The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

The South Carolina Judicial Department is conducting a review of the current Pilot Program for Electronic Filing in the Court of Common Pleas. As part of this review, the Judicial Department is seeking comments from attorney E-Filers.

Attorneys desiring to submit written comments regarding the E-Filing Pilot Program may do so by emailing their comments as an attached .pdf file to: efilecomments@sccourts.org. Written comments must be submitted on or before June 10, 2016.

Written comments should identify the attorney's practice area(s) and any county or counties in which the attorney has submitted filings through the E-Filing System during the Pilot Program. Attorneys are encouraged to include comments from staff members who have assisted attorneys in E-Filing during the Pilot.

Columbia, South Carolina
May 25, 2016

The Supreme Court of South Carolina

Dedication of the Jean Hoefer Toal Conference Room

Tuesday, May 17, 2016

Retired Chief Justice Jean Hoefer Toal served the people of South Carolina for more than twenty-seven years as a member of the Supreme Court, including nearly sixteen years as its Chief Justice.

By our unscientific, yet likely accurate extrapolation, she participated in nearly 700 Agenda meetings, and at least an equal number of meetings with commissions, judges, and visiting dignitaries, all taking place in the Court's Conference Room. It is unlikely if any previous, present, or future member of this Court has had, or will have, a more significant official presence in the Court's Conference Room.

Thus, by my authority as Chief Justice, and with the unanimous approval of the full Court, I hereby declare that the Supreme Court of South Carolina's Court Conference Room, will henceforth be know as the "Jean Hoefer Toal Conference Room" in recognition of her dedicated and impactful service to this Court and to the people of South Carolina.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
May 17, 2016

The Supreme Court of South Carolina

In the Matter of Christopher W. Del Rossi, Petitioner

Appellate Case No. 2016-000946

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

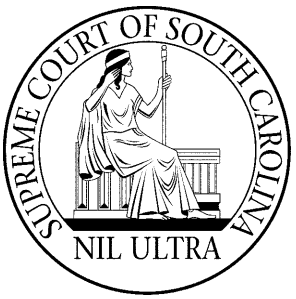
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

May 18, 2016



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 25, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford,
Appellants,

v.

Scott L. Robinson and Johnson McKenzie & Robinson,
LLC, Respondents.

Appellate Case No. 2013-001452

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinions for the opinions previously filed in this matter.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ Jean H. Toal A.J.

Columbia, South Carolina
May 25, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford, Appellant,

v.

Scott L. Robinson and Johnson McKenzie & Robinson, LLC, Respondents.

Appellate Case No. 2013-001452

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge

Opinion No. 27572
Heard December 10, 2014 – Refiled May 25, 2016

REVERSED AND REMANDED

Andrew K. Epting, Jr. and Michelle Nicole Endemann, both of Andrew K. Epting, Jr., L.L.C., of Charleston, for Appellant.

Susan Taylor Wall and Henry Wilkins Frampton, IV, both of McNair Law Firm, P.A., of Charleston, for Respondent Scott Lamar Robinson; Warren C. Powell, Jr., of Bruner Powell Wall & Mullins, L.L.C., of Columbia, for Respondent Johnson McKenzie & Robinson, L.L.C.

JUSTICE BEATTY: In this legal malpractice case, Stokes-Craven Holding Corporation d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the circuit court's order granting summary judgment in favor of Scott L. Robinson and his law firm, Johnson, McKenzie & Robinson, L.L.C., (collectively "Respondents") based on the expiration of the three-year statute of limitations. Stokes-Craven contends the court erred in applying this Court's decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005),[1] and holding that Stokes-Craven knew or should have known that it had a legal malpractice claim against its trial counsel and his law firm on the date of the adverse jury verdict rather than after this Court affirmed the verdict and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). We overrule *Epstein*, reverse the circuit court's order, and remand the matter to the circuit court for further proceedings consistent with this opinion.

I. Factual / Procedural History

Donald C. Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used truck and discovered the vehicle had sustained extensive damage prior to the sale. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act (the "Dealer's Act"), violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Odometer Act. Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. *Id.* at 35, 691 S.E.2d at 141-42. Stokes-Craven was represented by Scott L. Robinson of Johnson, McKenzie & Robinson, L.L.C. throughout the trial proceedings. On August 16, 2006, after a three-day trial, the jury found in favor of Austin and awarded $26,371.10 in actual damages and $216,600 in punitive damages. *Id.* at 35, 691 S.E.2d at 142.

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[1] *See Epstein*, 363 S.C. at 381, 610 S.E.2d at 820 (rejecting the continuous-representation rule and affirming the dismissal of a legal malpractice case based on the expiration of the statute of limitations on the ground the three-year limitations period began to run on the date that the adverse verdict was entered against claimant).

Austin and Stokes-Craven filed cross-appeals to this Court. Although Robinson was listed as counsel of record on the appellate pleadings, Stokes-Craven had employed attorneys with Young, Clement, Rivers, L.L.P. to represent it during the course of the appeal. On March 8, 2010, a majority of this Court affirmed the jury's verdict and held that: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of $26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Odometer Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of $216,000 in punitive damages. *Id.* at 59, 691 S.E.2d at 154. This Court issued the remittitur on April 21, 2010.[2]

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Respondents, alleging negligence and breach of fiduciary duty in trial counsel's representation of Stokes-Craven both prior to and during the trial. Specifically, Stokes-Craven alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses; obtain copies of the plaintiff's experts' curricula vitae; prepare a pretrial brief, trial exhibits, voir dire, and requests to charge; preserve certain evidentiary issues for appellate review; notify Stokes-Craven's insurance carrier about the claims; and settle the case prior to the jury verdict. Based on these purported errors, Stokes-Craven claimed the jury returned the adverse verdict. Respondents generally denied the allegations and asserted several defenses, including that Stokes-Craven's claims were barred by the expiration of the three-year statute of limitations.

Subsequently, Respondents filed motions for summary judgment. Stokes-Craven filed a cross-motion for partial summary judgment and a motion to compel discovery of Respondents' professional liability policy applications for the years 2002 through 2012, all correspondence between Respondents and their malpractice insurer, and the billing records for computer research from any research provider used by Respondents for the years 2003 through 2006.

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[2] In a related appeal, this Court (1) affirmed the circuit court's order that entered judgment in favor of Austin for his requested trial-level fees, and (2) remanded the matter to the circuit court to determine what amount of appellate and post-appellate fees should be awarded to Austin. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013).

Following a hearing, the circuit court granted Respondents' motions for summary judgment on the ground Stokes-Craven's legal malpractice claim was barred by the expiration of the statute of limitations. In so ruling, the court concluded that Dennis Craven, as agent of Stokes-Craven, had notice of the claim on August 16, 2006, the date of the jury's adverse verdict. Referencing portions of Craven's deposition testimony, the court determined that Craven's testimony as a whole indicated that he was aware that he might have a legal malpractice claim against Respondents because Craven: knew at the time of trial that counsel had not contacted and interviewed crucial witnesses prior to trial; was not shown the defendants' interrogatory responses until the day of trial; had not been prepared for cross-examination; and knew that counsel failed to settle the case despite the admission by Stokes-Craven that it "had done something wrong." The court also noted that Craven acknowledged the jury's verdict presented a "serious problem" for Stokes-Craven. Citing *Epstein*, the court found that Craven's knowledge of counsel's "shortcomings" and other "actionable errors" constituted evidence that Craven knew at the time of the verdict that he might have a claim against trial counsel.

The court also held that the doctrines of equitable estoppel and equitable tolling were inapplicable. In terms of equitable estoppel, the court found "nothing in the record to support the conclusion that [Respondents] did anything to mislead Stokes-Craven" or that Robinson "engaged in any conduct to prevent Stokes-Craven from filing a malpractice action." The court further found Stokes-Craven could not invoke equitable tolling because it failed to present evidence of an "extraordinary event" beyond its control that prevented it from timely filing its legal malpractice action.

Because the court granted Respondents' motions for summary judgment, it noted that it was unnecessary to rule on Stokes-Craven's motion to compel discovery. However, in the event the decision on summary judgment was overturned on appeal, the court proceeded to rule on the motion. Initially, the court found the correspondence between Respondents and their malpractice carrier was not discoverable as it was prepared in anticipation of or during litigation. The court further determined that Stokes-Craven had not established the need for this information. Although the court ruled Respondents' professional liability policy applications were discoverable, the court stated that any "issues of ultimate admissibility" would be left to the trial judge.

Stokes-Craven appealed the circuit court's order and filed a motion to argue against precedent pursuant to Rule 217, SCACR. This Court granted Stokes-Craven's motion to argue against *Epstein*.

II. Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

III. Discussion

A. Commencement of the Statute of Limitations

Stokes-Craven asserts the circuit court erred in holding as a matter of law that the statute of limitations began to run on the date of the adverse jury verdict against Stokes-Craven. Contrary to the circuit court's characterization of Craven's testimony, Stokes-Craven notes that Craven "repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial." Based on this testimony, Stokes-Craven maintains Craven did not know or could not have known that it might have a claim for legal malpractice on the date the verdict was rendered.

Stokes-Craven further argues the court erred in relying on *Epstein* as it is not only factually distinguishable from the instant case but is no longer viable precedent. Stokes-Craven requests that this Court overrule its decision in *Epstein* and adopt a bright-line rule that the statute of limitations in a legal malpractice case does not commence until the remittitur has been issued in the underlying lawsuit.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe,* 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (quoting *Summer v. Carpenter,* 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); *see Berry v. McLeod,* 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); *see* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Id.*

"Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.* (citations omitted). "Another purpose of a statute of

limitations is to protect potential defendants from protracted fear of litigation." *Id.* "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.* (citation omitted).

1. *Epstein*

As noted by the circuit court and the parties, the key case in the instant dispute is *Epstein*. In *Epstein*, a jury returned a verdict for a wrongful death and survival action on February 18, 1998 against Dr. Franklin Epstein in a medical-malpractice action that arose out of the death of one of his patients following spinal surgery. *Epstein*, 363 S.C. at 374, 610 S.E.2d at 817. David Brown represented Epstein throughout the trial and filed a notice of appeal after the jury verdict. *Id.* at 374-75, 610 S.E.2d at 817. Although Brown remained counsel of record during the appeal, Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. *Id.* at 375, 610 S.E.2d at 817. The Court of Appeals affirmed the verdicts on July 31, 2000 in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). *Id.* This Court denied Epstein's petition for a writ of certiorari in January 2001. *Id.*

On January 9, 2002, Epstein filed a legal malpractice claim against David Brown in which he alleged breach of fiduciary duty, negligence, and breach of contract. *Epstein*, 363 S.C. at 375, 610 S.E.2d at 817. In terms of specific deficiencies, Epstein asserted that Brown was negligent in failing to conduct an adequate investigation, failing to advise him to settle, forgetting to call expert witnesses, and adopting a defense contrary to Epstein's medical opinion. *Id.* at 376, 610 S.E.2d at 818. Brown moved for summary judgment on the ground that Epstein failed to commence the action within the applicable three-year statute of limitations. *Id.* at 375, 610 S.E.2d at 817. The circuit court found the majority of the damages alleged by Epstein stemmed from the adverse jury verdict, and the damages to Epstein's reputation resulting from the publicity were all damages suffered at the time of the verdict. *Id.* at 376, 610 S.E.2d at 818. The court concluded that, although these damages might have been mitigated by a successful appeal, they could not have been wholly eliminated by a reversal of the jury's verdict. *Id.* Accordingly, the circuit court ruled the statute of limitations began to run, at the latest, on February 18, 1998, the date of the jury's verdict. *Id.* at 375, 610 S.E.2d at 817. As a result, the court found the action was untimely and granted Brown's motion for summary judgment. *Id.* Epstein appealed the circuit court's order to this Court. *Id.*

Justice Waller, who was joined by Justices Moore and Burnett, affirmed the circuit court's order. *Epstein*, 363 S.C. at 383, 610 S.E.2d at 821-22. In reaching this decision, the majority declined to adopt the continuous-representation rule, which permits the statute of limitations to be tolled during the period an attorney continues to represent the client on the same matter out of which the alleged legal malpractice arose. *Id.* at 380, 610 S.E.2d at 820. Instead, the majority chose to strictly adhere to the discovery rule set forth by the Legislature. *Id.*

The majority explained its decision by comparing a legal malpractice action to a medical malpractice action. *Epstein*, 363 S.C. at 377, 610 S.E.2d at 819. Despite the "very legitimate policy rationales in favor of adoption of a continuous treatment rule" in medical malpractice cases, the majority noted that our appellate courts had declined to adopt it because the "Legislature [had] set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability." *Id.* at 378, 610 S.E.2d at 819. The majority also noted that "numerous jurisdictions" had refused to adopt the continuous-representation rule. *Id.* at 379, 610 S.E.2d at 819.

