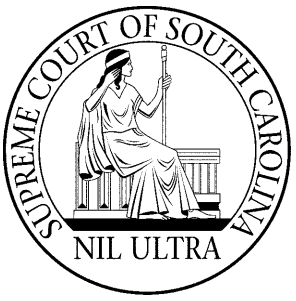

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 23, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Overland, Inc., d/b/a Land Rover Greenville, Petitioner,

v.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Synovus Financial Corporation d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc., Defendants,

of which Bank of America Corporation and SunTrust Banks, Inc. are the Respondents.

Appellate Case No. 2016-002151

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 27800
Heard May 2, 2018 – Filed May 23, 2018

AFFIRMED

Carl F. Muller, of Carl F. Muller, Attorney at Law, P.A., and T. Hunt Reid, of Howard Howard Francis & Reid, both of Greenville, for Petitioner.

James W. Sheedy and Susan E. Driscoll, both of Driscoll Sheedy, P.A., of Charlotte; Zachary Lee Weaver and W.

Howard Boyd Jr., both of Gallivan, White & Boyd, PA, of Greenville, for Respondents.

JUSTICE FEW: Overland, Inc., filed this lawsuit against Lara Marie Nance, Bank of America, SunTrust Banks, and other defendants seeking damages arising out of Nance's embezzlement of $1,282,000 from the Land Rover dealership Overland operated in the city of Greenville. Nance pled guilty in federal court to wire fraud for stealing the money and was sentenced to 46 months in prison. Overland's theory of liability against Bank of America and SunTrust was that allowing Nance to deposit forged checks into fraudulent accounts she created breached duties the banks owed to Overland. The banks made motions for summary judgment on the ground they owed no duty to Overland, who was not a customer of either bank. The circuit court granted the motions for summary judgment, stating, "Overland [was] unable to demonstrate that [the banks] owed it any duty . . . ." The circuit court denied Overland's Rule 59(e) motion. Overland filed a notice of appeal, which the court of appeals dismissed in an unpublished opinion. *Overland, Inc. v. Nance*, Op. No. 2016-UP-368 (S.C. Ct. App. filed July 20, 2016). We granted Overland's petition for a writ of certiorari.

This Court may affirm the trial court on any ground appearing in the record. Rule 220(c), SCACR. After carefully reviewing the record and the parties' briefs to this Court and the court of appeals, we affirm on the merits the circuit court's order granting summary judgment. *See* Rule 220(b)(1), SCACR; *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011) ("A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine."); S.C. Code Ann. § 36-3-103(a)(9) (Supp. 2017) ("In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4."); *Kerr v. Branch Banking & Tr. Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 727 (2014) (holding a bank's limited duty of care to customers does not extend to non-customers where the non-customer's claims are premised on disputed contractual obligations between a bank and its customer, but the non-customer is not an intended third-party beneficiary to that contract).

We clarify, however, a point of confusion that appears to have existed between the parties and the circuit court.[1] Rule 6(b) of the South Carolina Rules of Civil Procedure gives trial courts limited authority to extend deadlines set forth in the Rules. However, Rule (6)(b) explicitly excludes Rule 59 and certain other rules from that authority. Rule 6(b) states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 59(e) does not have any "conditions stated" which would allow such an extension. Rather, Rule 59(e) states, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

We have previously held that the ten-day limit for serving a Rule 59(e) motion is an absolute deadline. In *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000), the circuit court entered a dispositive order on January 10, 1997. 339 S.C. at 493, 530 S.E.2d at 127. "Neither party filed a Rule 59(e), SCRCP, motion within the ten day period allowed by that rule." *Id.* Nevertheless, on February 10, the circuit court issued another dispositive order completely reversing itself from the January 10 order. We held,

> the trial judge's . . . order filed February 10, 1997, more than thirty days later, was patently untimely. Under Rule 59(e), SCRCP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative . . . . When no timely Rule 59 motion was made nor timely sua sponte order filed under Rule 59(e), the January . . . order "matured" into a final judgment. The order filed on February 10 was a nullity because the trial judge no longer had jurisdiction over the matter.

339 S.C. at 494, 530 S.E.2d at 128; *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (on appeal from an order entered just before the effective date of the Rules of Civil Procedure, holding the trial court lost the

[1] Although we affirm the circuit court order pursuant to Rule 220(b)(1), the discussion following this footnote is not in the nature of a memorandum opinion pursuant to Rule 220(b)(1), and is intended to be precedential in all future civil litigation in this State.

power to modify the final order after end of the term of court, and noted that under Rule 59(e) the trial court would have the power to alter or amend such an order for a ten-day period after entry of judgment).

In light of these authorities, we repeat that the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion, *see Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) ("It is clear . . . that the district court was without power to enlarge the time period for filing a Rule 59(e) motion."). The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.

The order of the circuit court granting summary judgment to the banks is **AFFIRMED** on the merits.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darryl Frierson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001940

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 27801
Heard March 29, 2018 – Filed May 23, 2018

AFFIRMED AS MODIFIED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell, III, of Columbia, for Respondent.

JUSTICE HEARN: Petitioner Darryl Frierson pled guilty to assault and battery of a high and aggravated nature, criminal conspiracy, kidnapping, and armed robbery

for his role in masterminding a $9.8 million heist from an armored truck. He was sentenced to an aggregate term of thirty-five years in prison. Thereafter, he applied for post-conviction relief (PCR), asserting he would not have pled guilty but instead would have proceeded to trial had his plea counsel adequately informed him of the possibility to suppress evidence gathered from law enforcement's warrantless placement of a mobile tracking device on his vehicle. The PCR court denied relief, and the court of appeals affirmed. *Frierson v. State*, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016). We affirm as modified and take this opportunity to clarify the correct standard to determine prejudice when a defendant seeks PCR after pleading guilty.

FACTUAL/PROCEDURAL BACKGROUND

Around midnight on May 10, 2007, Frierson and his co-worker, David Jones, were refueling their company's armored truck at a gas station outside of Columbia when several individuals overpowered them, forcing them back into the truck at gun point. The attackers drove the truck to a nearby strawberry field, tied Jones up with duct tape, transferred the money to a get-away car, and fled, leaving Frierson and Jones behind. Unlike Frierson, Jones was severely injured, but he was able to remove the duct tape and walk to a night club where he called police. Frierson remained behind in the truck, claiming he was too injured to find help. Eventually, Jones and Frierson were transported to the hospital, where law enforcement arrived to speak with them. Investigators immediately became suspicious of Frierson as they noticed he appeared to have suffered no visible injuries whereas Jones was severely beaten. Thereafter, Frierson vividly described the details of the crime scene, even though the events occurred in the dark around midnight. After Frierson was released from the hospital, he went to the police station, where police observed him through a two-way mirror naturally moving his arms despite wearing a sling and claiming his shoulder was injured. Frierson agreed to take a polygraph test, which he failed. Believing the crime was an "inside job," law enforcement continued its surveillance of Frierson by placing a tracking device on the outside of his vehicle, which revealed he was traveling extensively and shopping at a Florence mall.

While police tracked Frierson's movements, more incriminating evidence was uncovered, including a blue latex glove found in Frierson's trash outside his home that matched a glove found inside the armored truck shortly after the robbery. Police talked to Paul Whitaker, another co-worker and close friend of Frierson, who subsequently confessed that he took part in the robbery and identified Frierson as

the mastermind. Thereafter, police searched Whitaker's house and found a substantial amount of money and mall receipts belonging to Frierson.

A few days later, pursuant to a valid arrest warrant, law enforcement officers used the tracking information to locate Frierson in Columbia, and they arrested him while he was driving with a friend, Domonique Blakney, who turned out to have been involved in the crime as well. Police searched the car and found several thousand dollars in cash. At the police station, investigators found pictures of bags of money on Blakney's cell phone, and he confessed that Frierson was the mastermind of the heist. Presented with Blakney's statements, Frierson subsequently confessed, as did the remaining co-conspirators.

