continued to deny Johnson's accusations, he put her in the car and drove back to Marion County.

During the drive, Johnson stopped for Victim to use the bathroom. He made another stop to buy more beer and a bandage for Victim's arm. When Johnson offered to take Victim to the hospital, Victim refused because she did not want to get him in trouble. Finally, Johnson stopped at a motel in Marion County. He went

inside to reserve a room, and Victim remained in the car. At no point did Victim try to escape or find help.

In the motel room, Victim asked Johnson to help clean the blood on her arm. Johnson replied, "No . . . . this is gone be your last night here." Johnson then left to retrieve a bottle of Windex and set of gloves from his car. When he returned, Johnson stood behind Victim and tried to "pop" her neck. He told Victim, "Tonight is going to be your last night here. And when I kill you, I gone turn around and kill myself." Unsuccessful in his attempt to break Victim's neck, Johnson snorted more cocaine, laid down on the bed, and passed out. Victim ran to the nearest motel room and asked for help. When the occupants said they were calling the police, Victim ran because she did not want Johnson to get in trouble. As she was running, Victim encountered a police officer, who summoned an ambulance. Victim was transported to a nearby hospital, underwent surgery for a broken arm, and was hospitalized for two days.

Johnson was indicted in Marion County for kidnapping and criminal domestic violence in the first degree. Johnson moved in limine to exclude any evidence of domestic violence occurring in Dillon and Marlboro Counties, claiming the trial court lacked "jurisdiction" to hear allegations from other counties. Citing *State v. Ziegler*,[1] the State argued evidence of Johnson's acts in Dillon and Marlboro Counties was admissible as part of the res gestae of the Marion County kidnapping. The State contended any undue prejudice could be prevented by a jury instruction limiting the evidence to prove kidnapping. Johnson replied, "I'm not going to withdraw my objection or my motion, but certainly if you allow all this stuff in, then certainly I would request a charge." The trial court took the issue under advisement and trial began. During Victim's testimony, the trial court ruled:

> I'm going to allow events that happened in other counties only to prove kidnapping. Otherwise, I'm going to give a clear charge that to prove domestic violence in this case, it must be from evidence that happened in Marion County. Any of the domestic violence acts that happened in another county can only pertain to kidnapping and not domestic violence. And I'll flesh that out in much greater detail before we charge.

[1] 274 S.C. 6, 260 S.E.2d 182 (1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (2002).

Victim proceeded to testify, over Johnson's renewed objection, about Johnson's acts in Dillon and Marlboro Counties. Victim testified she never attempted to escape because it was dark, she was scared, and she did not know where she was.

After the State rested, the trial court sua sponte decided not to give a limiting instruction. Citing South Carolina Code sections 17-21-10 and -20 (2014); *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by State v. Evans*, 307 S.C. 477, 415 S.E.2d 816 (1992); and *State v. Gethers*, 269 S.C. 105, 236 S.E.2d 419 (1977), the trial court found that venue was proper in Marion County and a limiting instruction was unnecessary. Johnson objected to this ruling.

Johnson offered no evidence, so the trial proceeded to closing arguments. The State argued Johnson's acts in Dillon and Marlboro Counties gave context to his acts in Marion County and to Victim's decision not to flee. The trial court did not give a limiting instruction during its jury charge. When the trial court asked if either party objected to the charge, Johnson replied he did not. Johnson was acquitted of kidnapping but was convicted of criminal domestic violence in the first degree.

During oral argument before the court of appeals, Johnson conceded evidence of his acts in Dillon and Marlboro Counties was admissible as part of the res gestae of the alleged Marion County kidnapping; however, Johnson argued he was entitled to the limiting instruction that the trial court initially ruled was proper. Johnson also argued then, as he does now, that the evidence from Dillon and Marlboro Counties was not admissible as part of the res gestae of the Marion County domestic violence. He contended that even if the evidence were admissible as to the Marion County domestic violence, he was entitled to a limiting instruction. Johnson argued the trial court's errors were prejudicial because it is impossible to determine whether the jury convicted him of domestic violence based on his acts in Marion County or his acts in Dillon and Marlboro Counties. The State argued Johnson failed to preserve this issue for appeal. Specifically, the State argued Johnson (1) did not seek a ruling that the evidence was "unduly prejudicial" and (2) did not, after the jury charge, object to the trial court's failure to give a limiting instruction. The State argued that even if the issue were preserved, the trial court properly admitted the evidence as part of the res gestae of the alleged Marion County kidnapping.

The court of appeals reversed Johnson's conviction and remanded for a new trial on the domestic violence charge. *Johnson*, 432 S.C. at 661, 855 S.E.2d at 309. The court of appeals held Johnson preserved his request for a limiting instruction by objecting to the trial court's final ruling that a limiting instruction was not required.

The court of appeals held it was unnecessary for Johnson to renew his objection at the end of the jury charge because "the issue regarding the limiting instruction was clearly before the circuit court and was finally ruled upon on the record." *Id.* at 657, 855 S.E.2d at 307-08.

On the merits, the court of appeals held sections 17-21-10 and -20 were inapplicable because venue was uncontested and Victim's injuries were non-fatal. The court of appeals distinguished *Allen* and *Gethers*, ultimately reverting to the trial court's initial ruling that *Ziegler* controls.[2] Looking to the prejudice analysis in *Ziegler*, the court of appeals concluded, "[T]he circuit court erred in not giving a limiting instruction to mitigate the prejudice to Johnson and ensure the jury found Johnson's conduct in Marion County established his guilt on the domestic violence charge." *Id.* at 659, 855 S.E.2d at 309. Finally, the court of appeals held the trial court's failure to give a limiting instruction was not harmless. We granted the State's petition for a writ of certiorari.

II.

The State makes several interrelated issue preservation arguments, all of which we must address, and all of which we reject. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003); *see I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); Rule 220(b), SCACR. A party "need not use the exact name of a legal doctrine in order to preserve [the issue], but it must be clear that the argument [was] presented on that ground." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694; *see Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

We first address the State's argument that Johnson did not preserve the issue of whether the evidence from Dillon and Marlboro Counties was admissible as part of the res gestae of the Marion County domestic violence. The State's preservation argument on this point is curious, as the State insisted at trial that it sought to introduce the evidence only on the issue of kidnapping. Only now does the State

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[2] According to the court of appeals, "Johnson attacked [Victim] in the woods in Marlboro County, stabbing her and hitting her with a hammer. Sometime later, he attempted to 'pop' her neck in Marion County—two separate acts much like the sexual assaults in *Ziegler*." *Id.* at 659, 855 S.E.2d at 308-09.

contend the evidence was also admissible as part of the res gestae of the Marion County domestic violence. That issue is preserved. Although Johnson couched his initial motion to exclude the evidence from Dillon and Marlboro Counties in the context of "jurisdiction," it is clear Johnson objected to the admissibility of that evidence. Johnson repeatedly argued the jury would not be able to "separate out" what happened in Dillon and Marlboro Counties from what happened in Marion County. These statements were also an objection to the admissibility of the evidence as to the Marion County domestic violence.

The State argues Johnson did not base his objection "on the ground the evidence would be unduly prejudicial." We accept the State's argument as a veiled—but incomplete—reference to Rule 403, SCRE. Rule 403 provides relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" or by other considerations set forth in the rule. Even the solicitor understood Johnson's objection when the solicitor stated, "I think right now what [Johnson is] essentially saying is this is some type of [Rule] 403 analysis . . . ." Johnson argued to the trial court at least four times that the jury would not be able to "separate out" what happened in Dillon and Marlboro Counties from what happened in Marion County. Johnson was essentially arguing the jury would be confused or misled and that he would suffer unfair prejudice as a result. While perhaps Johnson did not articulate the nuances of Rule 403 as clearly as he should have, the issue was before the trial court. After further discussion, the trial court stated, "[W]hy don't we get going [with the trial] and that will give me a little time to think about it." At this point, the issues before the trial court were (1) whether the evidence from Dillon and Marlboro Counties was part of the res gestae of the alleged kidnapping and domestic violence in Marion County; (2) whether that evidence should be excluded under Rule 403; and (3) if the evidence was admissible, whether a limiting instruction was required.

The trial commenced, and the State called Victim as its first witness. When Victim was questioned about what happened in Dillon and Marlboro Counties, Johnson renewed his objection. The trial court overruled Johnson's objection and stated the evidence would be admitted "only to prove kidnapping." The trial court then stated it would give a "clear charge that to prove domestic violence in this case it must be from evidence that happened in Marion County." The trial court concluded the ruling by stating it would "flesh [the instruction] out in much greater detail" before charging the jury. At that point, the admissibility of the evidence from Dillon and Marlboro Counties—as to both the threshold question of whether it was

proper res gestae evidence and the secondary question of whether it should be excluded under Rule 403—was raised to and ruled upon by the trial court. The Rule 403 issue is therefore preserved.

The State next contends Johnson has not preserved the issue of whether he was entitled to a limiting instruction. We disagree. First, when the admissibility issue was discussed during trial, defense counsel stated that if the trial court overruled his objection to the admissibility of the evidence, he wanted a limiting instruction. Second, as noted, Johnson unsuccessfully objected when the trial court later decided not to give a limiting instruction. Johnson could not argue the matter further because it was apparent the trial court had reconsidered the issue and made a final ruling. *See* Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.").