Additionally, the majority disagreed with Epstein's alternative argument that, absent applying the continuous-representation rule, the limitations period did not begin to run until the Court denied certiorari in January 2001. *Epstein*, 363 S.C. at 380-81, 610 S.E.2d at 820. The majority explained that "those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal." *Id.* at 380, 610 S.E.2d at 820.

The majority also rejected Epstein's argument that appealing the ruling in the medical malpractice action against him while filing a legal malpractice claim against Brown would cause him to argue inconsistent positions in two different courts. *Epstein*, 363 S.C. at 381, 610 S.E.2d at 821. The majority maintained that "there are measures which may be taken to avoid such inconsistent positions." *Id.* at 381-82, 610 S.E.2d at 821.

Ultimately, the majority applied the discovery rule and found that Epstein "clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." *Epstein*, 363 S.C. at 382, 610 S.E.2d at 821. The majority reasoned that the damages claimed by Epstein were "largely those to his reputation" and the claims he raised in his Complaint were "primarily related to trial and pre-trial errors." *Id.* The majority also noted that trial counsel conceded

during oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in." *Id.* at 382-83, 610 S.E.2d at 821. Finally, the majority referenced a letter from Epstein to his appellate attorney, Steven Groves, in which Epstein indicated that he would not deal with Brown and that he believed Brown's representation "was so egregiously lacking." *Id.* at 383, 610 S.E.2d at 821. The majority concluded that it was "patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." *Id.*

Then-Chief Justice Toal dissented as she would have adopted "a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Epstein*, 363 S.C. at 383, 610 S.E.2d at 822. Although Justice Toal agreed with the application of the discovery rule, she disagreed with the majority's holding that Epstein should have known of the existence of a cause of action arising from Brown's alleged malpractice at the conclusion of the trial. *Id.* at 384, 610 S.E.2d at 822. Instead, Justice Toal found "there was no evidence that [Epstein] [was] injured as a result of [Brown's] alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court." *Id.*

Chief Justice Pleicones concurred in the majority's rejection of the continuous-representation rule and the retention of the discovery rule; however, he dissented as he believed that Brown should have been estopped from asserting the statute of limitations as a defense. *Epstein*, 363 S.C. at 384, 610 S.E.2d at 822. Justice Pleicones pointed out that: (1) Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge and, in turn, affected the jury's fact-finding role; and (2) Brown remained nominally as counsel to Epstein throughout the appeal of the verdict. *Id.* Justice Pleicones concluded that Brown's representations and his presence on the appellate team "reasonably induce[d] Epstein's forbearance." *Id.* at 384-85, 610 S.E.2d at 822.

2. Propriety of *Epstein*

Our appellate courts for the past eleven years have continued to rely on the decision in *Epstein.*[3] However, *Epstein* is not without its critics. *See* James L. Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls−The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L. Rev. 643 (2006). In this article, the author identified what he perceived to be fundamental flaws in the majority's analysis in *Epstein*. Specifically, the author found that the majority's reasoning and holding were questionable "because [of]: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the *Epstein* court relied, and (3) *Epstein*'s operative facts." *Id.* at 654.

Although the author distinguished the secondary authority relied on by the majority and noted that *Epstein* was limited to its facts, his primary challenge was to the majority's reliance on the statute of repose in medical malpractice actions. Specifically, the author stated that:

> neither section 15-3-535 nor section 15-3-530(5) create a statute of repose governing legal malpractice actions. Instead, those sections create a general three-year statute of limitations in legal malpractice actions. This distinction may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit" for legal malpractice actions which is observed in medical malpractice actions.

Id. at 656 (footnotes omitted). In addition to these distinctions, the author opined that the adoption of the "continuous representation rule would protect the sanctity of the attorney-client relationship" because a client should be able to rely on his attorney's advice, particularly where the attorney suggests filing an appeal of the underlying lawsuit. *Id.* at 658.

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[3] *See, e.g.*, *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (citing *Epstein* and affirming the circuit court's ruling that legal malpractice claims were barred by the expiration of the statute of limitations); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (citing *Epstein* and affirming grant of summary judgment in favor of attorneys in legal malpractice action based on the expiration of the statute of limitations).

Notably, *Epstein* represents a minority position in this country as the majority of courts in other jurisdictions have adopted the continuous-representation rule. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice*, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule; identifying *Epstein* as within the minority position); George L. Blum, Annotation, *Attorney Malpractice−Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, § 4 (2001 & Supp. 2015) (discussing state cases that have applied or found inapplicable the continuous-representation doctrine); *see also* George L. Blum, Annotation, *When Statute of Limitations Begins to Run on Action Against Attorney Based upon Negligence−View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission−Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs*, 14 A.L.R. 6th 1, § 8 (2006 & Supp. 2015) (collecting state and federal cases that applied or found inapplicable the discovery rule and highlighting *Epstein*).

The facts of the instant case present us with an appropriate opportunity to address the criticism and conflict that has arisen out of our decision in *Epstein*. As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this rule, all legal malpractice actions must be commenced within three years after the claimant *knew or* by the exercise of reasonable diligence *should have known* that he or she had a cause of action. *See* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.").

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,[4] and (2) establishing the four requisite elements of his or her claim. Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) ("Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause

[4] "A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud." 1 S.C. Jur. *Attorney & Client*, § 69 (Supp. 2016) (citing section 15-3-530 of the South Carolina Code).

of action that has accrued. Thus, 'accrual' means the existence of a legally cognizable cause of action.").

As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate of a will or a divorce. Further complicating the determination of when a cause of action accrues is if the claimant pursues an appeal of an unfavorable ruling, such as in the instant case.

Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system. Clearly, if a client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions.

While the legal bases and policy reasons for adopting the continuous-representation rule are persuasive, we find its application may be problematic because we can foresee factual scenarios where it is unclear exactly at what point trial counsel ends its representation. Moreover, we acknowledge the merit of the remittitur rule espoused by the dissent in *Epstein* as it offers a clear and definitive date for the accrual of a legal malpractice cause of action. We, however, decide to adopt a position that is analogous to the remittitur rule but is strictly based on existing appellate court rules.

Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal as it states:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding *with matters not affected by the appeal*.

Rule 205, SCACR (emphasis added). Rule 241(a), a corollary rule that governs matters stayed on appeal, provides:

> As a general rule, the service of a *notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision*. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), SCACR (emphasis added).[5]

As previously stated, a legal malpractice cause of action is predicated on an injury or damage to a client caused by an alleged breach of duty by the client's

[5] As a general rule, an appeal acts as an automatic stay. However, exceptions to this rule are found in Rule 241(b), in statutes, court rules, and case law. *See* Rule 241(b), SCACR (providing eleven exceptions to the general rule that are found in statutes, court rules, and case law); Rule 246, SCACR (identifying rules regarding the stay of a sentence in a criminal case); *see, e.g.,* S.C. Code Ann. § 18-9-130(A)(1) (2014) ("A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.").

Further, after the service of a notice of appeal, any party may move for the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court for an order lifting the automatic stay in cases that involve the general rule. Rule 241(c)(1), SCACR; *see Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 138, 742 S.E.2d 867, 868 (2013) (An "action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court. The parties must first seek to have the matter remanded to the lower court.").

attorney. This predicate injury or damage may take many forms, including one that stems from a favorable court ruling or successful yet insufficient award.[6]

However, the case that we address today is a legal malpractice cause of action that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice. In that particular scenario, there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling. Thus, if a client appeals the matter in which the alleged malpractice occurred, any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending.

Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over "*matters affected by the appeal*," which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a)."); *Black's Law Dictionary* 68 (10th ed. 2014) (defining "affect" as "to produce an effect on; to influence in some way").

Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues triggering the statute of limitations.[7]

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[6] *See, e.g.*, *Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, 390 S.C. 275, 701 S.E.2d 742 (2010) (affirming grant of summary judgment in favor of law firm for legal malpractice action arising out law firm's alleged failure to settle dispute prior to arbitration); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997) (analyzing legal malpractice action arising out of attorney's alleged failure to include the South Carolina Department of Highways and Public Transportation as a defendant in plaintiff's settlement for injuries sustained during a car accident).

[7] Generally, this will occur when the appellate court issues the remittitur. *See Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate [c]ourt has exclusive jurisdiction over the appeal, with the exception of

This position is consistent with the discovery rule as a client either knows or should know that a cause of action arises out of his attorney's alleged malpractice if the appeal is unsuccessful. *See Dean v. Ruscon Corp*., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."). In other words, a client knows or should know that he or she has a legally cognizable cause of action for legal malpractice at the conclusion of the appeal.

While this approach may be perceived as impermissibly requiring a person to have actual knowledge of a potential claim before the statute of limitations begins to run, we find that it is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature. *See Black's Law Dictionary* 1624 (10th ed. 2014) (An objective standard is defined as "[a] legal standard that is based on conduct and perceptions *external to a particular person*." (emphasis added)); *id.* at 1529 (A rule is generally defined as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.").[8]

Our decision warrants overruling *Epstein* because the holding in that case is contrary to Rules 205 and 241, SCACR. In *Epstein*, the Court affirmed the dismissal of a legal malpractice case based on the expiration of the three-year statute of limitations, which the Court found began to run on the date that the adverse verdict was entered against claimant. *Epstein*, 363 S.C. at 383, 610 S.E.2d

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matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.").

[8] We find additional support for our decision in the analogous civil proceeding of Post-Conviction Relief ("PCR"). Similar to a legal malpractice claimant, a PCR applicant is challenging the effectiveness of his or her trial counsel. Notably, a PCR application must be filed within one year after the entry of a judgment of conviction, *or if there is an appeal,* "*within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later*." S.C. Code Ann. § 17-27-45(A) (2014).

at 821. Yet, until the Court of Appeals affirmed the adverse verdict on appeal, there was no damage or harm to claimant for which to establish a claim for legal malpractice.

Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because the stay, pending appeal, was not lifted and Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).[9] Accordingly, we reverse the circuit court's order granting Respondents' motions for summary judgment.

B. Motion to Compel Discovery

Having reversed the circuit court's grant of summary judgment in favor of Respondents, the question becomes whether the court erred in denying a portion of Stokes-Craven's motion to compel. Stokes-Craven claims the circuit court erred in holding that Respondents' communications with their legal malpractice carrier were not discoverable. In particular, Stokes-Craven contends the documents are not protected by the work-product doctrine because they were "prepared in the ordinary course of insurance business" and not in anticipation of litigation. Additionally, Stokes-Craven maintains it has a "substantial need" for these documents and that it is unable to obtain equivalent information by other means.

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

"The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the

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[9] In view of our decision, we need not reach Stokes-Craven's contention that equitable doctrines precluded the application of the statute of limitations. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

requesting party." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); *see* Rule 26(b)(3), SCRCP (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tobaccoville,* 387 S.C. at 294, 692 S.E.2d at 530.

We conclude the circuit court abused its discretion in ruling on Stokes-Craven's motion to compel production of communications between Respondents and their malpractice carrier because there was no evidentiary basis to support its factual conclusions. The court failed to conduct an in camera hearing to review the requested information and stated in its summary ruling that it had "not received a privilege log of these communications." Therefore, we find the court lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation and that Stokes-Craven had a substantial need of the materials in preparation of its case. Accordingly, we direct the circuit court on remand to conduct an in camera hearing, review the requested information, and issue a specific ruling.

IV. Conclusion

This case presents us with an appropriate opportunity to reevaluate our decision in *Epstein*. We now overrule *Epstein.* In doing so, we hold that the statute of limitations for a legal malpractice cause of action may be tolled if the client appeals the matter in which the alleged malpractice occurred. We conclude that this rule is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature.

Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications

between Respondents and their malpractice carrier given there was no evidence to support the court's ruling.

Based on the foregoing, we reverse the circuit court's order and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur. PLEICONES, C.J., concurring in a separate opinion.

CHIEF JUSTICE PLEICONES: I concur in the decision to reverse the trial court's order granting summary judgment, and to reverse the discovery order but write separately because I would adhere to our decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). The majority adopts Justice Toal's dissenting view in *Epstein*, but shrouds its decision in discussions of appellate court rules and practices. As explained below, I would not create a special statute of limitations for legal malpractice cases that is tied to the status of an appeal.[10]

First, I believe the majority unnecessarily expands the meaning of the term "matters affected by the appeal" under Rule 205, SCACR, to include inchoate and speculative collateral lawsuits. As this Court has explained, Rule 205 provides that an appeal deprives the trial court of jurisdiction to modify issues decided by that court which are the subject of a pending appeal, *e.g.*, *Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1985), or to entertain a settlement agreement, *e.g.*, *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013), absent a remand from the appellate court. I do not understand how or why a Rule 205 operates to deprive a trial court of jurisdiction over a nonexistent lawsuit.