Thereafter, plea counsel advised Frierson the placement of the tracking device without a warrant was likely permissible;[1] however, plea counsel was unaware of section 17-30-140 of the South Carolina Code (2014).[2] Frierson pled guilty and later sought PCR, arguing plea counsel failed to adequately inform him that he could have moved to suppress the information garnered from the tracking device on constitutional grounds and based on section 17-30-140.[3] Although Frierson testified

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[1] Frierson pled guilty four years before the United States Supreme Court decided *United States v. Jones*, 565 U.S. 400 (2012), holding the physical placement of a monitoring device on a suspect's vehicle constituted a trespass on private property and therefore a search under the Fourth Amendment. At the time, plea counsel relied on *United States v. Knotts*, 460 U.S. 276 (1983), holding the use of a tracking device to monitor the location of a defendant traveling along public roadways did not invade any legitimate expectation of privacy and was not a "search" in violation of the Fourth Amendment, and *United States v. Karo*, 468 U.S. 705, 713 (1984), holding the placement of an electronic beeper in a container with the owner's consent did not constitute a search because the buyer's privacy interests were not infringed when he received possession of the container.

[2] Section 17-30-140(A) states, "The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State."

[3] Frierson actually discovered the existence of section 17-30-140 himself while researching his case in prison.

he would not have pled and instead proceeded to trial, the PCR court found his testimony "wholly incredible." The court denied relief, finding counsel was not deficient because he sufficiently researched the legality of the warrantless placement of the device and concluding Frierson failed to establish prejudice, primarily based on the court's credibility finding. The court of appeals affirmed, concluding there was overwhelming evidence that "the outcome of [Frierson's] case would have been no different had he chosen to proceed to trial." *Frierson*, 417 S.C. at 299, 789 S.E.2d at 768. We granted Frierson's petition for a writ of certiorari to review the court of appeals' opinion.

STANDARD OF REVIEW

We defer to the PCR court's factual findings and will uphold them if supported by any evidence in the record. *Smalls v. State*, 422 S.C. 174, ___, 810 S.E.2d 836, 839 (2018). Furthermore, we afford great deference to a PCR court's credibility findings. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed de novo, and we will reverse the PCR court if its decision is controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

LAW/ANALYSIS

To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in

this case. *See Smalls*, 422 S.C. at ___, 810 S.E.2d at 843–47 (surveying cases that discuss overwhelming evidence—all of which involved a conviction obtained at trial). The court of appeals initially acknowledged the correct standard and affirmed the PCR court's determination that Frierson failed to prove prejudice—and we affirm this decision. However, thereafter, the court proceeded to discuss how the outcome at trial would have been the same as Frierson's guilty plea due to the overwhelming evidence of guilt against him. The court of appeals exceeded the proper scope of the prejudice inquiry, and accordingly, we modify the portion of the court's opinion which addresses overwhelming evidence. We reiterate the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.

Despite the court of appeals' erroneous application of the standard of review, it correctly deferred to the PCR court's finding that Frierson was not prejudiced. Accordingly, we **AFFIRM AS MODIFIED.**

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephanie Irene Greene, Appellant.

Appellate Case No. 2014-000764

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27802
Heard February 15, 2018 – Filed May 23, 2018

AFFIRMED IN PART, VACATED IN PART

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan Wilson and Senior Assistant Attorney General David Spencer, both of Columbia, and Seventh Judicial Circuit Solicitor Barry J. Barnette, of Spartanburg, for Respondent.

JUSTICE KITTREDGE: Appellant Stephanie Irene Greene appeals her convictions and sentences for homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child for the death of her infant daughter, Alexis. Appellant was sentenced to prison for twenty years for homicide by child abuse, five years concurrent for involuntary manslaughter, and five years concurrent for unlawful conduct toward a child. We affirm the homicide by child abuse and

unlawful conduct toward a child convictions and sentences, but we vacate the involuntary manslaughter conviction and sentence.

I.

Appellant was Alexis's mother; she was Alexis's caretaker during her brief life. Alexis died from morphine poisoning when she was forty-six days old. Appellant, a former nurse, was addicted to many drugs. The State contended that Appellant's morphine addiction (as well as dependence on other drugs) caused Alexis's drug poisoning through breastfeeding. The jury convicted Appellant on all charges.

This appeal followed. Appellant has raised four issues: (1) whether the trial court erred in denying her motion for a directed verdict on all charges due to the State's failure to prove causation; (2) whether the trial court erred in denying her motion for a directed verdict on the homicide by child abuse charge due to the State's failure to prove she acted with extreme indifference; (3) whether the trial court erred in failing to instruct the jury that it could only return a guilty verdict on one charge; and (4) whether the trial court erred in failing to require the State to open fully on the law and the facts of the case. We address each of these issues in turn.

II.

Appellant's first assignment of error is the trial court's failure to grant a directed verdict on all charges because the State allegedly failed to produce any evidence that the morphine found in Alexis came from Appellant's breast milk. Appellant ignores the "synergistic effect" of the morphine poisoning when considered along with Appellant's abuse of other drugs. We have carefully reviewed the evidence and, when viewed in a light most favorable to the State as our standard of review mandates, we find sufficient evidence to present all charges to the jury. *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (noting that when reviewing the denial of a directed verdict the Court must not weigh the evidence but must view it in the light most favorable to the State, for the Court is concerned only with the existence or nonexistence of evidence) (citations omitted).

The State's causation theory was Appellant consumed excessive amounts of central nervous system depressants, principally morphine,[1] while breastfeeding Alexis and these drugs passed through Appellant's breast milk, resulting in Alexis's death.

[1] While the State focused mainly on Alexis's morphine poisoning, the other central nervous system depressant abused by Appellant was Clonazepam.

The evidence at trial revealed that Appellant continuously took morphine—MS Contin—and other drugs while pregnant with Alexis and while breastfeeding her. Moreover, the evidence showed that Appellant took more morphine than her doctors prescribed. In addition, Appellant exclusively breastfed Alexis until approximately one week before her death. Appellant told investigators that she began supplementing with formula due to her new blood pressure medication; however, Appellant also told investigators that she breastfed Alexis extensively during the two nights immediately preceding Alexis's death. Thus, sufficient evidence was shown that Appellant took many drugs, including morphine, and breastfed Alexis.

In addition, the evidence presented at trial was sufficient to show that the morphine and Clonazepam found in Alexis came from Appellant's breast milk. Appellant contends there is no evidence to support a finding that Alexis's drug poisoning was the result of ingesting morphine through Appellant's breast milk. We disagree, for we find the evidence, when considered in its entirety, provides a substantial basis from which a reasonable juror could conclude Appellant's breast milk was the source of the morphine that killed Alexis. The record includes extensive scientific evidence on morphine and the synergistic effect when combined with other central nervous system depressants. This evidence included the varying rates of metabolism in adults, the absence of metabolism in infants, the transferability of morphine from a mother to her baby through breast milk, and the risks of infants ingesting morphine (and other drugs) from their mothers' breast milk.

Dr. David H. Eagerton, an assistant professor of pharmacology and founding faculty member at the Presbyterian College School of Pharmacy and the former chief toxicologist at the South Carolina Law Enforcement Division, provided considerable testimony. Part of that evidence included the warning accompanying MS Contin, which provides that morphine "passes into the breast milk":

> **Dr. Eagerton**: "Before taking MS Contin tell your healthcare provider if you have a history of it." It gives several histories. And then in bold again it says, "Tell your healthcare provider if you are pregnant or planning to become pregnant. MS Contin may harm your unborn baby. *If you're breastfeeding MS Contin passes into the breast milk and may harm your baby*."

(emphasis added).

Much of the scientific evidence addressed an infant's inability to absorb and process a drug like morphine:

> **The State**: And obviously the child died. Obviously, it is consistent with that. Through the breastfeeding and everything a child—can it metabolize drugs like an adult does?
>
> **Dr. Eagerton**: No, they don't.
>
> **The State**: If you would, tell the jury about that, especially a six-week-[]old.
>
> **Dr. Eagerton**: Okay. Typically, whenever—just to kind of back up a little bit how—you have to understand what drugs do in your body.
>
> Once—once you take them they don't stay there forever. They go through a cycle. And in pharmacology we use the acronym ADME absorption. You have to get the drug into your system. So how do you get it in there? There's—there's lots of different ways. You can—most things we're talking about now is you think of it orally. But you can give it, you know, as a shot either just under your skin, in your muscle. You can give it [in an] IV directly in your veins. You can absorb some drugs through the skin, different things like that. So you have different routes of administration depending on what you're trying to do and what the drug is.
>
> Once you absorb it it's going to distribute throughout your body based on its chemical and physical properties, that is whether it likes water or whether it likes fat, or it distributes into one of those two areas in the body primarily.
>
> Certain tissues may pick up drugs preferentially, things like that. So it's going to distribute throughout your body.
>
> Then the next step is metabolism, which is more correctly termed biotransformation. Basically, your liver is responsible for that, and it has enzymes that develop over time that basically take these foreign compounds that you're taking and make it usually more

water [soluble], and the idea is to make it either less toxic or more readily excreted. But the idea i[s] to make it more readily—more water [soluble] typically so that it could be more readily excreted from your body. And that's the last stage[] of elimination. And it's eliminated—it's eliminated—most drugs are going to be once they're—especially once they've been metabolized and made more water [soluble] they're going to be eliminated throughout the water in your body—urine, feces, sweat, saliva, tears, things like that is how it's going to be eliminated primarily. There are other ways too.