The only thing that transpired after the trial court rescinded its initial ruling was the court's questioning of Johnson as to whether he understood his right to testify or remain silent. Johnson introduced no evidence, the parties gave their closing arguments, and the trial court charged the jury. The State also argues the issue of a limiting instruction is not preserved because Johnson stated he had no objection to the trial court's charge to the jury. Keeping in mind this Court "approach[es] issue preservation rules with a practical eye and not in a rigid, hyper-technical manner[,]" *Herron*, 395 S.C. at 470, 719 S.E.2d at 644, we agree with the court of appeals that "the issue regarding the limiting instruction was clearly before the circuit court and was finally ruled upon on the record." *Johnson*, 432 S.C. at 657, 855 S.E.2d at 308-09. Johnson's failure to renew his request for a limiting instruction at the end of the jury charge is inconsequential. *See State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) (reciting "the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at [the] conclusion of the court's instructions").

III.

Johnson concedes evidence of his acts in Dillon and Marlboro Counties was admissible as part of the res gestae of the Marion County kidnapping (of which he was acquitted). However, Johnson argues that evidence was not admissible as part of the res gestae of the Marion County domestic violence. We disagree.

"The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (cleaned up); *see State v. Wood*, 362 S.C. 520, 528, 608 S.E.2d 435, 439 (Ct. App. 2004). In *State v. Adams*, this Court quoted in its entirety the Fourth Circuit's description of the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (alterations in original) (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980)), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). As this excerpt indicates, "it is important that the temporal proximity of the prior bad act be closely related to the charged crime." *Wood*, 362 S.C. at 528, 608 S.E.2d at 439; *King*, 334 S.C. at 513, 514 S.E.2d at 583; *see Adams*, 322 S.C. at 122, 470 S.E.2d at 371.

We hold evidence of Johnson's acts in Dillon and Marlboro Counties most definitely "furnishes part of the context" of the Marion County domestic violence, "is necessary to a 'full presentation' of the case," and "is so much a part of the setting of the case . . . that its proof is appropriate in order 'to complete the story'" of what occurred in the Marion County motel room. *Adams*, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting *Masters*, 622 F.2d at 86). "[T]here is no reason to fragmentize the . . . inquiry" by excluding evidence of Johnson's actions in Dillon and Marlboro Counties. *Id.* at 122, 470 S.E.2d at 371 (quoting *Masters*, 622 F.2d at 86). The requirement of temporal proximity has clearly been met, as the evidence adduced at

trial established an unbroken thirteen-hour timeline of violence perpetrated by Johnson upon Victim, culminating in Johnson's attempt to break Victim's neck in the Marion County motel room.

We also affirm the trial court's decision not to exclude the evidence under Rule 403. *See State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) ("[E]vidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence."). The significant probative value of Johnson's acts in Dillon and Marlboro Counties was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or any other consideration pertinent to a Rule 403 analysis. While there are surely cases in which res gestae evidence would not survive a Rule 403 analysis, this case is not one of them.

IV.

Finally, we hold that under our caselaw, Johnson was not entitled to a limiting instruction. In *State v. Johnson*, the defendant was tried in Jasper County for the murder of a state trooper. 306 S.C. 119, 122, 410 S.E.2d 547, 550 (1991). The defendant—a hitchhiker—was picked up in North Carolina by Dan Swanson, who was driving a recreational vehicle (RV). Swanson soon picked up two more hitchhikers. In Clarendon County, the defendant shot and killed Swanson, stole his jewelry, wrapped his body in a sheet, and concealed his body under a mattress in the back of the RV. The defendant and the other two hitchhikers continued down Interstate 95. One of the hitchhikers testified the defendant told them that if they were stopped on the highway by a police officer, he would kill the officer to prevent the discovery of Swanson's body. As the defendant drove erratically through Jasper County, Trooper Bruce Smalls initiated a traffic stop. The defendant shot and killed Trooper Smalls during the stop. At trial, the State introduced evidence of Swanson's murder in Clarendon County "to establish [the defendant's] motive and intent to kill Trooper Smalls" in Jasper County. *Id.* at 125, 410 S.E.2d at 551. The trial court admitted the evidence of Swanson's murder as part of the res gestae of Trooper Smalls' murder. The trial court denied the defendant's request for a limiting instruction that the jury could consider evidence of Swanson's murder only as to the defendant's motive for killing Trooper Smalls. We noted,

> The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is

> offered. The reasoning behind this rule is to protect against a jury convicting a defendant just because he has committed other crimes and not because it has been proven that he is guilty of the crime for which he is accused.
>
> An exception to this general rule is . . . . that a limiting instruction is unnecessary where "evidence of the other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance of such motive or intent." . . . . "Evidence which has a direct bearing on, or relation to the commission of, the crime itself, so as to form part of the res gestae, is admissible without limiting instructions."

Id. at 126, 410 S.E.2d at 552 (cleaned up) (quoting *State v. Nix*, 288 S.C. 492, 498, 343 S.E.2d 627, 630 (Ct. App. 1986)). We concluded the evidence of Swanson's murder formed part of the res gestae of Trooper Smalls' murder and held a limiting instruction was not required. We see no reason to depart from *Johnson* and *Nix* in this case, and we hold the trial court did not err in denying Johnson's request for a limiting instruction.

V.

Evidence of Johnson's acts in Dillon and Marlboro Counties was admissible as part of the res gestae of both the alleged Marion County kidnapping and the Marion County domestic violence. Even though Johnson preserved the issue of a limiting instruction, he was not entitled to one. Therefore, we reverse the court of appeals and reinstate Johnson's conviction.[3]

REVERSED.

BEATTY, C.J., KITTREDGE, J., and Acting Justice Kaye G. Hearn, concur. FEW, J., dissenting in a separate opinion.

[3] Because indictment insufficiency and subject matter jurisdiction are not issues in this case, the court of appeals' reliance on *Ziegler* is misplaced.

JUSTICE FEW: I respectfully dissent. I would hold the court of appeals was correct to reverse Johnson's conviction for domestic violence, even if—as the majority explains—it did so for the wrong reason. I would affirm the court of appeals as modified.

As I read the pretrial dialogue between Johnson and the trial court, Johnson was attempting to raise two issues concerning the events that occurred in Dillon and Marlboro Counties. First, Johnson was attempting to exclude evidence of what happened in the other counties. Second, he was attempting to enforce the general principle of venue that a defendant may be convicted only for acts that occurred in the county in which the case is being tried. *See State v. Perez*, 311 S.C. 542, 545, 430 S.E.2d 503, 504 (1993) ("An accused has a right to be tried in the county in which the offense allegedly was committed." (citing *State v. Evans*, 307 S.C. 477, 480, 415 S.E.2d 816, 818 (1992))); *Evans*, 307 S.C. at 480, 415 S.E.2d at 818 (clarifying "this right is not jurisdictional"), *overruled as to a separate issue by State v. Gentry*, 363 S.C. 93, 106, 610 S.E.2d 494, 502 (2005). The trial court initially understood there were two issues, indicating as to the first issue that he would allow the evidence in, and then stating as to the second issue, "I'm going to give a clear charge that to prove domestic violence in this case it must be from evidence that happened in Marion County." Over the course of the trial, however, Johnson and the trial court conflated the two issues. By the time the trial court changed its mind about giving an instruction, the court was focused only on whether the evidence it had admitted required the type of "limiting instruction" discussed by the majority. In concluding—correctly—it was not required to give such an instruction, the court incorrectly ruled as to the second issue "that if the elements of the offense took place in more than one county[,] each county has concurrent jurisdiction."

On the first issue, there is no doubt the evidence of what Johnson did to his victim in Dillon and Marlboro Counties was admissible in his trial for crimes committed in Marion County. As the majority explains well, the trial court was correct to admit all the evidence. The majority is also correct that—as to this evidence—there was no requirement for a "limiting instruction." Thus, for purposes of determining whether Johnson committed the crime for which he was indicted—domestic violence in Marion County—the jury was free to use evidence of what he did in the other counties for any purpose it wanted, except one—which brings me to the second issue.

On the second issue, however, it was necessary for the trial court to tell the jury it could convict Johnson only for the Marion County crimes. The Marion County jury

must not have been permitted to convict Johnson for crimes he committed in Dillon or Marlboro Counties. Thus, the one purpose for which the jury could not use Johnson's actions in the other counties was to find him guilty of domestic violence for those actions. The trial court refused to tell the jury this because it erroneously concluded "each county has concurrent jurisdiction." In other words, the trial court erroneously ruled that Johnson may be convicted in Marion County for stabbing the victim in Marlboro County with a "long metal stick." For this error, Johnson is entitled to a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ani Creation, Inc. d/b/a Rasta: Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape: Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc, d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up, Appellants,

v.

City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach, Respondents.

Appellate Case No. 2021-001074

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

Opinion No. 28151
Heard February 9, 2023 – Filed April 19, 2023

AFFIRMED

Reese R. Boyd III, of Davis & Boyd, LLC, of Myrtle Beach, and Gene McCain Connell Jr., of Kelaher, Connell, & Connor, PC, of Surfside Beach, both for Appellants.

Michael Warner Battle, of Battle Law Firm, LLC, of Conway, for Respondents.

JUSTICE KITTREDGE: The City of Myrtle Beach (the city) is a town economically driven and funded by tourism. After receiving frequent criticism from tourists and residents alike, the city became concerned that the proliferation of smoke shops and tobacco stores were repelling families from the area due to those stores' merchandise and advertising practices. More specifically, the city was troubled with those shops' sale of sexually explicit items, cannabidiol (CBD)-infused products, and tobacco paraphernalia. Therefore, in an effort to improve the "family friendly" nature of the downtown area, the city created a zoning overlay district[1] that prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown.