The majority also reinterprets Rule 241, SCACR, to include inchoate and speculative collateral lawsuits when, by its own term, the rule governs stays only in "matters decided in the order, judgment, decree or decision on appeal. . . ." Rule 241(a), SCACR. Further, in footnote 5, the majority reiterates that the Rule permits a party to an appeal which is subject to an automatic stay to "move for the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court for an order lifting [that stay] . . . ." I do not understand what the majority contemplates would be the benefit of superseding such a stay vis-à-vis a future malpractice suit, since the majority holds that "until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice."

I would adhere to the discovery rule adopted in *Epstein*, and reverse the trial court's order granting summary judgment because there are unresolved genuine issues of material fact that make that relief inappropriate. *E.g.*, *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015). Further, I concur in the majority's decision to reverse the discovery order without prejudice.

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[10] That the statute of limitations in the Post-Conviction Relief Act, S.C. Code Ann. § 17-27-45(a) (2014), contains a specific post-appeal provision only emphasizes the extraordinary nature of the majority's decision to create a special rule here.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda Johnson, as Personal Representative of the Estate of Inez Roberts, Petitioner,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., And UHS-Pruitt Corporation, Respondents.

Appellate Case No. 2014-002502

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27639
Heard November 18, 2015 – Filed May 25, 2016

REVERSED

Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, Lee D. Cope, of Hampton, and Matthew Vernon Creech, of Ridgeland, both of Peters Murdaugh Parker Eltzroth & Detrick, PA, and Charles J. McCutchen, of Lanier & Burroughs, LLC, of Orangeburg, for Petitioner.

Monteith P. Todd, Robert E. Horner, and J. Michael Montgomery, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, and Joshua S.Whitley, of Smyth Whitley, LLC, of Charleston, W. Jerad Rissler and Jason E. Bring, both of Arnall Golden Gregory, LLP, of Atlanta, Georgia, for Respondents.

ACTING JUSTICE TOAL: Linda Johnson asks this Court to review the court of appeals' decision in *Johnson v. Heritage Healthcare of Estill*, Op. No. 2014-UP-318 (S.C. Ct. App. filed Aug. 6, 2014), reversing the circuit court's finding that Heritage Healthcare of Estill (HHE)[1] waived its right to arbitrate the claims between it and Johnson. We granted certiorari and now reverse.

FACTS/PROCEDURAL BACKGROUND

In 2007, Johnson enrolled her mother, Inez Roberts (Mrs. Roberts), in HHE to receive nursing home care. Johnson held a general power of attorney for Mrs. Roberts, and as such, signed an arbitration agreement with HHE on her mother's behalf upon Mrs. Roberts's admission to HHE.[2]

At the time, Mrs. Roberts was eighty-five years old and enjoyed good health. However, within six months of entering HHE, she developed severe pressure ulcers, resulting in the amputation of her leg and ultimately, her death in 2009.

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[1] In addition to HHE, there are three other Respondents: United Clinical Services, Inc.; United Rehab, Inc.; and UHS-Pruitt Corporation, each of which are parent companies of HHE. For ease of reference, we refer to all of them as HHE.

[2] The arbitration agreement stated, in relevant part, that Mrs. Roberts and HHE agreed to arbitrate "any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or relating to the Resident's Admission Agreement with the Facility . . . or any service or care provided to the Resident by the Facility." The covered claims explicitly included, *inter alia*, "negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract."

Prior to Mrs. Roberts's death, in August 2008, Johnson requested HHE allow her access to Mrs. Roberts's medical records, but HHE refused, citing privacy provisions in the Health Insurance Portability and Accountability Act (HIPAA). Johnson then filed an ex parte motion for a temporary restraining order (TRO), seeking to obtain a copy of Mrs. Roberts's medical records from HHE and to restrain HHE from changing, altering, or destroying the records. The circuit court granted the TRO, and HHE filed a motion to dissolve the order, again citing HIPAA's privacy provisions.

Subsequently, at Johnson's request, the circuit court appointed her Mrs. Roberts's guardian *ad litem* (GAL) in order to pacify HHE's HIPAA concerns. However, HHE still refused to produce the records. The court again ordered HHE to produce the records, and HHE appealed. During the pendency of the appeal, Mrs. Roberts died, and Johnson became her personal representative. HHE then produced the records, and the parties dismissed the appeal by consent.

Several months after obtaining the records, in August 2010, Johnson filed a notice of intent (NOI) for a wrongful death and survival action against HHE. In October 2010, following an impasse at pre-suit mediation, Johnson filed her complaint. In November 2010, HHE filed its answer and asserted arbitration as one of several defenses, but did not move to compel arbitration at that time. Instead, HHE filed arbitration-related discovery requests on Johnson.

In December 2010, Johnson moved to strike HHE's arbitration defenses, arguing that HHE waived its right to enforce the arbitration agreement. Specifically, Johnson argued that although the TRO proceedings fell within the scope of the arbitration agreement, HHE did not move to compel arbitration during those proceedings, the GAL proceedings, or the subsequent appeal. Moreover, Johnson contended that HHE participated in pre-suit mediation, responded to Johnson's discovery requests, and served discovery requests on Johnson in return, thus availing itself of the court's authority.

In response, HHE speculated that if it moved to compel arbitration at that time, Johnson would raise defenses to arbitration. HHE therefore requested "a small amount of time to conduct discovery" to determine in advance the defenses Johnson intended to raise, and to obtain information through discovery that would allow HHE to better defend itself.

In March 2011, the circuit court denied Johnson's motion to strike, but found that Johnson could re-raise the waiver issue if, and once, HHE filed a motion to compel arbitration.

The parties then engaged in discovery. Johnson filed multiple motions to compel, and HHE appeared before the court to defend the motions. Further, in May 2011, the parties deposed Johnson and the HHE employee who signed the arbitration agreement on HHE's behalf. In August 2011, after a delay to obtain the deposition transcripts, HHE moved to compel arbitration.

The circuit court denied the motion, finding, *inter alia*, that HHE waived its right to enforce the arbitration agreement by waiting to file its motion to compel until after it participated in discovery and appeared multiple times in court. The court found that Johnson was prejudiced by HHE's tactics because they forced Johnson to waste a significant amount of time and money that was wholly within HHE's power to avoid.

HHE appealed, and the court of appeals reversed in an unpublished opinion. *Johnson*, Op. No. 2014-UP-318 (stating only "[w]e reverse as to whether the trial court erred in ruling [HHE] waived arbitration" (citing *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 759 S.E.2d 727 (2014))). By implication, the court of appeals found that HHE moved to compel arbitration at its first opportunity. *See id.*

The Court granted Johnson's petition for a writ of certiorari to review the decision of the court of appeals with respect to the waiver issue.

ISSUE

Whether HHE waived its right to enforce the arbitration agreement?

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22,

644 S.E.2d 663, 667 (2007); *Rhodes*, 374 S.C. at 125–26, 647 S.E.2d at 250–51. The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *See Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (citations omitted); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001).

ANALYSIS

South Carolina courts favor arbitration. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Nonetheless, a party may waive its right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (citing *Hyload, Inc. v. Pre-Eng'd Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992) (per curiam)).

"The party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration." *Gen. Equip. & Supply Co.*, 344 S.C. at 556, 544 S.E.2d at 645; *see also Evans v. Accent Mfd. Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). Mere inconvenience or delay is insufficient to establish prejudice on its own. *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585; *Rich v. Walsh*, 357 S.C. 64, 72, 590 S.E.2d 506, 510 (Ct. App. 2003) ("[M]ere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions.").

As in all waiver cases, any appropriate analysis is heavily fact-driven. *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753 ("'There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.'" (quoting *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624)); *see also Rhodes*, 374 S.C. at 127, 647 S.E.2d at 252. Here, in its order finding that HHE waived its right to enforce the arbitration agreement, the circuit court set forth the relevant facts in detail, and made various factual and legal findings. However, in contrast, the court of appeals summarily reversed the circuit court, with no mention of any factual or legal errors. *See Johnson*, Op. No. 2014-UP-318 (stating only "[w]e reverse as to whether the trial court erred in ruling [HHE] waived arbitration"). In this fact-driven issue, we find the court of appeals' summary reversal inappropriate, particularly when compared with the circuit court's order, which clearly considered the facts of the case.

The initial dispute between HHE and Johnson began prior to the TRO proceedings, when HHE refused to release Mrs. Roberts's medical records to Johnson. At various times, Johnson functioned as Mrs. Roberts's power of attorney, GAL, and personal representative. Thus, both Mrs. Roberts *and* the court appointed Johnson to speak and act on Mrs. Roberts's behalf. Nonetheless, on multiple occasions, HHE unreasonably refused to release the records to Mrs. Roberts's duly-appointed representative, resulting in Johnson incurring unnecessary litigation expenses. Moreover, even after Johnson filed her complaint, HHE continued to delay by seeking limited discovery of issues that HHE wished to pursue, but ignoring Johnson's requests for discovery of issues that, in HHE's opinion, were irrelevant at that point in the litigation. Unsurprisingly, HHE's tactics caused Johnson to incur further expenses, both in responding to HHE's requested discovery, and in preparing for litigation in the event that HHE never moved to compel arbitration at all.

HHE contends that the delay and expenses are insignificant because Johnson was on notice that it intended to compel arbitration in the future. However, we note that similarly, after Johnson filed her motion to strike, HHE was on notice that Johnson intended to pursue a defense of waiver, and that further action before filing a motion to compel would be costly and dilatory. *See Evans*, 352 S.C. 551, 575 S.E.2d at 77 (noting that the party seeking to compel arbitration has the burden to halt discovery and seek the court's protection from further discovery pursuant to Rule 26(c)(1), SCRCP, and stating that "Accent's prolongation of discovery necessitated Evans's pursuit of discovery, thereby forcing her to incur costs she would not have incurred in arbitration. Thus, we find evidence that Accent's continuation of discovery, rather than seeking arbitration in a timelier manner, prejudiced Evans by forcing her to incur discovery costs."). Nonetheless, HHE waited another eight months to file its motion to compel, in the meantime conducting its own discovery and appearing in court multiple times. *Cf. Gen. Equip. & Supply Co.*, 344 S.C. at 557, 544 S.E.2d at 645–46 (finding no waiver when the parties only appeared in front of the court twice in eight months to substitute a defendant, and to refer the action to a Master-in-Equity, and that as such, neither party had yet incurred substantial attorney's fees); *Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753 (finding waiver when the parties sought the court's assistance approximately forty times prior to the filing of the motion to compel, on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCP); *see also Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Accordingly, in light of the court of appeals' summary reversal and failure to outline any factual or legal errors committed by the circuit court, we reverse and find that HHE waived its right to enforce the arbitration agreement.

CONCLUSION

For the foregoing reasons, the court of appeals' decision is

REVERSED.

BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.
PLEICONES, C.J., dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES: I respectfully dissent and would dismiss the writ of certiorari as improvidently granted since I believe the Court of Appeals correctly reversed the trial court's order finding HHE waived its right to arbitration.[3]

I disagree with the majority that Johnson's first litigation, seeking her mother's medical records, is somehow relevant to the issue whether HHE waived its right to seek arbitration in this medical malpractice suit. In this matter, HHE raised arbitration in its answer filed on November 24, 2010, and Johnson filed a motion to strike that defense on December 1, 2010. It was only after the circuit court denied Johnson's motion to strike in March 2011 that HHE was permitted to engage in discovery related to the arbitration issue. The majority holds, however, that when Johnson moved to strike HHE's arbitration defense shortly after the answer was

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[3] The majority suggests that reversal is somehow compelled because "of the Court of Appeals' summary reversal and failure to outline any factual or legal errors committed by the circuit court . . . ." The Court of Appeals adequately addressed the waiver issue in its opinion:

> 3. We reverse as to whether the trial court erred in ruling Heritage waived arbitration. *See Dean* at 47 (ruling the appellants did not delay in filing their demand for arbitration when the appellants participated in the statutorily required mediation process, and after the respondent filed her formal complaint, moved to compel arbitration at their first opportunity).
>
> *Johnson v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-318 (S.C. Ct. App. filed August 6, 2014).