The State: Does a six-week-[]old child metabolize at all?

Dr. Eagerton: No, not typically because it take[s] time[] for your liver to develop. It takes time for these—the genes that code for these enzymes to turn on and be expressed. And you don't—even a child doesn't metabolize things the same as an adult.

Usually you don't—whenever you go through puberty is whenever most of the things that are going to turn on for an adult is going to turn on.

And, in fact, it even goes the other way. As you get old, become aged, some of these genes can become nonfunctional. Some—you may not have the same metabolic capacity.

Your kidneys may not work as well, things like that. So you have to take into consideration age certainly whenever you're looking at the effects of drugs and how long they're going to stay in your body.

The State: Obviously, the baby Alexis showed signs of this before the death.

Dr. Eagerton: Right. The—the lethargy, maybe trouble breathing. I—I don't know how to interpret that exactly, but there [were] some—there were some symptoms that were conveyed that were consistent with morphine toxicity.

The State: And basically if she was continuously breastfeeding and things like that could she reach a level, especially if she didn't metabolize it nearly as fast as the mother, for example, could it reach the levels of toxicology—toxicity of the level [sic]?

Dr. Eagerton: Yes. And that's one of the things that if you can't metabolize it, then the drug may build up in your body and you become—you have a toxic dose whenever you wouldn't normally have a tox[ic] dose.

Dr. Eagerton's testimony further included the warning on morphine from LactMed[2]:

Dr. Eagerton: "Epidural morphine given to mothers for post[-] cesarean section analgesia results in trivial amounts of morphine in their colostrum and milk. Intravenous or oral doses of maternal morphine in the immediate postpartum period result in higher milk levels than with epidural morphine. Labor pain medication may delay the onset of lactation. *Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.*"

(emphasis added).

Dr. Eagerton: "[A]t least some of [the morphine] I believe within a reasonable degree of scientific and medical certainty had to come through the breast milk."

Accepting this evidence as true—as we must under the standard of review—one may reasonably deduce that morphine ingested through breastfeeding "can cause . . . death." The evidence, scientific and otherwise, further allows a reasonable juror to conclude that Appellant's breast milk was the source of the morphine found in Alexis's body. Thus, the testimony of Dr. Eagerton provides evidence that, if believed, is sufficient to survive Appellant's directed verdict motion. The State presented additional evidence.

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[2] LactMed is a database that provides information and warnings on drugs to which breastfeeding mothers may be exposed. It is part of TOXNET, a database operated by the National Institute of Health.

Dr. John D. Wren, a pathologist, performed the autopsy on Alexis. Dr. Wren is an experienced pathologist, having performed more than four thousand autopsies. Early in Dr. Wren's testimony, the State established that Alexis's body had no needle marks. Dr. Wren stated that "the only way this child could have gotten that much [morphine] would be orally, because I saw no injection sites. . . . The route of administration had to have been orally." And as Dr. Wren explained, the level of morphine in Alexis was lethal:

> **Dr. Wren**: Then you come to morphine. The level was .52 mg per liter, therapeutic level was .10 to .30 mg per liter. And from my references therapeutics [sic] .001 to .200. Toxic is .3 to 2.5. And lethal is .2 to 7.2.
>
> Now, you'll notice that some of these overlap. It really depends on how the—how accustomed the body is to that drug.[3]

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[3] This is consistent with Dr. Eagerton's testimony that the line dividing toxic and lethal levels is not an exact demarcation but rather falls within "a range."

Thus, the dissent's misconceptions are twofold. First, the dissent fails to appreciate that the ranges for toxic and lethal levels of morphine are overlapping and that Alexis's level fell within the overlapping area. According to the expert testimony in this case, the level of morphine found in Alexis (.52 mg) could have been classified in either the toxic level (.3 to 2.5 mg) or lethal level (.2 to 7.2 mg); it is simply lethal because it caused her death. Therefore, the dissent's attempt to draw an artificial distinction that there was only evidence showing enough morphine could pass through the breast milk to be "toxic" but not "lethal" is unavailing.

Second, the dissent fails to recognize the expert testimony that a baby is unable to metabolize this type of drug and chronic exposure can lead to a higher level of morphine building up within the body, which can logically result in a lethal level of morphine. It was not necessary to show Alexis received a lethal level of morphine from one dose of breast milk in order to prove the State's causation theory: "the child died as a result of consumption of a controlled substance through the mother's breast milk." The State provided evidence that Appellant was taking morphine and breastfeeding Alexis continuously, morphine can pass from a mother to a baby through breast milk, the level of morphine can build up in a baby due to the inability to process it, and Alexis died from a lethal level of morphine. Contrary to the dissent's assertion, nothing more was required for the jury to make a logical deduction.

. . .

> And then in pieds [sic]—I put this in because I had found this later—that the levels that produce surgical analgesia in pediatrics is .046 to .083, which is 46 to 83. Once again, the level reported [in Alexis] is 520. And then of course there's a caveat there. Lethal levels may be higher in individuals under chronic opioid treatment.
>
> If you have a person that's under chronic opioid treatment they're taking in a lot—a lot often and they're—over a long period of time they adjust to the—their body physiology adjusts to that, and they can sustain higher levels without it having an effect on them.
>
> So you have to take into account where the person has a history of that—and of course nobody that comes to the morgue is going to tell you they're taking morphine, and sometimes the family don't tell you either. So we have to take it if they don't have a prescription that they're getting it illegal[ly] or they're taking something else.
>
> So based on all of that *all of these drugs essentially lead to respiratory depression*. And so I said based on the history and autopsy findings—and I should have put in including toxicology results—*it was my opinion that this child died as a result of respiratory insufficiency secondary to synergistic drug intoxication. I could just as easily have said morphine intoxication, but lawyers like to split hairs, and so I included them all.*
>
> (emphasis added).

Dr. Wren's testimony continued:

> **The State**: And, Doctor, let me ask you this. Obviously, being a young child, six-and-a-half weeks, her metab—the ability to metabolize drugs, is it much less than an adult?
>
> **Dr. Wren**: That's—that's correct. It builds up.

The State: So it will build up over a period of time if it—if it keeps getting the drugs.

Dr. Wren: Yeah. If they can't metabolize it'd have to go somewhere. And there's something called intrahepatic circulation. If it's excreted into the bile or whatever, it gets into the GI tract, and it's reabsorbed and goes back in[,] it just recirculates. It's just not eliminated unless she's—has affluent diarrhea or—or urinating all of the time.

The State: So, and the—the mother was taking morphine in this situation and breastfeeding. Obviously, the baby was getting morphine though the—taking MS Contin actually.

Dr. Wren: At least some, yeah.

The State: Yeah. From there. So the baby would get the morphine from the mother.

Dr. Wren: That's correct.

The State: And could then metabolize it as fast as it, you know—in a fast way or was constantly getting it from the breast milk, could it build up in that body?

Dr. Wren: That's right. I did a couple of calculations. I'm not as good in my head as I used to be, but I think I might be correct or at least close. I have one reference here if I can find it.

The State: Yes, sir. Take your time.

Dr. Wren: It's from toxnet.

The State: Yes, sir.

Dr. Wren: It says—this is a caveat. "Newborn infants tend to be particularly sensitive to the effects of even small doses of analgesics. Once the mother's milk come in—comes in it's best to provide pain control with a nonnarcotic analgesic and limit maternal intake of morphine to a few days at a low dosage with

close infant monitoring. And then if the baby shows signs of increased sleepiness more than usual, difficulty breastfeeding, breathing difficulties, a physician should be contacted immediately."