Appellants are nine of the twenty-five affected stores located in the area, and each was issued a citation by the city's zoning administrator for failing to comply with the zoning overlay ordinance. Following a complicated legal battle, appellants raised a host of constitutional challenges to the zoning overlay ordinance. However, the circuit court found the ordinance survived appellants' veritable barrage. Appellants directly appealed that decision to this Court. We now hold that, under this Court's long-standing precedent, the overlay ordinance did not impermissibly spot zone the city's historic downtown area. We additionally find the overlay ordinance is a constitutional exercise of the city's police powers. We therefore affirm the decision of the circuit court and uphold the validity of the ordinance.

I.

A.

In 2011, the city adopted a comprehensive plan that, among other things, set forth future objectives aimed at increasing tourism and revenue. In the comprehensive plan, the city noted that tourists and residents had repeatedly expressed concern over the "noise and behavior of certain groups visiting the area," resulting in "negative

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[1] *See* S.C. Code Ann. § 6-29-720(C)(5) (Supp. 2022) (defining an overlay zone as "a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries").

perceptions about Myrtle Beach." Likewise, the city determined that "[c]rime and the perception of crime [was] a problem that need[ed] addressing." The city concluded all businesses needed to encourage and support a "family beach image" and determined that a positive "city image" would foster more tourism. To that end, the city outlined a number of specific objectives, including its desires to (1) "define and maintain Myrtle Beach as a family beach"; (2) "revitalize the downtown area of Myrtle Beach"; and (3) "create an environment[] which ensures that visitors and residents are safe."

Ultimately, the Myrtle Beach city council effectuated those objectives by enacting Ordinance 1807 (the ordinance), which created a zoning overlay district—known as the Ocean Boulevard Entertainment Overlay District (OBEOD)—that encompassed the historic downtown area of the city. Myrtle Beach, S.C., Code of Ordinances app. A § 1807 (2019). In creating the OBEOD, the ordinance extensively set forth its purpose and intent, emphasizing, among other things, the importance of fostering more family tourism and discouraging things that were "repulsive" to families, including "unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." *Id.* § 1807.A. As a result, the city council found the displacement of smoke shops and tobacco stores from the historic downtown area was "in the interests of the public health, safety, and general welfare." *Id.* Likewise, city council stated the presence of smoke shops and tobacco stores heightened the risk of "negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses." *Id.* Finally, city council noted that despite the creation of the OBEOD, there were numerous other locations throughout the city available for the continued operation of smoke shops and tobacco stores. *Id.*

Following the city council's lengthy recitation of the purpose and rationale underlying the ordinance, the ordinance prohibited certain retail businesses and offerings within the OBEOD, including (1) smoke shops and tobacco stores; (2) any merchandising of tobacco paraphernalia or products containing CBD, such as lotions, oils, and food; (3) any merchandising of tobacco products more than that of an incidental nature (i.e., more than 10% of store's inventory); and (4) any merchandising of sexually oriented material (collectively, the prohibited retail uses). *Id.* § 1807.D.

The prohibited retail uses were declared immediately nonconforming upon passage of the ordinance on August 14, 2018. *Id.* § 1807.E. However, the ordinance provided for an amortization period that gave affected businesses until December

31, 2018, to cease the nonconforming part of their retail offerings. *Id.* The ordinance likewise stated that, should a business continue engaging in the prohibited retail uses, it would be subject to suspension or revocation of its business license. *Id.* § 1807.F.

B.

Shortly before the end of the amortization period, on December 19, 2018, appellants filed suit in federal court seeking damages, injunctive relief, and a declaration that the ordinance was unconstitutional.[2] Two days later, appellants filed a motion for a temporary restraining order, but the parties resolved the motion by consent, agreeing the city would enforce the ordinance "through use of [the city's] zoning ordinance administrative procedures."

Six months later, the city's zoning administrator issued individual citations to each of the appellants for continuing to engage in the prohibited retail uses in violation of the ordinance. The zoning administrator also requested that each of the businesses comply with the ordinance. No penalties were imposed on appellants at that time; rather, the letters were merely the zoning administrator's determination that appellants' businesses were nonconforming under the ordinance.

Appellants appealed the zoning administrator 's determination to the city's Board of Zoning Appeals (BZA). At the BZA hearing, the zoning administrator set forth evidence as to how each appellant was engaged in the prohibited retail uses, submitting photographs of appellants' stores and merchandise. Appellants' only

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[2] The federal lawsuit alleged the ordinance amounted to an unconstitutional taking and violated appellants' rights to free speech, due process, and equal protection. Eventually, the federal court dismissed appellants' due process claim, citing the *Burford* abstention doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (explaining the *Burford* abstention doctrine allows a federal court to dismiss a case "only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (citation omitted) (internal quotation marks omitted)). The federal court also dismissed the takings claim without prejudice, finding the claim was not yet ripe. The court stayed the remaining claims (free speech and equal protection) pending resolution of this state court proceeding.

witness, Tim Wilkes, conceded each of appellants' stores was engaged in one or more of the prohibited retail uses. Nonetheless, appellants requested the BZA either declare the ordinance unconstitutional or grant variances to appellants so that they could continue engaging in the prohibited retail uses. Ultimately, the BZA found (1) it did not have jurisdiction to declare the ordinance unconstitutional;[3] (2) it could not grant a use variance because it would allow the continuation of a use not otherwise allowed in the OBEOD;[4] and (3) appellants' businesses were engaged in one or more of the prohibited retail uses.

Appellants appealed the BZA's decision to the circuit court, but the circuit court affirmed the BZA's decision and found meritless appellants' twenty-five grounds for challenging the ordinance. In relevant part, the circuit court held the boundaries of the OBEOD were not arbitrary and capricious, citing to the city council's extensive recitation of the rationale for adopting the OBEOD and locating the boundaries where it did. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The circuit court also found that whether the ordinance promoted the public welfare was "fairly debatable." In support, the circuit court cited to the zoning administrator's testimony regarding a number of complaints he had received regarding the sale of tobacco paraphernalia and sexually oriented merchandise in the historic downtown where there was a high level of pedestrian traffic by families with young children. The court thus concluded appellants had failed to meet their burden to show the ordinance was unconstitutional.

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[3] *See* S.C. Code Ann. § 6-29-800(E) (Supp. 2022) (explaining that in exercising its statutory authority, as outlined in subsection (A), the BZA "has all the powers of the officer from whom the appeal is taken"). No one contends the zoning administrator here—the "officer from whom the appeal [was] taken"—would have had the authority to declare a zoning ordinance unconstitutional.

[4] *See* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) ("The [BZA] may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.").

Appellants directly appealed to this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR, raising five issues challenging the validity of the ordinance on both procedural and constitutional grounds.[5] We address each in turn.

II.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991) (per curiam); *see also Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application . . . ."). Courts must make every presumption in favor of the constitutionality of a legislative enactment. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curiam) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional "when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Id.* at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55).

More specifically, "The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *see also Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (explaining the Court must exercise "carefully and cautiously" its power to declare a challenged ordinance invalid on the basis that the ordinance unreasonably impaired or destroyed a constitutional right). Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council's action unless the council's findings were arbitrary and capricious or had no reasonable relation to a lawful purpose. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425 ("The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." (citation omitted)); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) ("This State's

[5] To be more precise, appellants' brief listed eleven issues on appeal, but because some of the issues overlapped, we have condensed them to five.

constitution provides that the powers of local governments should be liberally construed." (citing S.C. Const. art. VIII, § 17)).

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust. *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998) (citing *Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425); *Rush*, 246 S.C. at 276, 143 S.E.2d at 531.

III.

Appellants first argue the ordinance is defective as a matter of law because it was not adopted following the procedure set forth in section 5-7-270 of the South Carolina Code. *See* S.C. Code Ann. § 5-7-270 (2004) (requiring generally that municipal ordinances be "read two times on two separate days with at least six days between each reading" prior to being adopted and having the force of law). Specifically, appellants contend the versions of the ordinance introduced for the first and second readings were so different from one another that the city council was required to conduct a third reading prior to enacting the ordinance. We disagree.

Because appellants failed to timely challenge the efficacy of the two readings of the ordinance, they are statutorily barred from raising this issue. Section 6-29-760(D) of the South Carolina Code (2004) requires parties to challenge the validity of an ordinance within sixty days of the decision of the governing body, provided "there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The ordinance was formally adopted and went into effect upon the second reading on August 14, 2018. Appellants did not file their federal suit or take any other formal action to challenge the validity of the ordinance until December 19, 2018—well over sixty days later. As a result, appellants can no longer challenge the validity of the ordinance under section 5-7-270. *See Quail Hill, L.L.C. v. Cnty. of Richland*, 379 S.C. 314, 320–21, 665 S.E.2d 194, 197 (Ct. App. 2008) (holding a challenge to the validity of the enactment of a county ordinance was untimely because the challenge was made long after the sixty-day window had closed), *aff'd in part on this ground and rev'd in part on other grounds*, 387 S.C. 223, 692 S.E.2d 499 (2010).

Even were we to overlook the untimeliness of appellants' challenge and address the merits of their argument, appellants' suggestion that the two readings of the ordinance were vastly different is simply untrue. While the city council expanded the "purpose and intent" section of the original version of the ordinance and added a

number of definitions, the prohibited retail uses in the final version were identical to those in the original version. If anything, the amendments merely better-defined the terms used to describe actions or merchandise that qualified as a prohibited retail use. There is no basis on which to conclude the amendments to the ordinance were so drastic as to trigger the need for a new first reading. *Cf. Brown v. Cnty. of Charleston*, 303 S.C. 245, 247, 399 S.E.2d 784, 785–86 (Ct. App. 1990) (explaining the purpose of providing public notice related to zoning amendments is to satisfy the "general principles of due process that require notice which fairly and reasonably apprises those whose rights may be affected of the nature and character of the action proposed"). We therefore affirm the circuit court's decision as to this issue.