Even if this passage did not to meet the requirements of Rule 220(b), SCACR, the proper remedy would be to remand the case to the Court of Appeals and not a reversal, as it is not within a party's power to compel that court to give a fuller explanation. In my opinion, however, there is simply no evidence in this record that Johnson overcame "the presumption against finding a party has waived its right to compel arbitration," *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (internal citation omitted), and therefore no necessity for such a remand.

filed, HHE was obligated to immediately move to compel arbitration, because anything less was both "costly and dilatory." It is undisputed, however, that the arbitration issue was in limbo until Johnson's motions to strike were resolved in March 2011, and that the multiple court appearances were the result of Johnson's own "multiple motions to compel," and that "HHE appeared before the court [only] to defend [against Johnson's] motions." *Johnson v. Heritage Healthcare of Estill, LLC*, *supra*. I do not see any facts in this record supporting the majority's conclusions that HHE's actions were costly or dilatory, nor any evidence that Johnson was prejudiced by HHE's failure to move to compel arbitration for approximately nine months after filing its answer raising the issue, especially since the arbitration discovery process was unavailable from December 2010 until March 2011 as the result of Johnson's filing the motion to strike the defense. *Compare, e.g.*, *Evans v. Accent Mfg'd Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding waiver where arbitration was neither pleaded nor raised for first nineteenth months of litigation)

In my opinion, nothing in this record supports a finding that Johnson met her "heavy burden" of overcoming the presumption that HHE did not waive its right to arbitrate, nor that she suffered an "undue burden" caused by HHE's "delay" in demanding arbitration. *Dean*, *supra*. I therefore dissent, and would dismiss the writ as improvidently granted.

The Supreme Court of South Carolina

Re: Rule 425, South Carolina Appellate Court Rules:
Mandatory Lawyer Mentoring Program

Appellate Case No. 2016-000874

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 425, SCACR, which controls the Mandatory Lawyer Mentoring Program, is amended to provide that the South Carolina Bar, rather than the Commission on Continuing Legal Education and Specialization, shall administer the program. The amendments to Rule 425, which are set forth in the attachment to this Order, are effective May 23, 2016.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
May 18, 2016

RULE 425
MANDATORY LAWYER MENTORING PROGRAM

(a) Mentoring Program. Following successful lawyer mentoring pilot programs, this rule has been promulgated by the Supreme Court of South Carolina to establish a mandatory lawyer mentoring program. The program shall be administered by the South Carolina Bar.

(b) Qualifying Lawyer Defined. A qualifying lawyer is any lawyer admitted under Rule 402, SCACR, on or after April 1, 2012, if that lawyer (1) is a resident of the State of South Carolina or practices law in an office located in South Carolina on more than a temporary basis; and (2) has not previously practiced law actively in another jurisdiction for more than two years.

(c) Mandatory Participation and Completion. The mentoring program is mandatory for all qualifying lawyers. Unless participation is deferred or waived under Section (d) below, qualifying lawyers admitted in South Carolina from January 1 through June 30 must complete the mentoring program not later than December 31 of the following calendar year. Unless participation is deferred or waived under Section (d) below, qualifying lawyers admitted in South Carolina from July 1 through December 31 must complete the mentoring program not later than one year after June 30th of the year following their admission.

(d) Deferment or Waiver of Participation Based on Special Circumstances.

> **(1)** A qualifying lawyer who is employed as a non-permanent, full-time clerk to a state or federal judge during the first year of admission to the South Carolina Bar may elect to fulfill the requirements of the mentoring program either during the clerkship by participating in an approved program, or immediately following the clerkship. If the lawyer elects the latter option, the lawyer shall provide written notice to the South Carolina Bar not later than thirty days after completion of the clerkship.
>
> **(2)** A qualifying lawyer who is not engaged in the representation of clients nor any other form of the active practice of law may request a waiver of this requirement by certifying that he or she is not engaged in the active practice of law in South Carolina and does not intend to do so for a period of at least two years. If within the first two years of admission to the South Carolina

Bar, the new lawyer later begins to actively practice law in South Carolina, he or she must notify the South Carolina Bar in writing within thirty days and participate in and complete the mentoring program in a timely manner as provided in Section (c) above.

(3) A qualifying lawyer who begins the mentoring program, but, prior to the completion of the program, moves his or her residency out of the state and no longer practices regularly in the state, is not required to complete the mentoring program. The new lawyer must, however, provide notice to the South Carolina Bar of his or her move from the state as the basis for not completing the program. The new lawyer shall not be subject to the sanctions as provided in Section (l) below for the failure to complete the program in this circumstance. If that lawyer subsequently returns to South Carolina prior to having been engaged in the active practice of law as a member of another bar for at least two years, he or she shall notify the South Carolina Bar in writing within thirty days of the lawyer's return to South Carolina. Such lawyer shall complete the mentoring program in a timely manner as provided in Section (c) above.

(4) A qualifying lawyer who is enrolled in a further graduate program during the first year of admission to the South Carolina Bar must participate in the mentoring program after the completion of his or her graduate program provided that he or she completes the program within two years after admission to the South Carolina Bar. The new lawyer is required to provide written notice to the South Carolina Bar within thirty days after completion of the graduate program.

(e) Application. Within thirty days of admission under Rule 402, SCACR, new lawyers must complete and submit a New Lawyer Application to the South Carolina Bar. This form must be submitted even if the lawyer is not a qualified lawyer as defined by Section (b) above. Further, this form shall be used to request any deferment or waiver of participation in the program as provided in Section (d) above.

(f) Purpose of Program. The purpose of the mentoring program is to provide assistance to the new lawyer in the following respects:

(1) The mentor should assist the new lawyer in developing an understanding of how law is practiced in a manner consistent with the duties, responsibilities, and expectations that accompany membership in the legal profession. The mentor should provide guidance or introduce the new lawyers to others who can provide guidance as to proper law practice management, including the handling of funds, even if the new lawyer is not currently in a setting that requires the use of those practices. Guidance should be given not only as to a lawyer's ethical duties, but also as to the development of a higher sense of professionalism based upon internalized principles of appropriate behavior consistent with the ideals of the profession.

(2) The mentor should assist the new lawyer in developing specific professional skills and habits necessary to gain and maintain competency in the law throughout his or her career and should assist the new lawyer in developing a network of other persons from whom the new lawyer may seek personal or professional advice or counsel when appropriate or necessary throughout the lawyer's career. While a strong mentoring relationship (particularly if the mentor and new lawyer are in the same firm or office) may also include specific advice to or training of a new lawyer regarding substantive aspects of the law, such substantive legal training should not be required of a mentor in this program.

(3) The mentor should assist the new lawyer in identifying and developing specific professional skills and habits necessary to create and maintain professional relationships based upon mutual respect between the lawyer and client; the lawyer and other parties and their counsel; the lawyer and the court, including its staff; the lawyer and others working in his or her office, including both lawyers and staff; and the lawyer and the public. The mentor should assist the new lawyer in understanding the appropriate boundaries between advocacy and overzealous or uncivil behavior and in developing appropriate methods of responding to inappropriate behavior by others.

(4) The mentor should introduce the new lawyer to others in the lawyer's local or regional legal community and encourage the new lawyer to become an active part of that community.

(g) Structure of the Program.

(1) Generally; Uniform Mentoring Plan. Mentoring shall be made available through either individual or group mentoring. Unless a different mentoring plan is approved under Section (h) below, each qualifying new lawyer is required to complete the mentoring tasks set forth in the Uniform Mentoring Plan, which has been approved by the Supreme Court. The uniform plan may include a recommended schedule for completing the tasks, but the actual order and timing of completion of the tasks shall be within the discretion of the participants, provided that the full plan is completed as required in Section (c) above. In addition to completing the specific required tasks, it should be expected that, in an individual mentoring arrangement, the mentor and new lawyer will consult throughout the year-long mentoring period as either may deem necessary or appropriate.

The mentor and new lawyer may choose the method of communication that best suits their needs. However, if a mentor and new lawyer do not otherwise have regular in-person contact, they should schedule at least some periodic in-person discussions throughout the mentoring period. Each person should be cognizant of demands on the other's schedule and attempt to find a mutually acceptable time for these meetings. If there is a recurrent failure by either party to make time available for this purpose, or if other difficulties arise which cannot be resolved by the parties and which threaten the timely and effective completion of the mentoring program, the parties to the relationship (or either of them) should advise the South Carolina Bar of the situation and request the assistance of the South Carolina Bar in resolving the matter.

Using the Uniform Mentoring Plan as a guide, the mentor and new lawyer must jointly draft an individualized mentoring plan for the coming twelve months. The individual mentoring plan shall be submitted to the South Carolina Bar for approval within thirty days of the start of the mentoring term. The mentor and new lawyer are required to meet the nine objectives in the Uniform Mentoring Plan through a series of action steps over the course of a year-long mentoring relationship.

(2) Individual Mentoring. Most new lawyers will have an individual mentor approved by the South Carolina Bar. Preference should be given to the appointment of a mentor selected by the new lawyer, who may be, but is not required to be, a lawyer working in the same firm or office as the new lawyer.

If a new lawyer does not select a qualified mentor, then one of the following options will apply:

(A) if the new lawyer is employed and another lawyer in the same firm or office could serve as a mentor, the South Carolina Bar shall contact the firm or office and seek the voluntary agreement of a qualified lawyer in the firm or office to serve as the new lawyer's mentor;

(B) if the new lawyer wishes to have an individual mentor and either no mentor is obtained under Subsection (A) above or the new lawyer is not employed in a firm or office able to supply a mentor, then the South Carolina Bar shall seek to recruit a qualified individual mentor from among the members of the South Carolina Bar. In this event, a reasonable effort should be made to designate a mentor from the same or a nearby geographic area with experience in a practice setting similar to that of the new lawyer; or

(C) the new lawyer shall be assigned to participate in group mentoring.

(3) Group Mentoring. A program of group mentoring has been developed for those new lawyers not assigned an individual mentor. A group mentoring program should have some element of live contact with members of the mentoring group, but it may be a combination of live contact and electronic or other forms of distance mentoring as may be deemed sufficient by the South Carolina Bar. The preferred ratio of new lawyers to mentors in a group mentoring program shall be no greater than 3 to 1.

(h) Certification of Internal Programs. A law firm or office (including, but not limited to, governmental agencies, corporate legal departments, state and local prosecutors, and public defenders) which has an internal mentoring program in

place that it believes achieves all of the purposes of this program may apply to the South Carolina Bar to have its mentoring plan certified as compliant with the mentoring obligation under the program. The application for certification shall include a detailed description of the internal program and a detailed showing of how each of the purposes of this program will be achieved under the internal program. If a program is certified, completion of that program by a qualifying new lawyer shall be deemed to satisfy the mentoring requirement. The new lawyer and the lawyer responsible for the certified program shall be required to file a statement for each new lawyer verifying that the new lawyer has completed all requirements of the program within thirty days of completion of the program, as provided in Section (c) above. If the duration of the internal program extends beyond a period of one year, the nine objectives, as found in the Uniform Mentoring Plan, must be met within the first twelve months of the internal mentoring program. Once certified, a program shall remain certified unless it is altered or unless certification is removed after notice by the South Carolina Bar. A law firm or office desiring to alter its internal program shall submit such request to the South Carolina Bar. Internal programs certified under the second pilot mentoring program remain certified, subject to the conditions herein.

(i) General Qualifications of Mentors. Mentors must be members of the South Carolina Bar who have been admitted under Rule 402, SCACR. A person may not serve as a mentor if the person has been an inactive or retired member of the South Carolina Bar for more than two years, or if the person is not a member in good standing under Rule 410, SCACR. Mentors must have at least five years' experience in the active practice of law. It is preferable that mentors have experience with the court system, although it is understood that not all mentors will have litigation experience. A lawyer without such litigation experience may nevertheless be an appropriate mentor if that lawyer has otherwise developed an understanding of appropriate behavior in a lawyer's relationship with the court.

Mentors should display, through their own conduct, an understanding of and commitment to ethical responsibilities and the prevailing expectations with regard to a lawyer's appropriate professional behavior. A mentor must have a good reputation for professional behavior. Further, a mentor must not, in any jurisdiction, have been publicly reprimanded within the past 10 years, or have been suspended or disbarred from the practice of law for misconduct at any time; and must not be a respondent in a pending disciplinary proceeding in which a formal

charge or its equivalent has been filed under the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or the rules of another jurisdiction.

Mentors should be able to assist the new lawyer in developing a style of lawyering that is compatible both with professional expectations and with the personality of the new lawyer.

(j) Appointment of Mentors; Education and Support of Mentors. A lawyer may serve as a mentor for purposes of this program only if first approved by the South Carolina Bar. The prospective mentor must submit an application to the South Carolina Bar in an approved form certifying that the lawyer meets the qualifications specified in Section (i) above.