It goes further to say there's a study here of one mother who was 21 days postpartum, which is about half this one, [who] received oral morphine, 10 mg every six hours, and for four doses. That's 40 mg. And then five [milligrams] every six hours for two doses. So that's actually 50 mg total she got in a 24-hour period.

She had a peak morphine of a hundred micrograms per liter after one hour, and four and a half hours after her first milligram, 5 mg dose.

Using the peak level from this study an exclusively best—breastfed infant would receive 15 micrograms per [] daily[,] equal to about three percent of the maternal daily dose assuming a daily maternal oral morphine dose of 40 mg.

Okay. So I took 40 mg and took three percent of that. That comes out to be 1.2 mg.

The baby weighed 3,345 grams, which is 3.345 mg [sic]. And I was doing this in my head, so I got—took three times 1.2. That's—well, actually I didn't even do that. I took 1.2 mg and divided that by the volume of blood in a child that age. The rule of thumb is 75 to 80 milliliters per kilogram.

Okay. This child weighed, again, 3.345 kilograms, so 3.345 times 75 or 80 comes out to be about .285 liters. 285 milliliters is all the blood that child had in her body, and that has to go into the tissues everywhere in the body. So the—the blood—you'll have to take my word for it. It is hard to get 10 ccs of blood out of a child, an infant. It is really hard. The younger they are, the harder it is.

And we—a lot of places that do blood toxicology, they want 21 milliliters. They want three 7-milliliter tubes of blood. We can't get that. So we have to send them small amounts.

But, at any rate, if you take the 1.2 mg and divide it by two—.285 you get about 4 mg per liter, which is 4,000 micrograms per liter. So that's—that's a good bit of—when we're talking about micrograms and milligrams, that's a good bit.

Then I found another place in the same article where it says that an exclusively breastfed infant receives—tells what it receives. But it also says the peak morphine in—they did seven women who had preterm deliveries, and they—they gave them 60 mg of morphine in 24 hours cumulative. And they found out that the peak milk morphine varied, was 48 on the average mic—micrograms per liter. And the peak six glucuronide metabolite was 1,084 mg or micrograms per liter, which is also secreted in breast milk.

And it's thought that that—that active drug, the six—the six isomer is actually secreted in the milk too. And in the infant's digestive system it's converted back to morphine, and that is another source of morphine.

Dr. Wren also re-read portions of the LactMed warning on morphine:

> **Dr. Wren**: "Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression[,] and even death. Newborn instant—infants seem to be particularly sensitive to the effects of even small do[s]es of narcotic analgesics and limited maternal intake of morphine to a few—to a few days at a low dosage with close infant monitoring is best to provide pain control and limited maternal intake to a few days at low dosage."

The defense stressed the lack of studies and peer-reviewed articles linking drug-related infant deaths to breastfeeding. Dr. Wren provided a common sense explanation:

> **Dr. Wren**: I don't—I don't think anybody in here would subject [a] child to an ongoing test like that.

In sum, the State presented evidence that Appellant continuously ingested substantial doses of morphine and other drugs while pregnant and breastfeeding;

that morphine and other drugs can and do pass from a nursing mother to a breastfeeding child through breast milk; that infants cannot metabolize morphine and other drugs effectively; that Alexis exhibited symptoms consistent with morphine toxicity; and that Alexis's death was caused by respiratory failure secondary to synergistic drug intoxication.

As noted, we are mandated when reviewing the denial of a directed verdict motion to view the evidence in a light most favorable to the State. When examined through the proper lens, the State presented ample evidence that would permit the jury to logically and reasonably conclude that Appellant's morphine consumption while breastfeeding "place[d] the child at unreasonable risk of harm," S.C. Code Ann. § 63-5-70(A)(1) (2010), and constituted "an act or omission by any person which causes harm to the child's physical health or welfare" resulting in the child's death, S.C. Code Ann. § 16-3-85 (2015). *See State v. McKnight*, 352 S.C. 635, 643–44, 576 S.E.2d 168, 172 (2003) (affirming the denial of a directed verdict motion in a homicide by child abuse action despite an expert's inability to identify "the exact mechanism" through which the cocaine affected the infant's body).[4]

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[4] We, of course, agree with the dissent that the "State must prove every element of the crime charged." We are convinced the State has done so in this case, sufficient to survive a directed verdict motion. With respect for the dissent, we disagree with its reliance on the law concerning a jury's consideration of circumstantial evidence. It is here that the dissent introduces its view that "additional reasoning" is needed. While the dissent's desired framework may apply to a jury's consideration of circumstantial evidence, it has no place at the directed verdict stage. The reliance on *McCormick on Evidence* section 185 is misplaced, for this section "clarifies the meaning of relevance[,]" not a trial court's consideration of circumstantial evidence at the directed verdict stage. Similarly, the case of *State v. Logan*, cited by the dissent, addressed a challenge to a circumstantial evidence jury charge. 405 S.C. 83, 747 S.E.2d 444 (2013). *Logan* does not remotely touch upon a trial court's consideration of circumstantial evidence at the directed verdict stage. The dissent conflates the standards that apply to a trial court's consideration of circumstantial evidence at a directed verdict motion and a jury's consideration of circumstantial evidence. This conflation of different standards was addressed in *Bennett*, as the Court concluded that "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). Paradoxically, the dissent does acknowledge that "the State presented substantial circumstantial evidence to support its theory that Alexis died as a result

III.

Appellant argues that, even if causation was shown, the trial court erred in failing to direct a verdict on the homicide by child abuse charge because the State did not prove she acted with extreme indifference.

"A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2015). For purposes of this statute, we have previously defined "extreme indifference" as "a mental state akin to intent characterized by a deliberate act culminating in death." *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002)).

In this case, sufficient evidence was presented to show that Appellant was addicted to prescription drugs—including morphine—and Appellant knew she should use caution in taking morphine while pregnant or breastfeeding but elected to take it in excessive amounts without a doctor's supervision ensuring Alexis's safety.[5]

The testimony at trial revealed that Appellant began receiving prescription drugs due to injuries sustained in a car accident in 1998. In January 2006, Appellant was pregnant and began seeing Dr. Kooistra to treat a seizure disorder. Notably, Dr. Kooistra did not prescribe any pain medications for Appellant while she was pregnant and tried "to avoid prescribing medications of any sort during pregnancy." In November 2007, Appellant began seeing Dr. Kovacs and receiving

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of ingesting morphine from [Appellant's] breast milk." The dissent circumvents this undeniable finding by parsing selected portions of the testimony favorable to Appellant and recasting that evidence as the "proper lens." The State must present evidence from which a jury can fairly and logically deduce that the defendant committed the offense charged, and at the directed verdict stage, the evidence must be viewed in a light most favorable to the State, not the defendant.

[5] In addition, the toxicology report revealed that Alexis tested positive for Klonopin (Clonazepam), for which Appellant had a prescription. The pill bottle for this drug, found in Appellant's room on the morning of Alexis's death, specifically instructed, "Do not use if pregnant or suspect you are pregnant or are breastfeeding."

prescriptions for various narcotics. Unbeknownst to Dr. Kovacs, Appellant continued to receive other pain prescriptions from Dr. Kooistra. In March 2010, when Appellant realized that she was pregnant with Alexis, she did not notify either prescribing doctor. In April 2010, Appellant requested to switch her prescription patch—Duragesic—to MS Contin pills, which Dr. Kovacs prescribed as she was unaware that Appellant was pregnant. Dr. Kovacs testified that she would not have prescribed morphine to Appellant had she known of the pregnancy. In addition, Dr. Bridges, Appellant's O.B.G.Y.N. physician, testified that she and her colleagues were unaware that Appellant was taking morphine prior to the birth, during delivery, and postpartum.

Throughout her pregnancy, Appellant failed to disclose that she was pregnant to the doctors prescribing morphine to her and failed to disclose that she was taking morphine to her prenatal doctors. In addition, she routinely omitted the fact that she was taking morphine from the paperwork that she submitted to her doctors. The testimony at trial was that, at the very least, the drug should only be taken under a doctor's supervision so the baby's health could be monitored. Nevertheless, Appellant failed to disclose this important information to any of her doctors.