IV.

Appellants next argue the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, appellants broadly contend the creation of the OBEOD was unfair to them because they cannot sell certain merchandise that similar stores can continue selling in other areas of the city. Appellants therefore claim the creation of the OBEOD was arbitrary and capricious because it treated them differently from other, similarly situated businesses throughout the city. Appellants point to three specific concerns as evidencing the arbitrary and capricious nature of the ordinance: (1) city council reverse spot zoned the OBEOD; (2) the boundaries of the OBEOD are not drawn in straight lines or with any discernable reasoning behind them; and (3) there is no evidence that the prohibited retail uses affect public safety. We will address each of these concerns below.[6]

[6] Amongst their eleven issues on appeal, appellants raise two takings claims. The first is a traditional takings claim arising under the Fifth Amendment to the United States Constitution, which we address further below. The second is a claim that because the ordinance violated appellants' right to equal protection, the ordinance took their business without just compensation. Appellants' Br. at 10. We find such an argument meritless and do not address it further other than to note that takings and equal protection are two distinct constitutional doctrines with wholly separate requirements and bodies of case law.

A.

Appellants first contend the ordinance constitutes impermissible reverse spot zoning—a novel issue in South Carolina. We disagree.

There are two types of spot zoning. Traditional spot zoning occurs when a small parcel of land is singled out for a use classification different from that of the surrounding area, for the benefit of the parcel's owner(s) and to the detriment of others. *Bob Jones Univ. v. City of Greenville*, 243 S.C. 351, 361, 133 S.E.2d 843, 848 (1963); *see also id.* at 362, 133 S.E.2d at 848 (noting it is "not [] considered [] spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed [new use] classification" (citing *Eckes v. Bd. of Zoning Appeals*, 121 A.2d 249 (Md. 1956))). Typically, traditional spot zoning singles out and reclassifies a relatively small tract that is owned by a single person and surrounded by a much larger, uniformly zoned area, such that the small tract is relieved from restrictions to which the rest of the area is subjected. *See Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 175, 72 S.E.2d 66, 71 (1952) (citation omitted); Mark S. Dennison, Annotation, *Determination whether zoning or rezoning of particular parcel constitutes illegal spot zoning*, 73 A.L.R.5th 223 (1999) ("The zoning or rezoning of a single tract of land, usually small in size, such that it is zoned differently from surrounding property may be invalidated as illegal spot zoning.").

In contrast, reverse spot zoning occurs when a zoning ordinance restricts the use of a property when virtually all the property's adjoining neighbors are not subject to the use restriction. 83 Am. Jur. 2d *Zoning and Planning* § 89 (2013). Oftentimes, reverse spot zoning occurs where a zoning "island" develops as the result of a municipality's failure to rezone a portion of land to bring it into conformity with similar surrounding parcels that are otherwise indistinguishable. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 731 (Pa. 2003); *Palmer Trinity Priv. Sch., Inc. v. Vill. of Palmetto Bay*, 31 So. 3d 260, 262 (Fla. Dist. Ct. App. 2010) ("The properties surrounding Parcel B were all originally zoned AU or EU-2, but they have been changed to less restrictive zoning classifications as the agricultural character of the area has changed over the years.").

Thus, spot zoning may arise in two ways: (1) by an affirmative legislative act that affects the parcel at issue (traditional spot zoning); or (2) by changes to the zoning map around the parcel at issue (reverse spot zoning). *See* 39 Am. Jur. Proof of Facts 3d 433, § 3 (West 2023) (describing types of spot zoning challenges).

Spot zoning is not impermissible per se in South Carolina. Rather, as this Court has previously explained,

> [W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

Talbot, 222 S.C. at 175, 72 S.E.2d at 71 (citation omitted); *see also id.* at 175, 72 S.E.2d at 70 (cautioning that courts should not "become city planners but [should only] correct injustices when they are clearly shown to result from the municipal action"). Thus, when the Court finds an ordinance constitutes spot zoning, "the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown." *Knowles v. City of Aiken*, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991); *see also* 39 Am. Jur. Proof of Facts 3d 433 ("Legal challenges to [spot zoning] are generally based on allegations and proof of discriminatory treatment of a single landowner, inconsistency with the comprehensive plan, incompatibility with neighboring uses, and harm to the general welfare of the community.").

Here, despite Appellants' contentions, the creation of the OBEOD does not fit within the accepted definition of reverse spot zoning. The prohibited retail uses in the OBEOD were not the result of a zoning "island" that developed as the surrounding area was rezoned while the OBEOD was left behind; rather, the OBEOD was created by an affirmative legislative act by the city. In other words, if anything, the creation of the OBEOD more closely resembles traditional spot zoning.

However, we find it equally doubtful the creation of this overlay district constituted traditional spot zoning. The OBEOD is a fairly large area: it overlays at least twenty distinct zones; it comprises an approximate rectangle measuring slightly less than two miles by one-quarter mile; and it encompasses over fifty city blocks which are, of course, further divided into a significant number of individual properties owned by separate property owners. It goes without saying that creating an overlay zoning district over such a large, diverse area is distinct from the typical, traditional spot zoning factual scenario. *See Talbot*, 222 S.C. at 175, 72 S.E.2d at 71 (noting spot zoning occurs when an ordinance affects a small area within the limits of a single zone); Dennison, *supra*, 73 A.L.R.5th at 223 (explaining spot zoning involves a

single, small tract of land); 39 Am. Jur. Proof of Facts 3d 433 (stating spot zoning challenges generally require proof the ordinance has affected a single landowner).

Even were we to accept appellants' argument that the creation of the OBEOD constituted spot zoning in some fashion, we find that argument unavailing. Specifically, applying the test outlined in *Knowles* and *Talbot*, we find any spot zoning caused by the ordinance was legally permissible. *See Knowles*, 305 S.C. at 223, 407 S.E.2d at 642; *Talbot*, 222 S.C. at 175, 72 S.E.2d at 70. First, the ordinance was consistent with the city's comprehensive plan. Second, as we discuss further below, it is "fairly debatable" that city council enacted the ordinance to promote the public welfare. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (explaining the Court will not overturn a municipality's action if the decision is "fairly debatable" because the action is presumed to be a valid exercise of power, and it is not the Court's prerogative to weigh in on the wisdom of the decision). Third, the ordinance did not result in clear injustice to appellants: even after the creation of the OBEOD, appellants retained ownership of their property—the real estate and the merchandise—and they presented no evidence that they could not pivot to another business model. *See Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P.3d 691, 699–700 (Mont. 2012) (applying the state's traditional spot zoning test under a similar factual scenario, rather than some separate reverse-spot-zoning test, and concluding that because the zoning regulation was consistent with the county's comprehensive plan, it was not impermissible spot zoning); *cf.* S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (noting the BZA may not grant a variance if the effect of the variance would be to allow a use not otherwise permitted in a zoning district, and "[t]he fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance"). We therefore reject appellants' equal protection challenge on the basis of impermissible spot zoning.

B.

Second, appellants contend the OBEOD's boundaries are irrational and, to be constitutional, must ban the prohibited retail uses throughout the entire city. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where, as here, "there is no suspect or quasi-suspect class and no fundamental right is involved,

zoning ordinances should be tested under the 'rational basis' standard." *Bibco Corp.*, 332 S.C. at 52, 504 S.E.2d at 116.

Under rational basis review, the Equal Protection Clause is satisfied so long as (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."). A party challenging a legislative enactment under rational basis review "must negate every conceivable basis which might support" the enactment and, therefore, has a "steep hill to climb." *Bodman v. State*, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013) (quoting *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000)) (internal quotation marks omitted)).

Here, the ordinance explicitly states the city council enacted the ordinance to foster a more "family friendly" atmosphere in the historic downtown area and encourage more tourism by families. *See* Myrtle Beach, S.C., Code of Ordinances app. A § 1807.A. The zoning administrator testified that he had received complaints from families about the prohibited retail uses. The city council found the prohibited retail uses "repelled" families from the area. We find it is, at the very least, "fairly debatable" that prohibiting the sale of sexually oriented merchandise and tobacco paraphernalia would encourage a more "family friendly" atmosphere in the historic downtown area. *See Rushing*, 265 S.C. at 288, 217 S.E.2d at 799 (stating the Court should not overturn a municipality's decision if the action is "fairly debatable").

Moreover, the zoning administrator stated the boundaries for the OBEOD corresponded with the boundaries of the historic downtown area of the city as much as was practical. Those boundaries were set long ago based on pedestrian travel patterns, family-friendly attractions, and historical uses that preexisted the ordinance. There are two deviations from the historic downtown's boundary lines, both of which have rational explanations. First, the northwestern edge of the OBEOD is shifted half a block away from US-17 Business (the boundary for the historic downtown). Because the OBEOD was created in part to foster more pedestrian traffic in the historic downtown, and because the city council did not

believe families of pedestrians would readily walk along a busy road such as US-17 Business, the city council felt it unnecessary to include that portion of the historic downtown in the OBEOD. Second, and relatedly, the boundary line does not run in a completely straight line along the backs of *every* property that fronts US-17 Business because it cannot: two properties in the OBEOD are large enough that they comprise several city blocks, stretching from US-17 Business all the way to Ocean Boulevard.[7] In those two places, the boundary line runs on the US-17 Business side of the property rather than the ocean-side of the property. The city's decision regarding where to set the boundaries of the OBEOD is certainly not irrational or without basis.