Upon determining that a mentor applicant meets the threshold qualifications, the South Carolina Bar may conduct such further investigation of a prospective mentor's qualifications and reputation for professional behavior as it may deem appropriate. The South Carolina Bar has authority to appoint qualified lawyers as mentors or, in its discretion, to decline to appoint an applicant to serve as a mentor under this program.

An appointment shall qualify a lawyer to serve as a mentor in this program for five years, unless earlier removed as a mentor. A lawyer may be appointed to multiple consecutive terms as a qualified mentor. If at any time a lawyer appointed as a mentor is publicly reprimanded, suspended, disbarred in any jurisdiction, or becomes a respondent in a formal disciplinary proceeding, the lawyer shall be removed immediately as an approved mentor. If the lawyer is serving as a mentor at the time that his or her name is removed from the list of approved mentors, the South Carolina Bar shall immediately appoint a new mentor for the lawyer being mentored.

A lawyer appointed as a mentor is not required to attend a training session, but will be provided access to materials gathered or prepared by the South Carolina Bar that will assist the mentor in carrying out his or her responsibilities. The South Carolina Bar will provide at least annually a voluntary mentor orientation program that will qualify for ethics MCLE credit. Mentors are encouraged to contact other mentors to discuss issues, the most effective approaches to be used in working with new lawyers, the most effective means of resolving problems that are encountered in the relationship, or other concerns that arise during the mentoring relationship.

(k) Migration of a Mentor or a New Lawyer. From time to time, either a mentor or a new lawyer may change jobs during the mentoring year. It is expected that, whenever possible, the mentoring relationship, once established, will be maintained despite such a move. When maintenance of the relationship is not possible because one of the parties to the relationship has moved to a distant location or because of other extraordinary circumstances, the mentor or new lawyer should notify the South Carolina Bar, and that office may assign a substitute mentor or take such other measures as are appropriate.

(l) Addressing Situations in Which a Mentor is in a Position of Authority Regarding the New Lawyer. If a mentor participates in or has responsibility for any performance evaluations of the new lawyer being mentored, the mentor and new lawyer should set forth clearly at the outset of the relationship how information learned by the mentor during the mentoring relationship might be used in that evaluation process. If the role of the mentor as a supervisor or evaluator may conflict with the new lawyer's need for advice in some situations, the mentor should assist the new lawyer in making contacts with other lawyers who could provide advice in those situations.

(m) Certification of Completion; Sanctions for Failure to Complete.

(1) A qualifying lawyer must complete the mentoring program in a timely manner, as provided in Section (c) above. Not later than thirty days after completion of the program, the new lawyer must file with the South Carolina Bar a document signed by the mentor certifying such completion. If the new lawyer has not completed all requirements of the mentoring program by that time or is otherwise unable to obtain a certificate from the mentor, the new lawyer shall provide a detailed response to the South Carolina Bar explaining the reasons, including hardship reasons, for noncompliance. The South Carolina Bar, in its discretion, may grant such additional time as the South Carolina Bar deems appropriate to file the certificate of completion.

(2) A willful failure to complete the program in a timely manner shall be a ground for discipline under Rule 7 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, and may subject the lawyer to sanctions under that rule. If a qualifying lawyer fails to complete the

program, the South Carolina Bar may refer the matter to the Office of Disciplinary Counsel.

(n) Limitation on Advice Regarding Legal Issues.

(1) In fulfilling his or her responsibilities as a mentor, a mentor may provide general advice and guidance to the new lawyer on typical matters of practical concern to the new lawyer. However, it is not the purpose of the mentoring program to provide case-specific legal advice to the new lawyer. To this end, except as provided in Subsection (2) below, a mentor is expressly prohibited from giving case-specific legal advice to the new lawyer. Moreover, the mentor may not serve as co-counsel with the new lawyer, unless full disclosure is made, the client consents, and the relevant provisions of the South Carolina Rules of Professional Conduct are satisfied.

(2) Notwithstanding Subsection (1) above, when a mentor is associated with the same law firm or office as the new lawyer, the mentoring relationship does not preclude the mentor from assisting the new lawyer in resolving a specific substantive or procedural legal issue. The extent to which such advice or supervision occurs should be determined by the policies of the law firm or office.

(3) When a mentor is not associated with the same firm or office as the new lawyer, the mentor should instruct the new lawyer at the outset of the relationship about the duty of the new lawyer not to share with the mentor confidential information about any representation. If a new lawyer needs advice about a particular situation, the mentor may discuss with the new lawyer the general area of law at issue, without reference to the facts of a specific matter, and may direct the new lawyer to resources that may assist the new lawyer in finding the necessary information. By virtue of acting as a mentor, the mentor does not undertake to represent the client of the new lawyer or assume any responsibility for the quality or timeliness of the work on a matter being handled by the new lawyer. The lawyer being mentored remains solely responsible for the client's matter. If a mentor does consult with the new lawyer about a specific legal matter, however, both the mentor and the new lawyer must keep in mind that the same professional duties apply as would apply whenever two lawyers not in the same firm consult about a matter.

(o) Satisfaction of Mandatory Continuing Legal Education (MCLE) Requirements. During any MCLE compliance reporting period in which a lawyer completes a full year as a mentor for one or more new lawyers, the mentor shall be deemed to have completed 4.00 hours of CLE credit, of which 2.00 hours shall constitute ethics CLE credit. The mentor shall not receive additional CLE credit for mentoring more than one lawyer in the same reporting period.

Last amended by Order dated May 18, 2016, effective May 23, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin McBride, Appellant.

Appellate Case No. 2013-002391

Appeal From Williamsburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5381
Heard November 10, 2015 – Filed February 17, 2016
Withdrawn, Substituted and Refiled May 25, 2016

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC, Joshua Preston Stokes, of McCoy & Stokes, LLC, and Adam Owensby, of Carolina Firm, LLC, all of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Ernest Adolphus Finney, III, of Sumter, for Respondent.

SHORT, J: Justin McBride appeals his conviction for first-degree criminal sexual conduct with a minor, arguing the following: (1) the trial court lacked subject

matter jurisdiction over McBride because he was a juvenile[1]; (2) numerous evidentiary and jury charge issues; (3) the evidence presented was insufficient to prove the required elements of the crime; and (4) the trial court erred in excluding only a portion of McBride's statement. We affirm.[2]

BACKGROUND FACTS

The victim[3] testified that on June 21, 2010, she was attending summer school. When she arrived home on the school bus, her mother was not there. The victim went to her aunt's house next door.[4] The victim testified her cousin, McBride, was home alone and let her in. The victim sat on the couch while McBride went into the kitchen. When McBride returned, the victim asked him to turn the television off. The victim testified McBride turned the television off, then "took out his manhood. And then he told [me] to jerk it. And he grabbed my hand, and put my hand on his manhood. And I jerk it away from him. And then that's when he is going to grab my head, and pull it down to make me put my mouth on it." The victim next testified she pushed McBride away from her, "[a]nd that's when the white stuff and clear stuff came out of his manhood. It was in my mouth and on my shirt. And I ran in the bathroom." The victim spit into the sink, wiped her shirt with tissue, and threw the tissue away. The victim testified she was wearing a black shirt and her "birthday pants that [her] grandmother gave [her]." According to the victim, when she returned to the living room, McBride was spraying the room with "man's perfume." The victim testified she ran to the front door, was blocked by McBride, ran to the back door, and went home.

The victim's mother was home by then and opened the door when the victim knocked. The victim originally denied anything was wrong. The mother smelled the "man's perfume" on the victim and saw a deodorant stain on the victim's shirt.

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[1] McBride was sixteen years old at the time of the alleged assault.

[2] By letter received November 5, 2005, McBride requested the court delay disposition of his case and remove counsel. McBride stated, "Elizabeth Tisdale has abandoned me and my issues . . . ." During oral argument, McBride's private counsel informed the court that Tisdale was McBride's girlfriend and not an attorney, and McBride was prepared to go forward.

[3] The victim was nine years old at the time of the assault and thirteen years old at the time of trial.

[4] McBride's mother is the victim's father's sister.

According to the victim, she had deodorant on the back of her shirt from where McBride had his arm around her neck when he forced her to touch him. The victim testified she spoke to Detective Wilma Trena Hamlet of the Kingstree Police Department and two other officers within ten to fifteen minutes of returning home.

Hamlet testified minor inconsistencies between the victim's first and second statements included which door she ran out of when exiting McBride's house. Hamlet also admitted that no deodorant was collected from McBride.

The victim's mother testified that on the day in question, when she arrived home, the victim was not there, but she arrived shortly thereafter. As the victim passed her in the entryway, the mother smelled men's cologne and saw the stain on the victim's shirt. After questioning the victim, the mother went next door and questioned McBride. She returned home and called her husband, her sister (the sister), and McBride's mother. The sister eventually called the police.

The sister testified she arrived at the victim's house after receiving the telephone call and confronted McBride after the victim told her what happened. According to the sister, McBride said he did not mean to do it, and "tr[ied] to compromise with [her]." The sister described it as McBride's confession.

At the close of the evidence, McBride moved for a directed verdict, arguing there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. The jury convicted McBride of first degree criminal sexual conduct. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's

ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

I. Subject Matter Jurisdiction

McBride argues the circuit court lacked subject matter jurisdiction to hear the case because he was sixteen at the time of the alleged crime and the case was not properly transferred to the court of general sessions. We disagree.

The State argues this issue is not preserved for our review and is a matter of personal jurisdiction, not subject matter jurisdiction. We agree. This issue was not raised to the trial court; thus, unless it involves subject matter jurisdiction, it must have been raised to and ruled upon by the trial court to be preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review); *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court."). Because the circuit court has the power to hear criminal cases, we find the issue was not one of subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (explaining issues relating to subject matter jurisdiction may be raised at any time and clarifying a court's subject matter jurisdiction is that court's power "to hear and determine cases of the general class to which the proceedings in question belong"). Thus, McBride has not preserved the issue for appellate review.

II. Evidentiary Rulings and Jury Charges

McBride argues numerous evidentiary and jury charge errors relating to the loss of the victim's clothing by the investigating police department, the admission of photographs, and the limitation of his cross-examination regarding the Department's investigation of the victim. We find no reversible errors.

A. The Victim's Shirt

McBride argues the trial court erred in limiting his ability to cross-examine witnesses regarding the victim's shirt, which law enforcement lost. Further, McBride maintains his due process rights were violated by the loss of the victim's

shirt. McBride also argues the trial court erred in denying his motion for an adverse inference jury charge on the issue. We affirm.

The mother testified she bagged the victim's clothing and three days later, she took it with the victim to the victim's forensic and medical examination. The facility double-bagged the clothing, labeled the bag, and instructed the mother to deliver it to the police department, which she did later that day. The mother testified she gave it to a bald man at the department.

Lieutenant Thomas McCrea, of the Kingstree Police Department, testified the only bald employee of the department was the evidence custodian, Sergeant Grant Huckabee. McCrea testified only Huckabee and the Chief of Police had access to evidence at the department and both had left the department. McCrea testified the mother came to the department to retrieve the clothing and, at that time, McCrea's understanding based on protocol was that the clothing would have been at the South Carolina Law Enforcement Division (SLED) for testing. However, he had never seen a report indicating the clothing was sent to SLED. He admitted the department did not have the clothing, an intake sheet reporting receiving it, or an analysis from SLED, and that SLED had no record of receiving it. He also admitted other evidence in the department had been lost during Huckabee's tenure with the department.

The allegedly improper limitation of cross-examination arose during McCrea's cross-examination. McBride asked, "Do you know why Officer Huckabee left the department? . . . . Can you disclose to the court why?" The State objected on the ground of relevance, and the trial court sustained the objection. McBride made no further attempt to cross-examine McCrea regarding the lost shirt. Furthermore, McBride did not raise the due process argument arising from the limitation of cross-examination that he now raises on appeal. Thus, the issue is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review).

McBride argues his due process rights were violated because the shirt was lost. We disagree.

Relying on *State v. Breeze*, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the trial court found no due process violation because there was no bad faith by the State

and no evidence the lost clothing possessed any exculpatory value. In *Breeze*, the defendant was convicted of possession of marijuana with intent to distribute. *Id.* at 542, 665 S.E.2d at 249. Prior to trial, the State informed the defendant the marijuana had been destroyed. *Id.* Breeze argued the trial court erred in finding the lost marijuana was not a due process violation and did not entitle him to an adverse inference jury charge. *Id.* at 545, 665 S.E.2d at 251. This court disagreed, finding the State did not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant. *Id.*

The court in *Breeze* stated, '"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."' *Id.* (quoting *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001)). The court found no bad faith by the State where the marijuana was inadvertently destroyed because the status of the case listed it as disposed and the policy of the department was to destroy drugs when a case was disposed. *Id.* at 546, 665 S.E.2d at 251; *see State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding no bad faith despite acknowledging "deeply troubling aspects" of the police investigation, including lost clothing, jewelry, and documents). *But see Reaves*, 414 S.C. at 129, 777 S.E.2d at 218 (noting that although the defendant was disadvantaged by the lost evidence, he forcefully cross-examined the police and the trial court instructed the jury on adverse inference).