The morphine addiction and concealment continued after Alexis's birth. In October 2010, Appellant told Dr. Kovacs that she had missed her appointments since receiving the MS Contin prescription in April because she had been so depressed that she could not leave the house—her pregnancy and Alexis's recent birth were never mentioned. One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. Moreover, in response to whether "the doctors definitely need to know about this," Dr. Eagerton stated, "Absolutely." Again, Dr. Kovacs testified that she would not have given Appellant the medication had she known about the pregnancy and Dr. Bridges testified that no mention of morphine was made during Appellant's postpartum visit. Due to her nondisclosure, the record reveals that Appellant received an additional prescription for MS Contin and continued to breastfeed Alexis.

The morning of Alexis's death, Appellant omitted morphine from the list of her current prescriptions that she provided to the investigators, despite their specific inquiry upon finding the pill bottle in her bedroom. At that time, Appellant only admitted to taking morphine while pregnant with Alexis. When initially questioned by law enforcement, Appellant lied about her morphine addiction. It was only after the autopsy and toxicology reports were finalized and Appellant was interviewed again by Investigator Gary that she told the truth and acknowledged

her addiction. Specifically, Investigator Gary testified that Appellant "finally admitted she just didn't tell [the doctors] because she was afraid they'd take off [sic] her off the morphine."

Thus, viewing the evidence in the light most favorable to the State, the jury could conclude Appellant acted with extreme indifference in taking the morphine and breastfeeding her child, resulting in Alexis's death.

IV.

Appellant argues alternatively that if the homicide by child abuse conviction stands, the multiple convictions and sentences for the remaining offenses cannot stand and should be vacated. Concerning the involuntary manslaughter conviction and sentence, we agree. As explained below, we find nothing in South Carolina's homicide statutes or law that reflects a legislative intent to deviate from the overwhelmingly prevailing view that the homicide of one person by one defendant is limited to one homicide punishment—one homicide, one homicide punishment. Concerning the unlawful conduct toward a child charge, we reject Appellant's challenge and affirm, for that entirely separate offense was complete prior to Alexis's death.

A.

Multiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense.[6] *See, e.g.*, *State v. Cavers*, 236 S.C. 305, 311–12, 114 S.E.2d 401, 404 (1960) ("It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither; if negligent, it would have supported a verdict of guilty of manslaughter, the court having eliminated murder and voluntary manslaughter; if reckless, it sustains the verdict of guilty of reckless homicide, and that finding by the jury is implicit in the verdict. The jury were instructed that they could not find appellant guilty on both

[6] U.S. Const. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law"); S.C. Const. art. I, § 3 ("[N]or shall any person be deprived of life, liberty, or property without due process of law . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . .").

counts. To sustain this point of appellant would require the court, instead of the jury, to determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury. The State cannot be required to elect between counts in an indictment when they charge offenses of the same character and refer to the same transaction, whether or not one charges a common law offense and another a statutory offense." (citations omitted)); *see also Ball v. United States*, 470 U.S. 856, 859, 861 (1985) ("It is clear that a convicted felon may be prosecuted simultaneously for violations of §§ 922(h) and 1202(a) involving the same firearm. This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case. . . . To say that a convicted felon may be prosecuted simultaneously for violation of §§ 922(h) and 1202(a), however, is not to say that he may be convicted and punished for two offenses. Congress can be read as allowing charges under two different statutes with conviction and sentence confined to one. Indeed, '[a]ll guides to legislative intent,' *United States v. Woodward*, 469 U.S. 105, 109, 105 S. Ct. 611-613, 83 L.Ed.2d 518 (1985), show that Congress intended a felon in [the defendant's] position to be convicted and punished for only one of the two offenses." (citations omitted)).

While the South Carolina legislature has manifestly authorized multiple homicide charges for a single homicide, we find no expression of legislative intent authorizing multiple homicide *punishments* for a single homicide committed by a single defendant. As a result, absent legislative intent to the contrary, we follow the prevailing rule—one homicide is limited to one homicide punishment per defendant. *See Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App. 1999) (collecting cases from various jurisdictions supporting that one person causing one death should result in one murder or homicide conviction); *see also People v. Lowe*, 660 P.2d 1261, 1271 n.11 (Colo. 1983), *abrogated on other grounds by Callis v. People*, 692 P.2d 1045 (Colo. 1984) (collecting "[c]ases holding that a person may be convicted of only one homicide offense for the killing of one person"). "It would be a strange system of justice that would permit the defendant to be sentenced to two . . . sentences for the killing of one person." *People v. Hickam*, 684 P.2d 228, 231 (Colo. 1984) (quoting *Lowe*, 660 P.2d at 1270–71). "[C]onviction of both charges, arising from the slaying of the same person amounts to piling punishment upon punishment. Fundamental fairness precludes such a practice." *Loscomb v. State*, 45 Md. App. 598, 613, 416 A.2d 1276, 1285 (1980).

B.

Homicide by Child Abuse and Involuntary Manslaughter

Appellant was indicted on both homicide by child abuse and involuntary manslaughter charges as a result of Alexis's death.

The homicide by child abuse statute reflects the legislature's intent to define and target a specific societal problem—child abuse resulting in death, which further explains why multiple homicide offenses may be *prosecuted* in a single trial. The statute defines in detail the elements of homicide by child abuse: "caus[ing] the death of a child under the age of eleven while committing child abuse or neglect" where "the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2015). Conversely, the now codified common law offense of involuntary manslaughter is defined in broad terms, covering unintentional killings from both unlawful conduct that does not naturally tend to place another in danger of death or serious bodily harm and lawful conduct that recklessly places another in danger of harm. *See, e.g.*, *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) ("Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others."); S.C. Code Ann. § 16-3-60 (2015).

In *McKnight v. State*, 378 S.C. 33, 51–52, 661 S.E.2d 354, 363 (2008), we applied the *Blockburger* "same-elements" test and held that involuntary manslaughter is not a lesser included offense of homicide by child abuse. *See Blockburger v. United States*, 284 U.S. 299 (1932). In *McKnight*, we stated a defendant charged with homicide by child abuse was not entitled to a jury charge on involuntary manslaughter because "the elements of involuntary manslaughter will never be included in the greater offense of homicide by child abuse." *Id.* at 52, 661 S.E.2d at 363. The lawful-conduct-in-a-criminally-negligent-manner prong could not apply because child abuse is not lawful. *Id.* at 51–52, 661 S.E.2d at 363. Further, the unlawful-conduct version of involuntary manslaughter could not apply because "child abuse could never be defined as an unlawful activity not tending to cause death or great bodily harm." *Id.* at 52, 661 S.E.2d at 363 (internal quotation marks omitted).

This issue is presented to us in an unusual posture. While both homicide charges were properly presented to the jury, the jury was not instructed in accordance with Appellant's proper request—Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges. The State erroneously contends both homicide convictions and punishments should stand.

The flaw in the State's argument on appeal is best understood by reviewing its theory of criminal liability as the trial unfolded. After indicting Appellant on varying homicide charges (which as a matter of law could not be premised on one theory of liability), the State ultimately elected to pursue a single theory of liability—Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk—and the trial court instructed the jury, "That applies to each of the separate charges." The jury could have accepted Appellant's view of the evidence and found Appellant not guilty of homicide by child abuse. Specifically, the jury could have concluded the State failed to prove Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."[7] In that scenario, the jury may have nevertheless found Appellant guilty of involuntary manslaughter.[8] But the jury's guilty verdict on Count One in the indictment—homicide by child abuse—precluded a guilty verdict on the charged offense of involuntary manslaughter in

[7] This language is from the trial court's jury charge on homicide by child abuse.

[8] The trial court's charge on involuntary manslaughter included the instruction, "Unintentional means that the defendant did not intend to kill the child nor did the defendant intend to inflict serious bodily harm or injury to the deceased child." A finding that Appellant's conduct satisfied this standard would be consistent with Appellant's argument that it is safe for breastfeeding mothers to take morphine. However, it would be inconsistent with a finding that Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."