Appellants have failed to show by clear and convincing evidence that the location of or rationale behind the boundaries of the OBEOD is arbitrary and capricious. Consequently, the boundaries of the OBEOD are valid. *See McMaster*, 395 S.C. at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55); *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642. As the circuit court found, "Zones must have beginning and terminating points. If the existence of divergent uses across zone boundary lines were taken *per se* as an appropriate basis for a constitutional violation, the entire zone plan in any municipality might well crumble by chain reaction." (Citations omitted.) The disparate treatment of similarly situated businesses on either side of the OBEOD boundary line is not a basis on which to find an equal protection violation. *Cf. Bibco Corp.*, 332 S.C. at 52–54, 504 S.E.2d at 116–17 (finding a zoning ordinance that prohibited mobile homes from some residential districts in the city—but not all—survived rational basis review).

C.

Finally, appellants argue the creation of the OBEOD was arbitrary and capricious because the city did not submit any evidence that the prohibited retail uses impacted public safety. We summarily dismiss this argument, as appellants—not the city—had the burden of proof. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531. The city did not need to submit anything affirmatively proving its policy decision was correct. *Cf. Nordlinger*, 505 U.S. at 11 (noting that the Equal Protection Clause requires only that the legislative fact on which the classification is apparently based rationally *may* have been considered to be true by the governmental decisionmaker). Rather, it was incumbent upon appellants to submit evidence that the city's policy decision was

[7] One property contains Pavilion Park, and the other contains Family Kingdom Amusement Park.

based on a faulty factual premise, and the prohibited retail uses had no impact on public safety. Appellants failed to do so.

Accordingly, we hold appellants have failed to demonstrate the ordinance violated their right to equal protection, and we affirm the circuit court's decision on this basis.

V.

Next, appellants raise two due process arguments. First, appellants argue the ordinance does not explicitly provide for a hearing in which an affected vendor could challenge the zoning administrator's finding that certain merchandise fits within the ordinance's definition of sexually oriented merchandise. Second, appellants contend the ordinance imposes an arbitrary and unreasonable amortization period. We disagree with both arguments.

We reject appellants' first argument as it is based on a faulty factual premise. Rather, section 6-29-800(A)(1) of the South Carolina Code explicitly provides the BZA has the authority to hear any appeal "where it is alleged there is error in . . . [a] determination made by an administrative official in the enforcement of the zoning ordinance." Section 6-29-800(E) additionally provides the BZA "has all the powers of the officer from whom the appeal is taken" and, therefore, may determine—just as the zoning administrator does in the first instance—whether the challenged merchandise fits within the ordinance's definition of "sexually oriented merchandise." Further, as occurred here, should an affected property owner disagree with the BZA's decision, it can appeal the decision to the circuit court and, if necessary, this Court.[8]

Turning to appellants' second due process argument, we find any contention that the amortization period was too draconian is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." (cleaned up)). Any attempts by the city to enforce the ordinance and actually impose the provided-for civil penalties were stymied by the pendency of this appeal. As a result, appellants have had nearly

[8] Of course, here, appellants conceded they were engaged in the prohibited retail uses, so there would be no need for an additional hearing challenging the determination of the zoning administrator.

five years to come into compliance with the ordinance and, apparently, have failed to do so. We cannot say an effective five-year amortization period is per se unreasonable.

We therefore reject both of appellants' due process claims.

VI.

Appellants additionally claim the ordinance effects a taking of their property without just compensation, specifically citing the three-factor test set forth by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (explaining that, in regulatory takings cases, courts should examine (1) the economic impact of the regulation on the affected property; (2) the extent to which the regulation interfered with the property owner's investment-backed expectations; and (3) the character of the government action). We disagree.

Takings claims are "essentially ad hoc, factual inquiries" that "depend[] largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 336 (2002) (cleaned up); *see also Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (explaining the question of whether a taking has occurred is a question of law that this Court must review de novo (citations omitted)). Appellants, however, have not developed any of the facts necessary to support a takings claim. For example, they do not quantify the economic impact of the ordinance on their properties—the first *Penn Central* factor. *See Penn Cent.*, 438 U.S. at 124. Rather, appellants merely claim the impact is a "significant amount" that is "dire" and "severe."[9]

[9] This lack of specificity stands in stark contrast to other takings cases, where parties typically quibble over the appropriate numbers to enter into the takings fraction, as well as the exact percentage necessary to amount to an unconstitutional taking. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017) (explaining the parties submitted competing appraisals for the value of the affected properties, including figures corresponding to the values of the properties with and without the challenged regulation); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 534 (2005) (discussing the exact figures corresponding to the impact of the challenged regulation on each of sixty-four affected properties owned by the claimant); *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, 316 n.12 (involving a dispute over how to define and calculate the denominator of the takings fraction, and detailing the average values of the over-400 affected properties); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001)

We are left to speculate about the facts necessary to support appellants' takings claim.[10] We therefore reject appellants' claim that the ordinance took their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

VII.

Finally, appellants claim the ordinance criminalizes the sale of consumer products that are otherwise legal under state law, and it therefore conflicts with—and must be preempted by—the State's criminal laws. This argument, too, rests on a faulty factual premise.

The ordinance does not impose any criminal penalties for continuing to engage in the prohibited retail uses after the amortization period; rather, the penalty provided for in the ordinance is the suspension or revocation of the nonconforming business's business license.[11] Myrtle Beach, S.C., Code of Ordinances app. A § 1807.F. Thus, the ordinance does not criminalize the sale of legal products in contravention of the State's criminal laws. *Compare, e.g.*, *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008) (upholding the validity of a municipal ordinance banning smoking in bars and restaurants despite the fact that smoking was legal throughout the State, and finding significant the fact that the no-smoking ordinance imposed only civil penalties), *with Beachfront Ent., Inc. v. Town*

(explaining the plaintiff in a takings action submitted an appraiser's report to quantify the amount of damages sought).

[10] In fact, appellants make no argument at all regarding the second and third *Penn Central* factors, i.e., the extent to which the ordinance impacted their investment-backed expectations or the character of the government action. We therefore find appellants have abandoned any argument regarding those two factors. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 646 n.7 (2000) (stating an issue is deemed abandoned if a party fails to make an argument as to the merits of the issue).

[11] We note appellants did not specify from which section of the Myrtle Beach Code of Ordinances they believed the criminal penalty arose. Thus, to the extent appellants believed the criminal penalty arose from another ordinance distinct from the ordinance at issue here (Ordinance 1807), we find that portion of their argument abandoned.

of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008) (striking down a municipal ordinance banning smoking in the workplace because it imposed significant criminal penalties for violations and, therefore, conflicted with State law that otherwise allowed smoking in the workplace). We therefore reject this argument as a basis on which to find the ordinance invalid.

VIII.

After examining the host of appellants' constitutional and procedural challenges to the ordinance, we hold the ordinance was a valid exercise of the city's police powers. *See Rush*, 246 S.C. at 276, 143 S.E.2d at 530–31 ("The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property[,] is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish [their] desired end unless there is [a] plain violation of the constitutional rights of [the] citizens."). We therefore affirm the decisions of the circuit court and BZA.

AFFIRMED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Isaiah Gadson, Jr., Appellant.

Appellate Case No. 2018-001041

Appeal From Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5979
Heard November 10, 2021 – Filed April 19, 2023

AFFIRMED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Taylor Davis Gilliam, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Mark Reynolds Farthing, and Assistant Attorney General William Joseph Maye, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

MCDONALD, J.: Isaiah Gadson, Jr. appeals his 2018 convictions for murder, first degree criminal sexual conduct (CSC), kidnapping, and armed robbery arising from a 1980 incident, arguing the circuit court erred in admitting evidence of his 1983 rape of a different victim (Victim 2). We affirm the convictions.

Gadson's 2018 convictions arose from a cold case investigation of the 1980 rape of Victim and the murder of her boyfriend. In 1999, the Beaufort County Sheriff's Office (BCSO) reopened the investigation as part of a newly created cold case task force. Captain Bob Bromage conducted the investigation; he reviewed the evidence, re-interviewed witnesses, and returned items to the South Carolina Law Enforcement Division (SLED) for retesting. SLED was unable to establish a DNA profile in 1999 due to the limited DNA technology available at the time.

In 2002, Captain Bromage sent the evidence back to SLED for additional testing. Due to improvements in technology, a SLED examiner was able to develop a DNA profile from semen found on Victim's underwear. As a result of the DNA profile, Captain Bromage eliminated a person of interest who was not a match. It was further determined that Victim's deceased boyfriend was not a match.

In 2016, SLED notified Captain Bromage that it had received notification of a match to the DNA profile in Victim's case from CODIS, the national DNA indexing system. The BCSO then returned the evidence to SLED for testing along with buccal swabs taken from Gadson. DNA technical leader Laura Hash examined Gadson's buccal swabs and compared them to the DNA profile from the semen previously found on Victim's underwear and pants. Gadson was a match to the DNA profile of the semen.

Prior to Gadson's 2018 trial, the State filed a motion under Rule 404(b), SCRE, seeking to introduce evidence of a 1983 sexual assault Gadson committed against Victim 2. The State argued Gadson's conduct in the 1983 attack satisfied Rule 404(b)'s exception permitting introduction of "other crimes, wrongs, or acts" when such evidence is offered to "show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."[1] During pretrial proceedings, the circuit court heard arguments on the State's 404(b) motion, and

[1] Gadson was indicted for first degree CSC following the 1983 attack on Victim 2 and pled nolo contendere to assault and battery of a high and aggravated nature (ABHAN). The State sought only to introduce the underlying conduct from the 1983 assault that gave rise to Gadson's plea.

the State proffered testimony from both Victim 2 and Captain Bromage. The circuit court found evidence of the 1983 assault was admissible because the similarities of the sexual assaults and Gadson's behavior toward each victim outweighed the dissimilarities and the probative value of the evidence outweighed its prejudicial effect.