The trial court in this case likewise found McBride did not show bad faith by the State in the loss of the shirt. We agree. Appellate courts give the trial court's finding great deference on appeal and review the findings under a clearly erroneous standard. *See e.g., State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) (reviewing factual findings regarding purposeful discrimination during jury selection in a pre-trial hearing).

As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." *See Breeze* 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a

due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt.

We also find no error by the trial court in denying McBride's request for an adverse inference jury charge. Prior to the trial court's jury charge, McBride requested the following charge:

> In evaluating a case, you may consider the lack of evidence presented by the State. Th[e]re are allegations that evidence has been lost or destroyed by the State in this case. We refer to this concept as spoliation or destruction of evidence. The State not only has the burden of proof of guilt, but it also has the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt.
>
> When evidence is lost or destroyed by a party, you may infer that the evidence that was lost or destroyed would have been adverse to that party. If you find first that evidence was spoiled or destroyed, and if you further find that the evidence could help establish the innocence of the defendant or create doubt about whether or not he is guilty, you may then consider those facts in deciding whether or not the State has met its burden of proof.

The trial court declined to instruct the jury as requested. The trial court in *Breeze* likewise denied Breeze's request to instruct the jury that an adverse inference could be drawn from the State's failure to produce the marijuana. *Id.* at 545-48, 665 S.E.2d at 251-53.

In this case, we find there was no error by the trial court in declining the charge. "In general, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Id.* The requested charge in this case included an instruction that permitted the jury to "infer that the evidence that was lost or destroyed would have been adverse to that party."

Adverse inference charges are rarely permitted in criminal cases. *See Reaves*, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence . . . ha[ve] been limited to civil cases in South Carolina"); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); *id.* (stating "a charge of this proposition to a jury on . . . behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

In summary, we find McBride failed to preserve the issue regarding his inability to cross-examine McCrea. We also find no due process violation by the State. Finally, we affirm the trial court's denial of McBride's request for an adverse inference jury charge.

B. Missing Photographs

McBride next argues the trial court erred in admitting two color photographs of the victim's shirt, which he did not receive prior to trial. We disagree.

During redirect examination of the victim, she testified she got a stain on her shirt after McBride pulled her head to his penis. Without the jury present, McBride moved to exclude two color photographs of the shirt the State was preparing to enter into evidence. McBride's counsel argued the documents produced by the State prior to trial were dark and illegible, but during trial, the State was attempting to introduce legible, color photographs. McBride's counsel explained he took this case on appointment after McBride's original counsel was disbarred. Trial counsel made a separate Rule 5, SCRCrimP, request and discovery motion and was never provided the color photographs. Trial counsel did not see the color photographs until just prior to making the motion. Trial counsel acknowledged he did not believe it was an intentional act by the State; rather, he accepted it was due to a copy machine. However, trial counsel argued it "dynamically change[d]" his representation of McBride, and it "could have . . . very well have pushed us along the line to . . . see if there was anything that could have been worked out."

The solicitor informed the court that the illegible copies were given to the solicitor's office by the Kingstree Police Department, but she knew what they

depicted. In the State's discovery responses, the solicitor "duplicated the pictures as they were given" to her. She also notified McBride's first counsel that there were pictures and a disk available for inspection. She stated the incident report provided to McBride referenced a white stain on the shirt. She argued, "it was incumbent upon the defense to . . . request better copies or request to be permitted to go to the Kingstree Police Department and see the photographs." The solicitor argued the State had complied with Rule 5. Finally, she informed the trial court she also received the color photographs the morning of trial.

The court weighed the extent of the State's compliance with Rule 5 with the obligation of the defense to investigate further when it received illegible photographs. Although "bother[ed] . . . immensely[,]" the court admitted the photographs, finding that the State did not violate Rule 5 and there was no prosecutorial misconduct. The court relied on the State's discovery Response 7, stating there were photographs that could be inspected.

Subject to McBride's previous objections, the State introduced the color photographs during Hamlet's testimony, and she testified the photographs depicted the victim's shirt and the discoloration on the left shoulder, which the victim claimed was McBride's deodorant. On appeal, McBride argues the trial court erred in balancing the State's compliance with Rule 5 and McBride's rights, stating the proper test for violations of Rule 5 is whether good cause has been shown.

Rule 5, SCRCrimP, governs disclosure in criminal cases. Rule 5(a)(1)(C), SCRCrimP, provides in part: "Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . photographs . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution . . . ." The decision by the trial judge regarding the admissibility of evidence for failure to comply with disclosure rules will not be reversed absent an abuse of discretion. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). *See State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

We find no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. *See State v. Newell*, 303 S.C.

471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); *see also State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file").

C. Investigation of the Victim

McBride argues the trial court erred in refusing to allow him to cross-examine law enforcement witnesses regarding whether they requested the victim submit to a polygraph examination. We disagree.

During the pre-trial hearing, McBride moved to be permitted to cross-examine law enforcement regarding its ability, under section 16-3-750 of the South Carolina Code, to request a victim submit to a polygraph examination. McBride argued he was entitled to ask law enforcement officers if they took "that additional step to verify whether this was an accurate allegation." The court denied the motion. During cross-examination of Hamlet, McBride questioned her regarding section 16-3-750. The court sustained the State's objection. At the close of evidence, McBride moved for a mistrial based on the issue. The court denied the motion.

Section 16-3-750 provides as follows:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code Ann. § 16-3-750 (2015).

"The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion." *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "The general rule is that no mention of a polygraph test should be placed before the jury." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). We find no error by the trial court. McBride presented no evidence challenging the credibility of the victim; thus, the statute did not apply.

D. Section 16-3-657

McBride also argued the trial court erred in charging section 16-3-657 of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." In light of our supreme court's recent opinion in *State v. Stukes*, Op. No. 27633 (S.C. Sup. Ct. filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 25), we agree the charge was erroneous. However, we find the error was harmless.

In *Stukes*, the victim testified she had been sexually assaulted and a DNA profile matched Stukes. *Id.* at 26. Stukes claimed he had consensual sex with the victim. *Id.* At trial, Stukes objected to the trial court charging the jury pursuant to section 16-3-657. *Id.* at 27; *see* S.C. Code Ann. § 16-3-657 (2015) ("The testimony of the [criminal sexual conduct] victim need not be corroborated . . . ."). On appeal, our supreme court found the "charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." *Id.* at 29. The court found the error was not harmless beyond a reasonable doubt because the case "hinged on credibility. Victim said it was rape; [Stukes] said it was consensual." *Id.* at 30.

Here, although we find the jury charge was error, we find it was harmless beyond a reasonable doubt. Unlike the situation in *Stukes*, there was corroborating evidence in this case. The victim's mother testified she smelled men's cologne and saw the stain on the victim's shirt. The mother's sister testified she confronted McBride and he said he did not mean to do it, and "tr[ied] to compromise with [her]." The

sister described it as McBride's confession. Thus, although the jury was erroneously charged section 16-3-657, we find the error was harmless beyond a reasonable doubt.

III. Directed Verdict

McBride argues the trial court erred in denying his motion for a directed verdict. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 273 (2002).

At the close of the evidence, McBride argued there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. Our own review of the victim's testimony indicates the victim testified to penetration. We find no merit in this issue and affirm.

IV. Admission of McBride's Statement

McBride argues the trial court erred in admitting his statement to Hamlet. We disagree.

Prior to trial, the court held a *Jackson v. Denno*[5] hearing to determine the admissibility of a statement McBride made to Hamlet, the investigator for the Kingstree Police Department. McBride moved to strike the initial portion of his statement. The court suppressed "that one particular statement and not anything else. . . ."

[5] 378 U.S. 368 (1964).

On appeal, McBride argues the circuit court erred in suppressing only a portion of the statement. This issue is not preserved for our review. *See State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (finding when "the appellant obtained the only relief he sought, this court has no issue to decide"); *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide.").

CONCLUSION

For the foregoing reasons, McBride's conviction is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Scott Eugene Williams, Respondent.

Appellate Case No. 2013-002307

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5405
Heard November 12, 2015 – Filed May 25, 2016

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Appellant.

G. David Seay, Jr., of David Seay, Jr., LLC, of Greenville, for Respondent.

KONDUROS, J.: The State appeals the circuit court's order affirming the magistrate's dismissal of the driving under the influence (DUI) charge against Scott E. Williams. The State contends because Williams was stopped without going through the driver's license checkpoint, the magistrate and circuit court erred in requiring the State to provide evidence to support the constitutionality of the

checkpoint. The State also maintains the magistrate exceeded its authority in considering Williams's motion to dismiss, holding a pretrial preliminary hearing, and dismissing the case. We reverse and remand.

FACTS

On March 26, 2011, the South Carolina Highway Patrol set up a driver's license checkpoint in Greenville, South Carolina at the bottom of a hill. Around 3 a.m., Williams approached the checkpoint but made a U-turn after coming over the hill. Trooper David Robertson[1] notified his supervisor that a vehicle had made a U-turn and was told to pursue the car. Trooper Robertson drove over the hill and saw the vehicle stopped in the backside of a parking lot with its lights turned off. Trooper Robertson approached the vehicle, noticed the odor of alcohol, and observed the driver's—Williams's—eyes were glassy and his speech was slurred. Following field sobriety tests, Trooper Robertson charged Williams with DUI.

Williams was scheduled for trial by a magistrate on the DUI charge. On March 14, 2013, prior to the swearing of the jury, the magistrate heard arguments on Williams's motion to require the State to demonstrate the checkpoint was constitutional. The State called Trooper Robertson to testify about the license checkpoint. Trooper Robertson gave some details about the checkpoint but indicated he was not at the checkpoint the entire time it was in place and he had not decided the location of the checkpoint. He testified Williams did not drive through the checkpoint but instead made a U-turn on the hill. The State argued it had established the constitutionality of the checkpoint but even if it had not, the stop was proper for other reasons. It asserted that once Williams made the U-turn, Trooper Robertson had probable cause or reasonable suspicion to suspect a traffic violation had occurred under section 56-5-2140 of the South Carolina Code. The State also argued the act of turning around upon seeing the checkpoint constituted reasonable suspicion.

Williams argued the State had not met the burden of proof for proving the checkpoint constitutional. Further, he asserted a person in the United States has no obligation to travel through a checkpoint. He argued the only evidence the State had presented for stopping him was his avoidance of the checkpoint because his U-

[1] At times, the record refers to Trooper Robertson as "Robinson," but the traffic ticket and list of officers on duty at the checkpoint both identify him as Robertson.

turn was not unlawful as section 56-5-2140 provided "no person shall turn the vehicle in the opposite direction unless such movement can be made in safety without interfering with other traffic."[2]

The State argued Williams only referred to subsection (a) of 56-5-2140 but subsection (b) provided "no vehicle shall be turned so as to proceed in the opposite directions upon any curb or upon the approach to or near the crest of a grade where such vehicle can not be seen by the driver of any other vehicle approaching by either direction within 500 feet."[3] The State maintained because Williams was on a hill, that was the case here. The magistrate determined no testimony had been presented about the legality of the U-turn but the State could recall Trooper Robertson to testify about it. Trooper Robertson then testified Williams's U-turn was illegal because just as Williams came over the grade, he made the U-turn within at most two hundred feet of where the crest starts to grade down. On cross-examination, Trooper Robertson admitted he had not measured the distances and was guesstimating.[4] He testified that at the crest of the hill, one could see in the other direction a distance of over five hundred feet.

The magistrate noted that while the State submitted reports constituting empirical data that could be used to justify the location of the checkpoint, it had not presented a sufficient foundation as to how the reports were prepared and whether they were considered as part of the decision to set up the checkpoint. Based on this lack of foundation, the magistrate determined the case would turn on whether the U-turn was sufficient cause for Williams to be stopped. The magistrate stated that

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[2] This varies slightly from the actual wording of this subsection, which is, "The driver of any vehicle shall not turn such vehicle so as to proceed in the opposite direction unless such movement can be made in safety and without interfering with other traffic." S.C. Code Ann. § 56-5-2140(a) (2006).

[3] This subsection actually states: "No vehicle shall be turned so as to proceed in the opposite direction upon any curve or upon the approach to or near the crest of a grade where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet." S.C. Code Ann. § 56-5-2140(b) (2006).