Count Two. Thus, under these circumstances, a conviction and sentence for each homicide charge cannot stand.[9]

The situation here should be contrasted with a homicide that would properly fall within multiple homicide statutes. In that situation, a jury may properly return a guilty verdict on more than one homicide charge. In *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997), this Court affirmed convictions and sentences for two homicide charges—felony driving under the influence causing death and reckless homicide—arising out of a motor vehicle accident that killed one person and seriously injured another. The evidence and theory of criminal liability satisfied the elements of both homicide statutes. *Easler*, however, went further and affirmed multiple punishments for the single homicide committed by one defendant, and this was error. We overrule *Easler* to the extent it authorizes multiple homicide punishments involving only one homicide.

It is because of this rule—one homicide, one homicide punishment—that even were we to accept the State's argument that the involuntary manslaughter guilty verdict should stand, an additional sentence for Alexis's death could not stand. The fact that Appellant received a concurrent five-year sentence for involuntary manslaughter does not change the result. The concurrent sentence likely reflects the learned trial judge's inherent understanding that a consecutive sentence could not be imposed. Yet the conviction itself is considered a punishment and that, too, must be vacated. *Ball v. United States*, 470 U.S. 856, 864–65 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. . . . Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.").

V.

Appellant's final challenge is the claim of error in the trial court's refusal to "require the State to open fully on the law and the facts of the case [in closing argument] and replying only to new arguments of defense counsel." We affirm

[9] This is the very argument made by defense counsel to the trial court, as he argued, "it's very inconsistent for the jury to have found that, one, [Appellant] was simply negligent, or, two, grossly negligent, or, three, extreme indifference, because there are different standards requiring different—different things."

pursuant to Rule 220, SCACR, and the following authority: *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse 2018 Adv. Sh. No. 17 at 57).

VI.

In sum, the homicide by child abuse and unlawful conduct toward a child convictions and sentences are affirmed; the involuntary manslaughter conviction and sentence is vacated; and we find no error in the order and manner of closing arguments.

AFFIRMED IN PART, VACATED IN PART.

BEATTY, C.J., HEARN and JAMES, JJ., concur. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE FEW: I concur in sections III, IV, and V of the majority opinion. I also concur with the conclusion the majority reaches in section II that Greene's conviction for unlawful conduct toward a child must be affirmed. I disagree, however, that we may affirm Greene's homicide convictions. On this point, for the reasons I will explain, I dissent.

I.

The State argues it is not required to prove scientific facts with expert testimony as we require civil plaintiffs to do. The State is mistaken. The State must prove every element of the crime charged, *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975), and when establishing any one element requires the State to prove a fact that is beyond the common understanding of lay people, the State must prove that fact by expert testimony, *see Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 659 (2012) ("In some design defect cases, expert testimony is required . . . because the claims are too complex to be within the ken of the ordinary lay juror."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (stating "expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge"); *see also Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (holding that unless the subject is a matter of common knowledge, expert testimony is required to establish that a defendant failed to conform to a required standard of care in a medical malpractice case); *Kemmerlin v. Wingate*, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979) (holding in a public accounting malpractice action: "Since this is an area beyond the realm of ordinary lay knowledge, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom.").

II.

The State's theory of how Greene caused Alexis's death was narrow:[10] Greene took morphine and other medications while breastfeeding, the morphine passed through

[10] In all prosecutions for homicide, the State must prove the defendant caused the death of the victim. *See State v. McIver*, 238 S.C. 401, 406, 120 S.E.2d 393, 395 (1961) ("In a homicide case, the corpus delicti consists of two elements—the death of the person killed, and its causation by the criminal act of another."). *McIver* was a manslaughter case, 238 S.C. at 403, 120 S.E.2d at 393, and the causation element

Greene's breast milk, and Alexis died as a result of morphine intoxication.[11] The trial court charged the jury,

> The State has the burden of proving these crimes, but it involves the ingestion of the controlled substance by the child through the child's mother's breast milk. That's the State's allegation and theory in the case, that the child died as a result of consumption of a controlled substance through the mother's breast milk. That applies to each of the separate charges.

The State had no difficulty proving Greene was taking morphine while breastfeeding, and that Alexis died from morphine intoxication. The issue, therefore, is whether the State proved the morphine that killed Alexis came from Greene's breast milk.

A. Circumstantial Evidence of Causation

On this point, as the majority has explained in detail, the State presented substantial circumstantial evidence, which we view in the light most favorable to the State. *State v. Pearson*, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016). The majority has recited the strongest circumstantial evidence in the record that supports the State's theory of causation, but to be fair, there is even more than what the majority has included. In fact, the circumstantial evidence that Alexis died from ingesting morphine through Greene's breast milk appears overwhelming, until we pose the scientific question of whether it is even possible for enough morphine to pass through breast milk to kill a child.

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is specifically included in the statute governing homicide by child abuse, S.C. Code Ann. § 16-3-85(A) (2015).

[11] The State began the trial with alternative theories of causation. The first theory was that Greene administered morphine directly to Alexis. At the conclusion of all evidence, however, the State elected not to proceed on the basis of a direct transfer of morphine, and the trial court directed a verdict for Greene on that theory.

B. Circumstantial Evidence Cases

The use of circumstantial evidence to prove guilt in criminal trials contemplates that "even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion." Kenneth S. Broun et al., *McCormick on Evidence* § 185, at 397 (Hornbook Series, 7th ed. 2014). In *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), we described the "evaluation of circumstantial evidence" and stated it "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence." 405 S.C. at 97, 747 S.E.2d at 451; *see also* 405 S.C. at 97-98, 747 S.E.2d at 451 ("Analysis of circumstantial evidence is plainly a more intellectual process."). In every circumstantial evidence case in which this Court affirmed the sufficiency of the evidence, the "additional reasoning" required to "connect[] collateral facts in order to prove the proposition propounded" was such that a lay juror could readily conduct the reasoning and make the connection. In those cases, the "intellectual process" through which the jury could reasonably infer the guilt of the defendant from the circumstances proven by the State involved a chain of inferences that lay jurors were fully capable of navigating.

In *Pearson*, for example, the State proved the following circumstances: the suspects fled the victim's home in the victim's stolen El Camino, and Pearson's fingerprint was found in the truck's bed where the victim saw one of the suspects sitting; Pearson lied about ever having been to the victim's house when he had previously done considerable landscaping work there; and Pearson lied about knowing the co-defendant whose DNA was found on the duct tape on the victim's head. 415 S.C. at 465-69, 473-74, 783 S.E.2d at 803-05, 808. From those circumstances, a lay juror could readily conclude through a chain of non-scientific inferences that Pearson was one of the people who robbed and beat the victim. We found "the evidence could induce a reasonable juror to find Pearson guilty." 415 S.C. at 474, 783 S.E.2d at 808.

In *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016), the State proved the following circumstances: Bennett's blood was found on the floor directly beneath the spot from which a television was stolen from a public building; his fingerprint was found on another television the suspects had attempted to steal from the "community room" of the building; and though Bennett "was known to frequent" the room in which his blood was found, "[t]estimony suggested Bennett would have no reason to be in the community room." 415 S.C. at 234-35, 237, 781 S.E.2d at 353, 354. From those circumstances, a lay juror could readily conclude

through a chain of non-scientific inferences that Bennett committed the burglary, malicious injury, and larceny. We found "the evidence could induce a reasonable juror to find Bennett guilty." 415 S.C. at 237, 781 S.E.2d at 354.

In *Pearson*, *Bennett*, and every other case in which this Court found the State's presentation of purely circumstantial evidence sufficient to survive a motion for directed verdict, a jury was fully capable of performing the "additional reasoning . . . required to reach the desired conclusion" by using its common knowledge, experience, and understanding.[12] In each of those cases, therefore, we focused only on the State's proof of collateral facts or circumstances—not on the inferences to be drawn from those facts or circumstances—and we found the State's proof of the circumstances sufficient to support the fact inferred.

C. The Circumstantial Evidence Standard

In *Bennett*, we reiterated that when reviewing the sufficiency of circumstantial evidence, "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." 415 S.C. at 235, 781 S.E.2d at 353 (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478-79 (2004)). We criticized the court of appeals in *Bennett* for considering a "plausible alternative theory" because doing so is "contrary to our jurisprudence and misapprehends the court's role" compared to the role of the jury. 415 S.C. at 236, 781 S.E.2d at 354. We held "the trial court . . . must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" 415 S.C. at 236-37, 781 S.E.2d at 354 (quoting *State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)).