At trial, Gadson did not contemporaneously object to Victim 2's testimony about the 1983 assault, and the testimony did not occur immediately following the circuit court's ruling on the pretrial motion. Therefore, we find the question of whether evidence of the 1983 assault of Victim 2 was properly admitted in the current case is not preserved for our review. *See State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial."); *id.* (holding the issue of the admissibility of the defendant's prior conviction was not preserved when the circuit court ruled it was admissible during pretrial proceedings and the defendant failed to object to the State's questions about the conviction at trial).

However, if this question were preserved, we would find the circuit court acted within its discretion in admitting evidence of the 1983 sexual assault under Rule 404(b), SCRE because Victim 2's testimony was relevant to establish Gadson's identity as the perpetrator of Victim's attack as well as his modus operandi. *See State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) ("The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion."). Both victims were young, white, tall, and slender females. Both victims were sexually assaulted on dark dirt roads in the same Lowcountry community. In both sexual assaults, Gadson performed oral sex on the victims before vaginally raping them. Victim was raped at gunpoint after her boyfriend was shot, and in perpetrating Victim 2's sexual assault, Gadson twice threatened to "blow her brains out."

Other—more unique—characteristics of the separate sexual assaults support admissibility: (1) Gadson apologized to Victim 2 after he raped her; Victim testified her assailant also apologized to her and (2) after raping Victim 2, Gadson asked her if she enjoyed it; similarly, someone, whom Victim believed to be Gadson, called Victim a few months after her sexual assault and asked her if she

was the girl who was raped and whether she enjoyed it. Finally, in his statement to law enforcement in the 1983 case, Gadson told officers he grew up on Glaze Drive in the Burton area of northern Beaufort County; Glaze Drive is less than two miles from the isolated location of Victim's 1980 attack.

We find these facts establish the necessary "logical connection" between the two sexual assaults for admissibility purposes. *See e.g.*, *State v. Perry*, 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020) (holding that to meet the "logical connection" standard for admission of other crimes under Rule 404(b), "[t]here must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged"); *see also State v. Cotton*, 430 S.C. 112, 113, 844 S.E.2d 56, 57 (2020) (reconfirming "the continued viability of the common scheme or plan exception"); *Perry*, 430 S.C. at 72, 842 S.E.2d at 679–80 (2020) (Kittredge, J., dissenting) (noting "the hallmark of the common scheme or plan exception is that the charged and uncharged crimes are connected in the mind of the actor by some common purpose or motive" and recognizing that with the *modus operandi* exception, "identity is interwoven with common scheme or plan").

Additionally, we find the circuit court acted within its discretion in balancing the probative value of the evidence of the 1983 attack with its prejudicial effect for Rule 403 purposes. *See State v. Brooks*, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct. App. 2019) (reiterating that an "appellate court reviews the circuit court's Rule 403 ruling 'pursuant to the abuse of discretion standard'" and a "decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances" (quoting *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014))).

Accordingly, Gadson's convictions are

AFFIRMED.

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Malinda J. Sullivan-Carter, Appellant,

v.

Sammy Joe Russell Carter, Respondent.

Appellate Case No. 2019-001841

Appeal From Kershaw County
Rosalyn Frierson-Smith, Family Court Judge
Gwendlyne Y. Jones, Family Court Judge

Opinion No. 5980
Heard December 6, 2022 – Filed April 19, 2023

REVERSED IN PART, VACATED IN PART

Miles Edward Coleman, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, and Jacob Daniel Taylor, of Nelson Mullins Riley & Scarborough, LLP, of Denver, Colorado, both for Appellant.

Ryan W. Lane, of The Lane Law Firm, LLC, of Columbia, for Respondent.

THOMAS, J.: In this family court action filed by Malinda J. Sullivan-Carter against Sammy Joe Russell Carter, Malinda appeals, arguing the family court erred in (1) finding a common-law marriage existed; (2) equitably dividing the parties'

property; and (3) awarding Sammy attorney's fees. We reverse in part and vacate in part.

I. FACTS

Malinda filed this "Action to Find Marriage Void" on February 21, 2017. Sammy answered and counterclaimed, seeking, *inter alia*, a finding of a common-law marriage, equitable distribution, and attorney's fees. The family court bifurcated this action, and the first hearings were held in April and August of 2018. During these hearings, the parties litigated the issue of whether a common-law marriage existed.[1]

The parties began living together in 1992 or 1993 and were married in July 1994. At the time, Sammy believed he had been twice-divorced. In 1995, Sammy learned his first marriage was not dissolved. Malinda testified she sought legal counsel and was advised to remarry or to "keep everything separate." Sammy's divorce from his first wife was not final until August 25, 1995. Malinda testified she thereafter asked Sammy if he wanted to get married. According to Malinda, Sammy wanted to "leave it like it is." Malinda testified she continued to keep her affairs separate and considered herself unmarried. Sammy testified he told Malinda he did not want to get married again because they were already married. Sammy claimed he still referred to Malinda as his wife, but when they got into an argument, he told her "to consider herself divorced."

Throughout their purported marriage, the parties lived on property at Rocky Branch Lane, which was titled solely in Malinda's name. Sammy admitted Malinda made the mortgage payments on the Rocky Branch Lane property. In approximately 2003, the parties purchased two contiguous lots on Sessions Road. The installment notes on the lots on Sessions Road were solely in Malinda's name. Sammy claimed they were in Malinda's name because he owed back taxes. Both

[1] Like our Chief Justice of the Supreme Court of South Carolina, we find bifurcation in family court is generally ill-advised. *See Stone v. Thompson* (*Stone II*), 426 S.C. 291, 296, 826 S.E.2d 868, 871 (2019) (Beatty, C.J., concurring) ("I write separately to express my displeasure with the manner of trial of this case. In my view, bifurcation in a domestic relations case should be rare if ever at all.").

parties contributed to the monthly payments on the lots and improvements, such as a well, driveway, and septic tank.

Sammy testified he worked for himself doing carpentry, had an eighth-grade education, and could read "a little bit" of "basic information." He claimed he was in good health and earned approximately $1,600 per month. Sammy testified he considered the money he earned to be his money. According to Sammy, he did not have a bank account. He testified he gave Malinda cash for their shared auto insurance premiums, money toward the Sessions Road property payments, and the electricity bills. He also claimed he sometimes paid for groceries and gave money to Malinda when she needed it. Sammy claimed he received a birthday card from Malinda's mother that was for a "son-in-law." Malinda's mother, Nancy Barber, denied she sent the card. Sammy introduced a layaway receipt indicating he purchased a curio cabinet as a gift for Malinda. The receipt stated, "This is a surprise Christmas gift for wife. Layaway. Hold for delivery . . . ."

Malinda testified she has health problems, including heart issues requiring two open-heart surgeries, chronic obstructive pulmonary disease, bursitis, and a brain aneurysm. She explained she has been on permanent disability since one of her open-heart surgeries. Her financial declaration indicated a monthly income of $1,410. Malinda testified she kept her own, separate bank account. She explained she declared bankruptcy after her open-heart surgery while waiting for her disability to be approved. She testified Sammy was not affected by the bankruptcy.[2] According to Malinda, the parties kept "[p]retty darn separate" finances. Malinda testified Sammy did not give her any money except exactly what was due on the few bills he paid. Malinda introduced her tax returns from approximately 1993-2010, which indicated she filed as Head of Household and claimed her children as dependents. Malinda denied Sammy ever owed back taxes, explaining she offered to help Sammy but he refused to file taxes.

Both parties were named on an auto insurance policy, and Sammy had been covered under Malinda's employer's health insurance for "a few years" when she worked for Mack's Truck Co. According to Malinda, the parties shared the auto insurance policy to get the multi-vehicle discount. The parties' vehicles were always independently, not jointly, owned.

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[2] Sammy acknowledged Malinda had to file for bankruptcy on her own.

Malinda's son, Charlton Richard Carter, III, testified he was thirteen years old and his sister, Megan Ray, was approximately eight years old when Malinda met Sammy. Charlton testified he and Megan both referred to Sammy as Sammy, never as father or daddy. Charlton maintained he lived with his father and had never lived with the parties.

Megan testified her two children called Sammy "Poppy" and he had "an active and ongoing relationship" with the children. Megan testified the parties lived on the Rocky Branch Lane property where Megan grew up. According to Megan, the parties referred to each other as husband and wife and she referred to Sammy as her stepfather. Bill Ray, Megan's husband, testified he had known the parties for fifteen years. Bill maintained Malinda introduced Sammy as her husband when Bill first met the parties. Travis Dinkins, a Rocky Branch Lane neighbor, testified he had known Sammy for twenty years, lived near the parties for eight years, and witnessed their continuous cohabitation. According to Dinkins, the parties held themselves out as being married.

The parties separated numerous times during the alleged marriage for up to a month each time. Sammy admitted that during one separation, he lived with another woman for a month. Malinda testified she stayed with Sammy despite his numerous affairs because she loved him, not as a husband, but as a lover, best friend, and companion.

By order filed November 2, 2018, the family court found a common-law marriage existed between the parties. Malinda did not immediately appeal the order finding a common-law marriage, and the hearing on the remainder of the action, including a divorce and equitable distribution, was held in August 2019 before a different family court judge. The court entered a decree of divorce, equitably distributed the marital estate, and awarded Sammy $4,500 in attorney's fees. This appeal follows.