[4] The magistrate's return indicated that the week following the hearing, Trooper Robertson had informed the magistrate that since he testified, he had measured the distance where this occurred and the applicable distance was over one thousand feet.

without actual measurements, which he noted went to the weight of the evidence and not its admissibility, the evidence was insufficient to establish Williams made the U-turn within five hundred feet of the crest of the hill. The magistrate orally ruled it was "grant[ing] the defense motions." Following the hearing, the magistrate issued its return stating it had dismissed the case based on its finding the State lacked probable cause and had presented no admissible evidence regarding the constitutionality of the checkpoint.

The State made a motion for reconsideration on several grounds including the magistrate erred in (1) ruling pretrial the action should be dismissed or evidence suppressed because the State was not required to establish the constitutionality of a driver's license checkpoint when the driver committed an unlawful U-turn; (2) ruling pretrial the action should be dismissed or evidence suppressed because the testimony of Trooper Robertson established sufficient probable cause or reasonable suspicion Williams violated the U-turn code section; (3) ruling pretrial the action should be dismissed before the State had an opportunity to present its case in chief; and (4) holding what amounted to a preliminary hearing on the existence of probable cause for the stop and arrest.[5]

The magistrate conducted a hearing on the reconsideration motion. The State asserted it still was challenging the magistrate's rulings on the legality of the checkpoint and Trooper Robertson having probable cause to stop Williams because of the violation of the U-turn statute. However, the State contended the magistrate had not ruled on its argument Trooper Robertson had a reasonable suspicion to stop Williams based on the totality of the circumstances. The State provided those circumstances were (1) Trooper Robertson found the U-turn unusual; (2) Williams turned into a parking lot; and (3) Williams turned off his headlights. Williams argued the State had not made the necessary objections to preserve most of its arguments.

The State also argued the magistrate had erred in the remedy it provided Williams. The State stated it believed the magistrate ruled the case was dismissed for lack of probable cause, and Williams concurred. The State argued "dismissal is a remedy authorized by statute," like the videotaping provision contained in section 56-5-2953 of the South Carolina Code, which provides dismissal is appropriate when the

[5] The State raised several additional issues regarding the constitutionality of the checkpoint decision.

State does not comply with the requirements of that section. The State argued that here, no authorizing provision allows dismissal. The State cited to *State v. Ramsey*, [6] in which the supreme court found the magistrate erred in dismissing a case for lack of probable cause because magistrates are not entitled to hold preliminary hearings on charges within their trial jurisdiction. Williams responded the State did not make a contemporaneous objection to the dismissal at the initial hearing. The magistrate denied the motion for reconsideration, stating despite *Ramsey*, "the fundamental flaws in the State's case can not be corrected upon retrial."

The State appealed to the circuit court, arguing the magistrate court erred in (1) holding a preliminary hearing on a charge within its jurisdiction and dismissing the case for lack of probable cause; (2) ruling reasonable suspicion did not exist to justify the stop based on the totality of the circumstances; (3) dismissing the action because Trooper Robertson's testimony established sufficient probable cause or reasonable suspicion Williams violated section 56-5-2140 to justify the stop; and (4) ruling the State failed to present sufficient evidence and competent witnesses to establish the constitutionality of the checkpoint.[7]

The circuit court held a hearing on the matter. Williams asserted that at the initial hearing before the magistrate the State never objected to the propriety of the motion or the magistrate's authority to hear and make a ruling on it, so the State's issues were unpreserved. The State asserted it did object on the record at the hearing to having to prove the constitutionality of the checkpoint prior to trial, citing page 8 of the transcript, stating "we don't agree with [Williams] that we have not shown the constitutionality of the checkpoint, but it doesn't matter in this case because [Williams] did not go to the checkpoint." The State also argued the magistrate erred in finding the State did not have probable cause to arrest Williams because the State has no burden to prove probable cause pretrial and the State's burden is to show the officer had a reasonable suspicion to stop Williams. The State asserted it had reasonable suspicion because Williams made a U-turn once he

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[6] 381 S.C. 375, 673 S.E.2d 428 (2009).

[7] The State consolidated these issues into two issues in its brief to the circuit court: (1) the State had no pretrial burden to prove the constitutionality of the checkpoint because Williams evaded the checkpoint and (2) the State did not have a pretrial burden to show probable cause for Williams's arrest.

saw the checkpoint, fleeing the scene; drove into a parking lot away from the scene; pulled to the backside of the parking lot; and turned off his lights.

The circuit court issued an order affirming the magistrate. It found the State appealed two issues: (1) whether the State had a pretrial burden to prove the constitutionality of the checkpoint and (2) whether the State had a pretrial burden to show probable cause for Williams's arrest. As to the checkpoint, the circuit court found no error because the magistrate reviewed the testimony and evidence presented by the State and concluded the State had not established a proper foundation. As to the probable cause versus reasonable suspicion standard, the circuit court found that even if a reasonable suspicion standard applied, the State could not meet its burden because the stop and arrest were premised on the validity of the checkpoint, which the magistrate correctly determined was without foundation. The circuit court noted the State was unable to prove the U-turn was illegal and only showed it appeared evasive. The circuit court further determined the magistrate properly considered *Ramsey*.

The State filed a motion for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). Further, an appellate court reviewing the circuit court's appeal may review for errors of law only. *Id.* Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Basis for the Stop

The State argues because Williams was stopped without going through the checkpoint, the circuit court erred in affirming the magistrate's requiring the State to provide evidence to support the constitutionality of the checkpoint. The State contends because the validity of the checkpoint was irrelevant, the only issue is

whether the magistrate erred in finding Trooper Robertson lacked probable cause or reasonable suspicion to stop and detain Williams. The State also contends the magistrate erred in requiring probable cause instead of reasonable suspicion. We agree.

A. Constitutionality of the Checkpoint

First, the magistrate held the State failed to prove the constitutionality of the checkpoint. We agree with the State this was not required.[8]

In *United States v. Scheetz*, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit looked at a situation similar to the one here. In that case "narcotics officers . . . observed a [vehicle] approach the checkpoint signs and then execute an illegal [U]-turn across the grass median after passing the first checkpoint sign but before reaching the checkpoint itself. Upon observing that conduct, the narcotics officers pursued the [vehicle] and executed a stop." *Id.* at 182-83.

The Fourth Circuit found

> nothing improper with respect to the stop and subsequent search of Scott Brooks's car and person. Because of his vehicular flight prior to arriving at the checkpoint, Scott Brooks was not seized for Fourth Amendment purposes by the show of police authority by virtue of the checkpoint signs or the checkpoint itself. *California v. Hodari D.*, 499 U.S. 621, 626-29 (1991) (no seizure for Fourth Amendment purposes when a defendant did not

[8] Williams asserts this issue is unpreserved. We disagree. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Id.* at 58-59, 609 S.E.2d at 523. During the hearing, the State maintained that even if it had not proved the checkpoint was constitutional, it did not need to because Williams did not go through the checkpoint. The State argued Trooper Robertson had probable cause to believe Williams had violated the U-turn statute or had a reasonable suspicion that criminal activity was afoot due to the U-turn before the checkpoint. Accordingly, this issue is preserved.

> acquiesce in the show of police authority); *id.* at 629 ("Assuming that [the officer's] pursuit . . . constituted a 'show of authority' in enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled."); *Brower v. Cty. of Inyo*, 489 U.S. 593, 599 (1989) (holding that for purposes of determining whether the roadblock worked a Fourth Amendment seizure, the controlling considerations are whether: (1) the motorist "was meant to be stopped by the physical obstacle of the roadblock"; and (2) the motorist "was so stopped"); *Latta v. Keryte*, 118 F.3d 693, 700 (10th Cir. 1997) (holding that a fleeing motorist was not seized for Fourth Amendment purposes until the law enforcement officers were successful in stopping the motorist at a roadblock); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) (holding that, unless the law enforcement officer's show of authority succeeds in restraining a person, the person has not been seized within the meaning of the Fourth Amendment).

Scheetz, 293 F.3d at 183 (alterations by court).

The Supreme Court of North Carolina recently addressed a similar issue in *State v. Griffin*, 749 S.E.2d 444 (N.C. 2013). In that case, "[d]efendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a three-point turn by beginning to turn left and continuing onto the shoulder." *Id*. at 447. The court determined based on the circumstances in that case, "because the trooper had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this [c]ourt to address the constitutionality of the driver's license checkpoint." *Id.*

In the present case, the magistrate erred in finding the State had to establish the constitutionality of the checkpoint. Both *Scheetz*, 293 F.3d at 183, and *Griffin*, 749 S.E.2d at 447, hold the analysis for determining if a checkpoint is constitutional only applies when a vehicle is stopped at the checkpoint and does not apply when the vehicle does not actually make it to the checkpoint. Here, Williams turned around before he got to the checkpoint; thus, he was never actually stopped by the

checkpoint. Accordingly, the magistrate erred in requiring the State to prove the checkpoint was constitutional.

B. Probable Cause and Reasonable Suspicion

The magistrate also found the State lacked probable cause to stop Williams. The State argues it did establish probable cause to stop Williams for a traffic violation. It also maintains even if it did not establish probable cause, it demonstrated it had reasonable suspicion criminal activity was afoot based on the totality of the circumstances. We agree the State established it had reasonable suspicion and because police can stop a vehicle for either reasonable suspicion or probable cause, it was error for the magistrate to dismiss the case for lack of probable cause.

"The Fourth Amendment guarantees a person the right to be secure from unreasonable searches and seizures. '[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention.'" *State v. Vickery*, 399 S.C. 507, 514-15, 732 S.E.2d 218, 221 (Ct. App. 2012) (alteration by court) (citations omitted) (quoting *State v. Pichardo*, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005)). "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision." *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (quoting *Whren v. United States*, 517 U.S. 806, 809-10 (1996)).

> A traffic stop constitutes a Fourth Amendment seizure; thus, the traffic stop must be reasonable under the circumstances. "Reasonableness is measured in objective terms by examining the totality of circumstances." *Pichardo*, 367 S.C. at 101, 623 S.E.2d at 849. A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity.

State v. Vinson, 400 S.C. 347, 351-52, 734 S.E.2d 182, 184 (Ct. App. 2012) (citations omitted).

"The decision to stop an automobile is reasonable whe[n] the police have probable cause to believe that a traffic violation has occurred." *State v. Banda*, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). "A finding of probable cause may be based upon less evidence than would be necessary to support a conviction." *Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 506, 692 S.E.2d 565, 568 (Ct. App. 2010). "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." *State v. Blassingame*, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer[']s disposal." *State v. George*, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996). "Moreover, a police officer's 'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" *Vinson*, 400 S.C. at 352, 734 S.E.2d at 184 (quoting *State v. Corley*, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009)).

"The police . . . may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." *Butler*, 343 S.C. at 201, 539 S.E.2d at 416.

> A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). "Reasonable suspicion" requires a "particularized and objective basis that would lead one to suspect another of criminal activity." *United States v. Cortez*, 449 U.S. 411, 418 (1981). In determining whether reasonable suspicion exists, "the totality of the circumstances—the whole picture—" must be considered. *Id.* at 417.

State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). "Under the United States Supreme Court's definition of reasonable suspicion, the facts and inferences relied on by the officer must be articul*able*, not necessarily articulat*ed*." *Robinson v. State*, 407 S.C. 169, 184 n.9, 754 S.E.2d 862, 869 n.9 (2014).

The United States Supreme Court has held:

> Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000).

The Court further explained:

> [I]n *Florida v. Royer*, 460 U.S. 491 (1983), . . . [the Supreme Court] held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. *Id.* at 498. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, 528 U.S. at 125.