In this case, the State presented substantial circumstantial evidence to support its theory that Alexis died as a result of ingesting morphine from Greene's breast milk, and abandoned any alternative theory of causation. Therefore, under *Bennett* and the long line of cases upon which it relies, our task is limited to the second step in the *Bennett*/*Littlejohn* analysis. The question before us under that second step is

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[12] *See generally Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204, 51 S.E.2d 744, 749 (1949) (discussing circumstantial evidence in a workers' compensation case, and stating, "The facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates.").

whether a reasonable jury could "fairly and logically" conclude from the circumstances proven that the State established the causation element under its theory. This, in turn, requires us to determine if the chain of inferences the jury must follow to reach this conclusion may be completed by the jury using its common knowledge, experience, and understanding, or whether expert testimony should be required.

Greene argues the jury could not fairly and logically complete this second step because, in the course of its analysis, the jury would necessarily consider whether it is even possible that a breastfeeding mother can transmit morphine through her breast milk in sufficient concentration to cause the death of a child. Green argues the means of answering this question are beyond the common knowledge, experience, and understanding of a lay juror. Therefore, Greene argues, expert testimony was required to establish the causal connection between morphine in the mother's breast milk and Alexis's death. Specifically, Greene argues the State was required to present an expert opinion that morphine—by itself or synergistically with other drugs—passed through her breast milk to kill Alexis.

I agree with Greene. In reaching this conclusion, I find it particularly important that the State's own expert witnesses refused to state the morphine that killed Alexis came from Greene's breast milk, or even whether that was possible. The reader may repeatedly scour the majority's outstanding recitation of the State's expert testimony—or the record from which it came—but will not find any testimony that comes close to such a statement. In fact, as I will explain, the State's two experts openly avoided answering this question. In addition, the circumstances proven at trial, considered in the light most favorable to the State, include the fact that reliable medical organizations and journals have stated it can be "safe" to take morphine while breastfeeding a child. Finally, the record in this case does not include even one instance documented in medical literature of a lethal level of morphine in a child that resulted from a breastfeeding mother taking morphine.

D. Expert Testimony on Causation

The State presented the testimony of two experts. David H. Eagerton, Ph.D., is an assistant professor of pharmacology and founding faculty member at the Presbyterian College School of Pharmacy and the former chief toxicologist at the South Carolina Law Enforcement Division. His doctoral degree is in pharmacology, and he is board certified in forensic toxicology. Dr. Eagerton gave an extensive explanation of the numerous drugs found in Alexis's body after her

death, including what he considered to be a lethal level of morphine, and how the combination of those drugs can work synergistically to increase the toxic effects of the drugs in the blood. He explained how drugs are absorbed into the body and that infants do not metabolize quickly because their liver has not yet developed. At one point, Dr. Eagerton testified a six-week old child like Alexis typically does not metabolize "at all."

The State then asked, "If she was continuously breastfeeding . . . could [Alexis] reach a level, especially if she didn't metabolize it nearly as fast as the mother, could it reach the levels of toxicology -- toxicity of the level?" Dr. Eagerton answered, "Yes." Dr. Eagerton went on to explain Alexis showed symptoms that were "consistent with morphine toxicity." He testified morphine may build up in a child's body to become "toxic." But Dr. Eagerton distinguished "toxic" from "lethal." Toxic means it will make you sick; lethal means it will kill you. There was never any dispute that morphine in breast milk could make a child sick. In fact, the label on the package states morphine "passes into the breast milk and may harm your baby."

On cross-examination, Dr. Eagerton acknowledged several articles in the medical literature that list morphine as "safe to take while breastfeeding," and conceded "based upon [his] research" he was not aware of any documentation in the medical literature "that ever says a mother taking morphine can create a toxic level of morphine in the child through breast milk." Counsel showed Dr. Eagerton a 2012 article from the journal *Clinical Toxicology* entitled, "Is Maternal Opioid Use Hazardous to Breastfed Infants," and the following dialogue took place,

> Q: Look on page six of this journal. And this is a peer-reviewed journal, correct?
>
> A: That's right.
>
> . . . .
>
> Q: Look there if you would on this highlighted portion . . . [and] read that to us.
>
> A: "The medical literature describes scant evidence of opioid toxicity in breastfed infants."
>
> Q: Do you have any evidence that's contrary to that?

A: No, sir. . . .

. . . .

Q: So there is scant evidence?

A: That is correct.

Q: Which is pretty close to none.

A: Yes, sir.

. . . .

Q: *So you are in no position to say then that that number*[13] *came through breast milk?*

A: *I don't believe I've said one way or the other. Nobody's asked me.*

Q: But you don't have any basis for saying that it came through breast milk?

A: Had to get into the baby somehow.

Q: That's not my question. You have no basis for saying that number came into the baby through breast milk?

A: I don't know that I'd say I have no basis. I'd say the basis is the mother is taking . . . morphine. She is breastfeeding. We know that based on the literature we've already talked about that at least small amounts certainly do pass through into the

[13] The question refers to the number 0.52 mg/L, the concentration of morphine measured in Alexis's blood after her death. Dr. Eagerton testified he considered that a lethal level of morphine.

> breast milk. So I don't think I have a basis to say that it didn't, or at least some of it.

The strongest testimony Dr. Eagerton gave on the causation question came when he read from the LactMed database[14] on the TOXNET internet site maintained by the National Institutes of Health in its National Library of Medicine. He testified, "Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death." However, Dr. Eagerton was careful never to say that the morphine that came from Greene's breast milk killed Alexis—that it was "lethal." In fact, he was specifically asked, "So, you cannot make a conclusion today as to how that morphine got into the baby?" He replied, "No, sir. I think I can make a conclusion . . . at least some of it . . . had to come through the breast milk." When pressed as to whether morphine could get to a specific toxicity level from breastfeeding, however, he stated, "Like I said earlier, I can't quantitate how much."

The State's other expert was John David Wren, M.D., the pathologist who performed the autopsy. Dr. Wren testified Alexis had lethal levels of morphine, "It's lethal in the brain, it's lethal in the liver, it's lethal in the blood." He explained, "it was my opinion that this child died as a result of respiratory insufficiency secondary to synergistic drug intoxication. I could just as easily have said morphine intoxication." However, Dr. Wren testified, "*It's not my opinion that it was from milk or anything else*. I just know that it was there." On cross-examination, Dr. Wren testified, "*I don't know how it got there*. It's unquestionably there. And you can argue any mechanism you want, but it's there, period."

E. The "Proper Lens"[15]

This case is different from *Logan*, *Bennett*, and every other circumstantial evidence case this Court has decided. The majority's suggestion that I have "conflated" the roles of judge and jury ignores that difference. None of those previous cases involved scientific questions, so the lay jury was fully capable of making all the necessary inferences on its own, "fairly and logically." *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354. The issue before the Court in those cases, therefore, arose only

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[14] The LactMed database contains information on drugs and other chemicals to which breastfeeding mothers may be exposed.

[15] The term "proper lens" is taken from the majority opinion, slip op. at 12.

under the first step of the *Bennett*/*Littlejohn* analysis—whether the circumstantial evidence met the "any substantial evidence" standard. That is not the issue we face in this case. As I have stated, the circumstantial evidence in this case that Alexis died from ingesting morphine through Greene's breast milk appears overwhelming.

The issue in this case arises under the second step of the *Bennett*/*Littlejohn* analysis—whether the "additional reasoning" required to infer from the circumstances proven that the morphine that killed Alexis came from Greene's breast milk required the jury to answer a scientific question beyond its common knowledge, experience, or understanding. It is the same question we addressed in *Graves*, *Watson*, *Green*, and *Kemmerlin*. Although *Watson*, *Green*, and *Kemmerlin* were not circumstantial evidence cases, *Graves* was a circumstantial evidence case. In this respect, this case is identical to *Graves*. We said in *Graves*—just like I say here—this case is not about the State's proof of sufficient circumstances, or "what quantum of circumstantial evidence . . . is necessary" to present a jury question. 401 S.C. at 80, 735 S.E.2d at 658.