II. STANDARD OF REVIEW

"Appellate courts review family court matters *de novo*, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson* (*Stone III*), 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011). "Even under de novo review, the longstanding principles that trial judges are in

superior positions to assess witness credibility and that appellants must show the trial judge erred by ruling against the preponderance of the evidence remain applicable." *Stone III*, 428 S.C. at 91–92, 833 S.E.2d at 272; *see Powell v. Dolin*, 437 S.C. 499, 507, 879 S.E.2d 26, 30 (Ct. App. 2022) (citing *Stone III* and applying the de novo standard of review in a family court action litigating the existence of a common-law marriage).

III. LAW/ANALYSIS

A. Appealability

Sammy argues this court lacks jurisdiction to hear the appeal of the 2018 family court order establishing the parties' common-law marriage due to Malinda's failure to (1) immediately appeal the order and (2) list the order in her notice of appeal. We disagree.

Sammy maintains Malinda's failure to immediately appeal the 2018 order divested this court of jurisdiction to hear the appeal. In *Stone v. Thompson*, (*Stone I*), the family court bifurcated the issues of common-law marriage from the divorce and equitable distribution action and found the parties were common-law married. 418 S.C. 599, 601–02, 795 S.E.2d 49, 50–51 (Ct. App. 2016), *rev'd*, 426 S.C. 291, 826 S.E.2d 868 (2019). One of the parties appealed, and this court dismissed the appeal, finding the order was not immediately appealable. *Id*. at 607, 795 S.E.2d at 53. In reversing this court, our supreme court found the order was immediately appealable under our general appealability statute, South Carolina Code Section 14-3-330(1), because it involved the merits of the causes of action.[3] *Stone II*, 426

[3] Section 14-3-330(1) provides for appeal of an intermediate order as follows:

> Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions . . . provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

S.C. Code Ann. § 14-3-330(1) (2017).

S.C. at 292–93, 826 S.E.2d at 868–69. The court in *Stone*, however, did not mandate that an order granting a common-law divorce must be immediately appealed. "Some 'interlocutory' orders are immediately appealable because they affect the merits or a substantial right, but the governing statute does not require an immediate appeal. Other interlocutory orders must be appealed immediately, or the right to appeal is lost." 15 S.C. Jur. *Appeal & Error* § 70 (1992).

Relying on *Stone II*, we conclude the intermediate order finding a common-law marriage existed is immediately appealable under section 14-3-330(1) because it involved the merits of the causes of action. However, we do not find Malinda was either *required* to immediately appeal the order or to specifically list the order in her notice of appeal. *See* § 14-3-330(1) (concluding if a party timely files a notice of appeal from a final judgment, "the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from"); *see generally Lancaster v. Fielder*, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) ("[U]nder Section 14-3-330(1), a party need not challenge the final judgment itself in order to contest an intermediate judgment."); *State v. Cooper*, 342 S.C. 389, 397 n.3, 536 S.E.2d 870, 875 n.3 (2000) (finding the State's failure to list the final judgment in its notice of appeal did not preclude the court's review of intermediate and post-judgment orders).

B. Common-Law Marriage

Malinda argues the family court erred in finding a common-law marriage existed. We agree.

The order establishing the existence of a common-law marriage was filed on November 2, 2018, several months before our supreme court prospectively abolished common-law marriage in *Stone III*.[4] The court relied on (1) the parties'

[4] The court in *Stone III* also changed the evidentiary burden of proof to apply in future common-law marriage litigation. 428 S.C. at 89, 833 S.E.2d at 271. "To sum up, in the cases litigated [after *Stone III*], a party asserting a common-law marriage is required to demonstrate mutual assent to be married by clear and convincing evidence. Courts may continue to weigh the same circumstantial factors traditionally considered, but they may not indulge in presumptions based on cohabitation, no matter how apparently matrimonial." *Id*.

cohabitation for a long period of time after the impediment to their marriage was removed; (2) Sammy's illiteracy; (3) Malinda's filing of tax returns as Head of Household both before and after the impediment was removed; (4) Malinda's failure to change the way she handled her finances after the impediment was removed; (5) Malinda's admission the parties were lovers, best friends, and companions; and (6) Sammy's belief the first marriage ceremony was sufficient after the impediment was removed.

In finding the existence of a common-law marriage, the family court relied on a probate action, *Campbell v. Christian*, 235 S.C. 102, 110 S.E.2d 1 (1959), *abrogated by Stone v. Thompson* (*Stone III*), 428 S.C. 79, 833 S.E.2d 266 (2019), and found this case had similar facts because the alleged common-law spouse in *Campbell* was illiterate. We find *Campbell* distinguishable.

> Campbell married Mattie Grey. They had no children.
>
> While married to Mattie, Campbell had illicit relation with Beulah Poole, an illiterate, ignorant girl; and on November 18, 1921, she bore him a child. He was then forty-five, she fourteen.
>
> On January 11, 1923, Mattie having died, Campbell married her niece, Gertrude. One child, Cornelia, was born to them on November 16, 1923. During this marriage, Campbell's relations with Beulah continued, with the result that she had two more children by him, one on January 28, 1925, the other on January 18, 1928. On December 10, 1927, he divorced Gertrude . . . .
>
> About a year after the divorce, Beulah came into his home and took the name of Campbell, and they lived together for more than twenty-four years, during which five children were born to them, one in 1931, one in 1932, one in 1935, one in 1938, and one in 1943. In the spring of 1954[,] he deserted her and moved to another house in the city of Anderson.

235 S.C. at 105, 110 S.E.2d at 2–3.

In finding a common-law marriage existed, the court explained,

> There is in the record before us considerable evidence that from the time that Campbell took Beulah into his home, a year or so after his divorce from Gertrude, he and she lived together as husband and wife, and that they were so recognized in the community. An elderly neighbor, who had known Campbell throughout the latter's life, testified that 'they lived openly as husband and wife'; that 'he carried the children around with him and they went by the name of Campbell and went to school under the name of Campbell'; and that the general public considered them as man and wife. One of Campbell's sons testified, without objection, that when strangers came to the house Campbell, after introducing himself, would introduce Beulah as his wife. His daughter Myrtis testified that during the many years that Campbell and Beulah lived together she visited in their home and understood that they were married; and that the people of the community knew them as man and wife.

Id. at 106, 110 S.E.2d at 3. The court also noted that the birth certificates of the children born in 1921 and 1925 indicated either no father or Campbell as the father, but not married. *Id*. However, the birth certificates of the children born in 1928, 1935, and 1943 named both Campbell and Beulah as parents and indicated the parents were married. *Id*. at 107, 110 S.E.2d at 3. The court noted that "[t]hroughout the record of this case Beulah appears as a woman illiterate, uneducated, and of childlike simplicity." *Id*. at 108, 110 S.E.2d at 4. The court found "there was ample evidence . . . to support the conclusion that after the barrier to their marriage had been removed by Campbell's divorce from Gertrude, he and Beulah entered into a new mutual agreement whereby their previously illicit relationship was terminated and a valid common-law marriage established." *Id*. at 109, 110 S.E.2d at 5.

Here, although Sammy claimed to be somewhat illiterate, there is evidence he was educated through the eighth grade, he was financially independent as a carpenter/handy man, and he recognized documents handed to him to identify in

court. We find the family court erred in relying solely on *Campbell*. Under our *de novo* review, we find Sammy failed to prove a common-law marriage.

In general, "[a] common-law marriage is formed when two parties contract to be married." *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005). There must be mutual assent to the marriage: "the intent of each party to be married to the other and a mutual understanding of each party's intent." *Id*. Cohabitation is a factor, but it is not alone dispositive. *Id*. When "'apparently matrimonial' cohabitation" exists, "a rebuttable presumption arises that a common-law marriage was created." *Id*. However, this rebuttable presumption does not exist when an impediment to marriage initially exists. *Id*. at 624, 620 S.E.2d at 62. The court in *Callen* explained:

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital. For the relationship to become marital, "there must be a new mutual agreement either by way of civil ceremony or by way of recognition of the illicit relation and a new agreement to enter into a common[-]law marriage."

Id. (quoting *Kirby v. Kirby*, 270 S.C. 137, 141, 241 S.E.2d 415, 416 (1978); *see Yarbrough v. Yarbrough*, 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct. App. 1984) ("In order for a common[-]law marriage to arise, the parties must agree to enter into a common[-]law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties.").

In this case, we do not find evidence of a new, mutual agreement by the parties after Sammy's 1995 divorce. To the contrary, Malinda requested a new ceremony, and Sammy's response was inconsistent at best when he alternately told Malinda he did not want to get married again because they were already married, but other times told her "to consider herself divorced." Sammy's possible misunderstanding of the parties' status does not equate to a mutual agreement. *See Callen*, 365 S.C.

at 626, 620 S.E.2d at 63 ("A party need not understand every nuance of marriage or divorce law, but he must at least know that his actions will render him married as that word is commonly understood."); *see generally Stone III*, 428 S.C. at 89, 833 S.E.2d at 271 ("A party is not required to show his opponent had legal knowledge of common-law marriage; ignorance of the law remains no excuse. He must demonstrate that both he and his partner mutually intended to be married to one another . . . .").