In a Fourth Circuit Court of Appeals case similar to the present one, the court held:

> [T]he principles of *Wardlow* apply to evasive conduct by drivers approaching a police roadblock. As with an individual who encounters police on foot, "[h]eadlong flight" or other "nervous, evasive behavior" in response to a roadblock may contribute to reasonable suspicion that the driver is engaged in criminal activity. *Id.* at 124. Such evasive behavior is "not going about one's business," *id.* at 125 (internal quotation marks omitted), but instead suggests that the driver is avoiding the roadblock for other than innocent reasons, *see id.* at 124-25. Indeed, we have repeatedly recognized that evasive reactions to the presence of police may be considered in determining whether reasonable suspicion exists for an investigatory stop. *See United States v. Sims*, 296 F.3d 284, 287 (4th Cir. 2002) (holding that defendant's evasive behavior—which reasonably suggested he was hiding from officers and not simply "going about his business"—supported finding of reasonable suspicion for investigatory stop (alteration & internal quotation marks omitted)); *United States v. Brugal*, 209 F.3d 353, 360-61 (4th Cir. 2000) (en banc) (plurality opinion) (concluding that officers had reasonable suspicion to stop vehicle that immediately exited interstate after passing "decoy" signs indicating drug checkpoint was ahead, in part because area surrounding exit was deserted when vehicle exited at 3:30 a.m.); *United States v. Sprinkle*, 106 F.3d 613, 618 (4th Cir. 1997) ("Evasive conduct can, of course, assist an officer in forming reasonable suspicion."); *see also United States v. Humphries*, 372 F.3d 653, 657, 660 (4th Cir. 2004) (explaining, in context of probable cause analysis, that officers may consider "evasive conduct that falls short of headlong flight," such as walking away from approaching officers at a quick pace and ignoring commands to stop). We therefore hold that when law enforcement officers observe conduct suggesting that a driver is attempting to evade a police roadblock—such as

> unsafe or erratic driving or behavior indicating the driver is trying to hide from officers—police may take that behavior into account in determining whether there is reasonable suspicion to stop the vehicle and investigate the situation further. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1138-39 (9th Cir. 2000) (en banc) (holding that U-turn of defendants' vehicles shortly before reaching border checkpoint, combined with other factors, including fact that vehicle subsequently stopped on side of highway in isolated area, provided reasonable suspicion for investigatory stop); *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996) (holding that defendant's apparent attempt to avoid roadblock by turning into parking lot was a factor supporting reasonable suspicion to stop vehicle); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) (explaining that among other factors officers may consider in determining whether reasonable suspicion exists to stop a vehicle near the border, "[t]he driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion").

United States v. Smith, 396 F.3d 579, 584-85 (4th Cir. 2005) (alterations by court).

In *Smith*, 396 F.3d at 585, the Fourth Circuit further determined based on the totality of the circumstances, the officers possessed a reasonable suspicion Smith was engaged in criminal activity. The court based its decision on the following factors:

> The officers observed Smith's vehicle brake abruptly and turn suddenly into a private gravel driveway. Smith's erratic driving and the nature of the road onto which he turned could have reasonably suggested to the officers that Smith was attempting to evade the roadblock rather than simply "going about [his] business," *Wardlow*, 528 U.S. at 125 (internal quotation marks omitted). *See Steinbeck v. Commonwealth*, 862 S.W.2d 912, 914 (Ky.

Ct. App. 1993) (finding reasonable suspicion for investigatory stop when, at 3:15 a.m., defendant's vehicle turned onto unpaved and uninhabited road before reaching roadblock). Upon further investigation, Officer McCoy observed Smith's vehicle stopped in the middle of the driveway, more than 200 feet from the public road but still some distance from the residence. McCoy could have reasonably inferred from this observation that Smith was attempting to evade the police checkpoint by hiding in the driveway and was not simply turning into the driveway because he lived there or because he was turning around to avoid the checkpoint for innocent reasons, such as a belief that an accident was ahead. *See Smith v. State*, 515 So. 2d 149, 150, 151 (Ala. Crim. App. 1987) (holding that investigatory stop of defendant's vehicle was justified when officer observed vehicle come around a curve approximately 200 yards from roadblock, turn rapidly into a private driveway, and stop 50 feet from a residence with its lights off but engine running); *State v. D'Angelo*, 605 A.2d 68, 70-71 (Me. 1992) (finding reasonable suspicion when defendant's vehicle turned into private driveway 75 yards before checkpoint, officer knew some residents of home but had never seen defendant's vehicle parked there, and occupants of vehicle did not exit after stopping engine and turning off lights but instead turned to observe police activities); *State v. Foreman*, 527 S.E.2d 921, 922-23 (N.C. 2000) (concluding that officer possessed reasonable suspicion when defendant's vehicle made abrupt turn before reaching checkpoint, made second abrupt turn, and parked in residential driveway with its lights and engine off). And although McCoy had activated his police lights, Smith's vehicle did not remain stopped—as one would expect of a driver who turned away from the roadblock for innocent reasons—but instead proceeded around the curve in the driveway. As the district court recognized, this additional evasive behavior gave McCoy further reason to believe that Smith might be engaged in

> criminal activity. *See Watkins v. City of Southfield*, 221 F.3d 883, 889 (6th Cir. 2000) ("[T]he fact that [the defendant] refused to stop when [officers turned on their police lights] contributed to the officers' suspicion that criminal activity may have been afoot."); *United States v. Lyles*, 946 F.2d 78, 80 (8th Cir. 1991) (considering, in reasonable suspicion analysis, the fact that "[w]hen the officers stopped behind the [defendants'] car and turned on the flashing red lights, the car began to drive away"); *United States v. Walraven*, 892 F.2d 972, 975-76 (10th Cir. 1989) (holding that reasonable suspicion existed for investigatory stop in part because vehicle failed to stop promptly in response to police lights). Thus, by the time Smith finally submitted to McCoy's display of authority by stopping at the end of the driveway, McCoy had observed Smith engage in a series of evasive actions—all inconsistent with innocent reasons for avoiding the roadblock. And, all of this conduct occurred at 3:05 a.m., compounding the suspiciousness of Smith's behavior. *See United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) (explaining that "[t]he lateness of the hour is another fact that may raise the level of suspicion"). We conclude that these facts, viewed in their totality, provided the officers with reasonable suspicion that Smith may have been engaged in criminal activity, thus permitting them to stop his vehicle to investigate that suspicion.

Smith, 396 F.3d at 585-87 (alterations by court) (footnotes omitted).

In *Griffin*, 749 S.E.2d at 447, the Supreme Court of North Carolina addressed whether actions similar to those of Williams constituted reasonable suspicion. In that case:

> Defendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a

> three-point turn by beginning to turn left and continuing onto the shoulder. From the checkpoint[,] Trooper Casner observed defendant's actions and suspected defendant was attempting to evade the checkpoint. Defendant's turn in the middle of the road and onto the shoulder was more suspicious than the defendant's turn onto a connecting street in *Foreman* and the defendant's turn into a private driveway in *Smith.* It is clear that this [c]ourt and the Fourth Circuit have held that even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional.

Id.

The State contended it had both probable cause and reasonable suspicion. Police can stop a car based on either probable cause that a traffic violation has occurred or reasonable suspicion an occupant is involved in criminal activity. Like in *Smith*, 396 F.3d at 585-87, and *Griffin*, 749 S.E.2d at 447, Williams's behavior indicated he was trying to hide from the police. All of the circumstances combined—his evasiveness; the time, 3 a.m.; the U-turn upon seeing the checkpoint; the turning into a parking lot; his turning off his headlights; and his pulling to the back of the parking lot—gave Trooper Robertson a reasonable suspicion that criminal activity was afoot. Accordingly, the State had to demonstrate it had either reasonable suspicion the suspect was involved in criminal activity *or* probable cause to believe a traffic violation had occurred. Because the State showed it had reasonable suspicion, it was not required to also show it had probable cause. Therefore, the magistrate erred in dismissing the case for lack of probable cause to believe a traffic violation had occurred.[9] [10]

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[9] Because we find the State had reasonable suspicion to stop Williams, we need not address its argument it had probable cause as well. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Motion for Dismissal

The State maintains the magistrate exceeded its authority in considering Williams's motion to dismiss because dismissal was not a proper remedy and magistrates do not have the power to hold pretrial preliminary hearings for charges that fall within their jurisdiction. We agree.

A. Preservation

Williams asserts this issue is not preserved for our review. We disagree.

"To preserve an issue for appellate review, an appellant must object at his first opportunity." *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). "A party cannot for the first time raise an issue by way of a Rule 59(e)[, SCRCP,] motion [that] could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). However, this court has found an issue preserved when a party raises for the first time in a motion for reconsideration the court failed to use the proper standard. *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374-75, 588 S.E.2d 639, 641 (Ct. App. 2003).

In *State v. Williams*, Respondent Smith argued the issue on appeal was unpreserved because the State did not oppose the hearing when Respondents moved that it be held. 321 S.C. 381, 385 n.3, 468 S.E.2d 656, 658 n.3 (1996).

> In moving for the hearing, Respondents asked the trial court to rule on the . . . issue "prior to allowing the testimony to come before the jury inasmuch as there is a

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[10] Additionally, the State asserts Trooper Robertson did not actually stop Williams because he was already stopped in the parking lot when Trooper Robertson approached him. We agree with Williams this argument is not preserved for review because this is the first time the State has raised it. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (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. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Harris*, 311 S.C. 162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) ("An issue not raised at trial is waived on appeal.").

> risk of prejudice if certain statements may be testified to . . . , at which point we would not be able to cure that in front of the jury." The State was given no indication that the trial court would peremptorily dismiss the charges at the close of a hearing the stated purpose of which was to prevent prejudice. Thus, we disagree with Respondent Smith that the State is procedurally barred from raising this issue.

Id. at 385-86 n.3, 468 S.E.2d at 658 n.3.

Our supreme court has observed "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part).

The State did not raise an objection at the initial hearing. However, the transcript of the hearing contains no mention Williams's motion was a motion to dismiss. At the beginning of the hearing, the magistrate told Williams "I understand you . . . have pre-trial motions," and Williams responded he was "asking the [S]tate for proper evidence to support that the checkpoint meets constitutional muster." At the end of the hearing, the magistrate stated, "I am going to grant the [d]efense motions." Nothing in the transcript of the hearing indicates Williams's motion was for a dismissal. Further, the record does not contain a written motion to dismiss. At the hearing on the State's motion for reconsideration, the State explained its issue was about the specific remedy in question in the particular case, that the case was dismissed. The State asserted Williams had never asked for a dismissal and that would not be a proper remedy.

We consider this argument preserved because the State asserted it did not realize at the initial hearing the magistrate was dismissing the case and the record does not dispute that. Like in *Williams*, 321 S.C. at 385-86 n.3, 468 S.E.2d at 658 n.3, if the State did not realize the magistrate was dismissing the case until it received the written decision, this issue is preserved because once the State received the magistrate's decision, it raised the issue in its motion to reconsider. Accordingly, we will address the merits.

B. Merits

> In general, magistrates have criminal jurisdiction "of all offenses which may be subject to the penalties of either fine or forfeiture not exceeding five hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days." S.C. Code Ann. § 22-3-550 (2007). For crimes outside magistrates' jurisdiction, magistrates are authorized to conduct a preliminary examination. *See* Rule 2, SCRCrimP ("Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing."). The purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed the crime and to warrant the defendant's subsequent trial. 12 S.C. Jurisprudence *Magistrates and Municipal Judges* § 31. Nevertheless, for those matters within magistrates' jurisdiction, *preliminary determinations of probable cause are not authorized by statute*. Indeed, South Carolina law requires that all magistrate proceedings "shall be summary or with only such delay as a fair and just examination of the case requires." S.C. Code Ann. § 22-3-730 (2007).

State v. Ramsey, 381 S.C. 375, 376-77, 673 S.E.2d 428, 428-29 (2009) (emphasis added).

"[T]here is no authority for the proposition that magistrates are authorized to conduct preliminary hearings on matters within their own trial jurisdiction. To hold otherwise would undermine the summary nature of magistrate proceedings and unduly expand magistrate dockets." *Id.* at 377, 673 S.E.2d at 429. In *Ramsey*, the supreme court determined "the magistrate judge should have declined Respondent's request for a probable cause hearing and instead brought the charge to trial for summary disposition. The trial court therefore erred in considering the merits of the probable cause inquiry and affirming the magistrate." *Id.* at 377-78, 673 S.E.2d at 429.

As noted above, the magistrate erred in finding the State had to prove the constitutionality of the checkpoint and dismissing the case because the State lacked probable cause. However, the magistrate also erred in holding a pretrial probable cause hearing instead of proceeding to trial because this matter was within its jurisdiction.

"[A] trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court. The prosecutor may, of course, request the dismissal of an indictment or charge." *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998), *modified on other grounds*, *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

> A statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order an indictment or prosecution dismissed. But in the absence of such a statute, a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor. . . .

State v. Ridge, 269 S.C. 61, 65, 236 S.E.2d 401, 402 (1977) (alterations by court) (quoting *In re Brittian*, 263 S.C. 363, 366, 210 S.E.2d 600, 601 (1974)).

The magistrate erred in dismissing the case. The proper remedy for evidence obtained in violation of the Fourth Amendment is suppression. *See State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013) ("The Fourth Amendment prohibits unreasonable search and seizure, and requires that evidence seized in violation of the Amendment be excluded from trial."). Accordingly, the magistrate erred in dismissing the DUI case against Williams because even if the stop had been unconstitutional, the magistrate only had the authority to suppress the evidence.

CONCLUSION

The magistrate court and circuit court erred in dismissing the case. Accordingly, those orders are

REVERSED AND REMANDED.

FEW, C.J., and MCDONALD, J., concur.