We also find the reliance by the family court on Malinda's tax filings as supporting a common-law marriage due to her filing as Head of Household with either one or two dependent children was error. Tax filing as Head of Household indicates an unmarried status. *See* Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 Tax L. Rev. 367, 367 (2018) ("Since 1951, unmarried taxpayers with qualifying dependents—usually children—have been able to claim the [H]ead of [H]ousehold filing status . . . ."); *Powell*, 437 S.C. at 511–12, 879 S.E.2d at 33 (considering a party's filing of tax returns as Head of Household as a factor "decidedly against a finding of common[-]law marriage"). Although Sammy presented some testimony that the parties held themselves out to a neighbor and Malinda's son-in-law as married, the documentary evidence showed a contrary intent by Malinda. She kept a separate bank account, filed taxes as Head of Household, was the sole owner of the alleged "marital" residence, was the only party listed on its mortgage, filed bankruptcy as an individual, and owned the Sessions Road properties exclusively in her name. We find Sammy's documentary evidence, which included a receipt for a curio cabinet and the seller's letters to the parties regarding the Sessions Road properties, failed to overcome the presumption that the relationship remained non-marital after the impediment was removed.

C. Equitable Distribution

Malinda argues the court erred in equitably distributing property that was non-marital. We agree.

Because no common-law marriage existed between the parties, the family court lacked jurisdiction to equitably apportion Malinda's non-marital property. *See* S.C. Code Ann. § 20-3-630(B) (2014) ("The court does not have jurisdiction or authority to apportion non[-]marital property.").

D. Attorney's Fees

Malinda argues the family court erred in awarding Sammy $4,500 in attorney's fees. Because we reverse the finding of a common-law marriage, we likewise reverse the award of attorney's fees. *See Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) ("[S]ince the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered."); *Stone III*, 428 S.C. at 94, 833 S.E.2d at 274 ("[B]ecause our decision constitutes a reversal on the merits, we likewise reverse the family court's award of attorney's fees.").

IV. CONCLUSION

Based on the foregoing, we reverse the finding of a common-law marriage and the award of attorney's fees. We vacate the equitable distribution award.

REVERSED IN PART, VACATED IN PART.

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tammy C. Richardson, Respondent,

v.

Halcyon Real Estate Services, LLP and McCabe, Trotter & Beverly, P.C., Defendants,

of which McCabe, Trotter & Beverly, P.C. is the Appellant.

Appellate Case No. 2019-000671

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5981
Heard June 8, 2022 – Filed April 19, 2023

DISMISSED

M. Dawes Cooke, Jr., John William Fletcher, and Justin Paul Novak, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Robert P. Wood, of Rogers Townsend LLC, of Columbia; and Joshua Robert Hinson, of Wolfe, Campbell, Gunst & Hinson, PLLC, of Charlotte, North Carolina, all for Appellant.

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mount Pleasant; and Justin S. Kahn, of Kahn Law Firm, LLP, of Charleston, both for Respondent.

VINSON, J.: McCabe, Trotter & Beverly, P.C. (MTB) appeals the circuit court's order (the Sanctions Order) imposing sanctions on MTB for deposition misconduct. MTB argues (1) the Sanctions Order is immediately appealable and (2) the circuit court erred by imposing sanctions when MTB's counsel did not violate Rule 30(j)(8), SCRCP,[1] and had legitimate reasons for ending one of the depositions. MTB requests this court reverse the Sanctions Order and order Tammy C. Richardson to return the money MTB paid as a sanction. We dismiss MTB's appeal because the Sanctions Order is not immediately appealable.

FACTS AND PROCEDURAL HISTORY

This case arises out of a foreclosure action brought by Southern Magnolia Homeowners' Association (Southern Magnolia) against Richardson for unpaid homeowners' association (HOA) dues. Richardson filed a third-party complaint against MTB—the firm Southern Magnolia retained to pursue collection of Richardson's unpaid HOA dues—and Halcyon Real Estate Services, LLC (Halcyon)—Southern Magnolia's property management company. The circuit court severed Richardson's third-party action from the pending foreclosure action. This appeal concerns Richardson's action against MTB.

During discovery, Richardson deposed an MTB employee and a former MTB employee (collectively, Deponents). Following the depositions, Richardson filed a motion for sanctions against MTB pursuant to Rule 37, SCRCP, for improper deposition conduct. Relying primarily on *In re Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001), Richardson alleged MTB's counsel discussed previously produced documents presented during depositions with Deponents in violation of Rule 30(j)(8) and engaged in witness coaching. Richardson further alleged MTB's counsel improperly instructed one of Deponents

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[1] Rule 30(j)(8) provides, "Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document."

to leave her deposition early. Following a hearing, the circuit court granted Richardson's motion for sanctions.

The circuit court ordered the parties to reconvene Deponents' depositions and that Deponents answer questions concerning the matters they discussed off the record with MTB's counsel and Stephanie Trotter, an MTB attorney, in the prior depositions. The court prohibited MTB's counsel from instructing Deponents not to respond to questions regarding these off-the-record conferences and ordered that MTB's counsel cease and desist from the prohibited behavior discussed in the order. In addition, the court ordered that Trotter be deposed and instructed her to answer questions about the off-the-record conferences. Finally, the circuit court ordered MTB to pay for the costs of Deponents' reconvened depositions and of Trotter's deposition and for the attorney's fees and costs associated with Deponents' prior depositions. MTB filed a motion for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

LAW AND ANALYSIS

MTB argues the monetary sanctions imposed under the Sanctions Order are immediately appealable. We disagree.

The determination of whether an award of attorney's fees and costs as a discovery sanction under Rule 37(b)(2), SCRCP, is immediately appealable is a matter of first impression in South Carolina.

Rule 30(j)(9), SCRCP, provides any violation of Rule 30(j), SCRCP, for deposition misconduct may subject the violator to sanctions under Rule 37, SCRCP.

> In South Carolina, our judges have broad discretion in addressing misbehavior during depositions. *See* Rule 37, SCRCP. In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of

> the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. *Id.* Among the costs a judge may deem appropriate could be those incurred for future judicial monitoring of depositions or payment for the retaking of depositions.

In re Anonymous, 346 S.C. at 194, 552 S.E.2d at 18; *see* Rule 37(b)(2), SCRCP.[2]

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code (2017)]." *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Section 14-3-330 provides that only final judgments and certain interlocutory orders are immediately appealable. "If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory." *Mid-State Distribs, Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). "An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709.

As established by existing South Carolina case law, the portion of the Sanctions Order directing the parties to reconvene depositions is interlocutory and not immediately appealable under section 14-3-330. *See Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under [section 14-3-330]."); *see also Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) ("[T]o challenge the specific rulings of . . . discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.").

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[2] "Rule 37[, SCRCP, uses] the language of the Federal Rule with minor changes." Rule 37, SCRCP, note. The differences are not relevant to this issue.

Similarly, we find the award of attorney's fees and costs under Rule 37(b)(2) is interlocutory and not immediately appealable.[3] Although the circuit court set the amount of the monetary sanctions, the Sanctions Order did not constitute a final judgment. *Cf. Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) ("A final judgment is an order that 'dispose[s] of the cause, . . . reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.'" (alterations in original) (quoting *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942))). For an interlocutory order to be immediately appealable, it must "involve[] the merits of the case or affect[] a substantial right." *Burkey*, 398 S.C. at 37, 726 S.E.2d at 230. We conclude the award of attorney's fees and costs as a Rule 37(b)(2) discovery sanction neither involves the merits of the case nor affects a substantial right and is therefore not immediately appealable. *Cf. Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) ("An order 'involves the merits,' as that term is used in [s]ection 14-3-330(1)[,] and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." (alterations in original) (quoting *Ex. Parte Capital U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467-68)); *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709 (holding an "order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and

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[3] While no cases in South Carolina's jurisprudence address the specific issue of the appealability of monetary sanctions under Rule 37(b), federal courts have determined that orders imposing attorney's fees and costs on a party under Rule 37(b) of the Federal Rules of Civil Procedure are interlocutory and not immediately appealable. *See, e.g.*, *David v. Hooker, Ltd.*, 560 F.2d 412, 416 n.6 (9th Cir. 1977) ("Normally, the imposition of the [Federal Rules of Civil Procedure] Rule 37(b)(2) sanction of attorney's fees and expenses upon a non-complying party is considered to be interlocutory."); *E. Maico Distribs., Inc. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981) ("[S]anctions for violation of discovery orders are usually considered interlocutory and not immediately appealable."); *see also* 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.23 (2d ed. 1992) ("Sanctions imposed for violation of discovery orders might seem plausible candidates for appeal on the theory that the sanction is severable from the continuing proceedings. The opportunities for appeal, however, have generally been limited to sanctions that conclude the proceeding or that involve nonparties.").

prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action'" (quoting § 14-3-330(2))). Based on the foregoing, we find the award of attorney's fees and costs under Rule 37(b)(2) is interlocutory and not immediately appealable.

Moreover, as our supreme court stated in *In re Anonymous*, "Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions." 346 S.C. at 194, 552 S.E.2d at 18. Allowing a party to immediately appeal an interlocutory order imposing sanctions under Rule 37(b) for deposition misconduct would further delay the process and drive up costs.

We further find MTB's argument that the Sanctions Order is immediately appealable because the circuit court's prohibition on conduct in violation of Rule 30(j)(8) was in the nature of an injunction is without merit. *Cf. Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("An injunction is an equitable remedy that may be used to require a party to perform an action."). The circuit court found MTB's counsel's deposition conduct violated the discovery rules. If MTB's counsel engaged in the same conduct in Deponents' reconvened depositions, it is logical to conclude the circuit court would have imposed additional discovery sanctions on MTB.

Accordingly, we hold the Sanctions Order is not immediately appealable.[4]

CONCLUSION

For the foregoing reasons, the appeal is

DISMISSED.

WILLIAMS, C.J., and KONDUROS, J., concur.

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[4] In light of our disposition of the appeal, we decline to address MTB's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).