In *Graves*, we first found the plaintiffs failed to present admissible testimony of an expert on the existence of a defect in a products liability case. 401 S.C. at 75-78, 735 S.E.2d at 656-57. We then turned to whether the plaintiffs nevertheless presented sufficient circumstantial evidence to reach a jury. We stated "the Graves have no direct evidence," and "[t]hus, the question is whether the record contains sufficient circumstantial evidence of a defect required to survive summary judgment." 401 S.C. at 79, 735 S.E.2d at 658. Focusing on the second part of the *Bennett*/*Littlejohn* analysis for circumstantial evidence, we stated "we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony is . . . dispositive." 401 S.C. at 80, 735 S.E.2d at 658. "In some design defect cases," we held, "expert testimony is required . . . because the claims are too complex to be within the ken of the ordinary lay juror." 401 S.C. at 80, 735 S.E.2d at 659 (citing *Watson*, 389 S.C. at 445, 699 S.E.2d at 175).

Thus, as in *Graves*, the "proper lens" invoked by the majority forces us to examine whether the State has satisfied the second prong of the *Bennett*/*Littlejohn* analysis. Through this lens we must determine whether a lay juror can comprehend the scientific possibility that morphine—even acting synergistically with other drugs—may pass through a mother's breast milk in sufficient quantity to kill a child. Greene's counsel repeatedly pressed both Dr. Eagerton and Dr. Wren as to whether there is any scientific documentation supporting the theory that this is even possible. At one point, Dr. Eagerton responded, "I don't believe I've seen any

literature that says that. But for everything there's got to be a first." Dr. Wren responded, "No. But, . . . there is a first time for everything."

These answers demonstrate the narrow point upon which I would reverse Greene's homicide convictions. If medical and scientific professionals have nothing more definitive to say as to whether the factual premise of the State's theory is even possible, then we should not permit a lay jury to base a verdict in a criminal trial on the premise. One day there may be a "first" who says morphine can do what the State argues it did here, but it should be a medical or scientific professional, not a jury in a criminal case.

III.

I agree with the majority that Greene's conviction for unlawful conduct toward a child must be affirmed, and that under any circumstance both convictions for homicide cannot stand. However, I would find the trial court erred in not directing a verdict on the homicide charges because the State failed to present evidence of causation "sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

DomainsNewMedia.com, LLC, Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce, Appellant.

Appellate Case No. 2016-000460

Appeal from Beaufort County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27803
Heard October 19, 2017 – Filed May 23, 2018

REVERSED

Robert E. Stepp, Tina M. Cundari, and Bess J. DuRant, all of Sowell Gray Step & Laffitte, LLC, of Columbia, for Appellant.

Andrew S. Radeker and Taylor M. Smith, IV, both of Harrison & Radeker, P.A., of Columbia, for Respondent.

William W. Wilkins and Kirsten E. Small, both of Nexsen Pruet, LLC, of Greenville, for Amicus Curiae Myrtle Beach Area Chamber of Commerce.

Jay Bender, of Columbia, for Amicus Curiae South Carolina Press Association.

JUSTICE KITTREDGE: This appeal presents the question of whether Appellant Hilton Head Island-Bluffton Chamber of Commerce (Chamber) is subject to the Freedom of Information Act (FOIA)[1] due to its receipt and expenditure of certain funds designated for promoting tourism, which we will refer to collectively as accommodation tax funds. The Chamber's receipt and expenditure of these funds is pursuant to, and governed by, the Accommodations Tax (A-Tax) statute and Proviso 39.2 of the Appropriation Act for Budget Year 2012–2013.

Respondent DomainsNewMedia.com, LLC (Domains) filed a declaratory judgment action, seeking a declaration and corresponding injunctive relief on the basis that the Chamber's receipt of these funds renders the Chamber a "public body" pursuant to FOIA, thus subjecting the Chamber to all of FOIA's requirements. The Chamber countered that FOIA did not apply, for the receipt, expenditure, and reporting requirements concerning these funds are governed by the more specific A-Tax statute and Proviso 39.2.

The trial court held that the Chamber was a public body and, thus, was subject to FOIA's provisions. We reverse. We hold, as a matter of discerning legislative intent, that the General Assembly did not intend the Chamber to be considered a public body for purposes of FOIA as a result of its receipt and expenditure of these specific funds.

I.

FOIA was enacted to promote transparency in government. While declaring FOIA's purpose, the General Assembly stated "it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 9, 760 S.E.2d 785, 789 (2014) (quoting S.C. Code Ann. § 30-4-15 (2007)). Thus, FOIA "must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay." S.C. Code Ann. § 30-4-15.

[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2017).

Subsequent to the passage of FOIA, the General Assembly enacted the A-Tax statute, which involves the administration of a state sales tax imposed on sleeping accommodations provided to overnight guests. S.C. Code Ann. § 12-36-920(A) (2014 & Supp. 2017); S.C. Code Ann. §§ 6-4-5 to -35 (2004 & Supp. 2017). A portion of this tax is remitted to the local governments where it was collected and, in turn, they must expend the A-Tax funds in accordance with the statutory provisions governing allocation. *See* S.C. Code Ann. § 12-36-2630(3); S.C. Code Ann. §§ 6-4-10 to -35. Specifically, the A-Tax statute dictates that the local governments must select at least one organization—referred to as the designated marketing organization (DMO)—to manage the expenditure of the funds; however, the local governments must ensure the funds are "used only for advertising and promotion of tourism." S.C. Code Ann. § 6-4-10(3).

In this case, the Chamber was selected to be a DMO—to direct the expenditure of tourism funds—for several local governments and it received funds from the Department of Parks, Recreation, and Tourism (a PRT Grant). These public funds are at the center of this appeal and raise the question of whether the legislature intended the Chamber to be subject to FOIA on the singular basis that it expends these funds.

The Chamber is a nonprofit organization that was created in 1957. The Chamber's stated purpose is to promote the common interests of its members, stimulate the expanding regional economy, and enhance the quality of life for all. The Chamber offers private membership and conducts seminars, as well as other events, for the benefit of its members. These members pay dues and contribute to the Chamber's various projects.

In addition to these purely private activities, since 1983, the Chamber has served the Town of Hilton Head Island as its DMO.[2] To be eligible for selection, the Chamber was required to demonstrate to the local governments "that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program." S.C. Code Ann. § 6-4-10(3). Moreover, the Chamber received a PRT Grant during the 2012–2013 fiscal year. The Chamber

[2] The Chamber began serving as the DMO for the Town of Bluffton and Beaufort County in approximately 2001 and 2008, respectively.

was required to submit a proposal to measure the success of its tourism marketing plan before it could be selected for the PRT Grant.[3]

Domains is a website company, based out of Beaufort County, which has questioned the Chamber's expenditure of the accommodation tax funds. In November 2012, Domains sent a FOIA request to the Chamber for information regarding its staff membership, policies, minutes, and accounts. Oddly, most of the information requested by Domains extends beyond the expenditure of these tourism funds. For example, Domains requested the non-exempt minutes of *all* meetings and votes by the Chamber. The Chamber refused to provide the requested information on the basis that it was not a public body for FOIA purposes, as the expenditure of these discrete funds is governed by the A-Tax statute and Proviso 39.2 and the corresponding records are available to the public through the local governments or the State.[4]

Thereafter, Domains filed suit seeking declaratory and injunctive relief to establish that the Chamber was a public body under FOIA and to require production of the requested information concerning all the Chamber's activities. After the parties conducted discovery, cross-motions for summary judgment were filed. The trial court granted Domains' summary judgment motion and held that the Chamber was a public body under FOIA's definition. Relying on *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), the trial court concluded there was a diversion of public funds to a related organization with no public access to information regarding the expenditure of the funds. The Chamber appealed, and the appeal was certified to this Court pursuant to Rule 204(b), SCACR.

II.

A.

Domains argues that the Chamber's expenditure of public funds—through its role as DMO—causes it to fall within the plain language of FOIA and, moreover, it is

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[3] Only one specific proviso providing a PRT Grant is at issue—Proviso 39.2 contained in the Appropriation Act for Budget Year 2012–2013 (Proviso 39.2).
[4] It is important to note that FOIA applies to the governmental entities that administer these funds.

considered a public body under the interpretation provided in *Weston*. The Chamber argues that public accountability for the expenditure of these funds has been provided through the A-Tax statute, as well as Proviso 39.2, such that the General Assembly did not intend for it to become a public body under FOIA, and furthermore, its provision of services as a marketing organization does not render it a public body for FOIA purposes under *Weston*.

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012) (citing *Felts v. Richland County.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "The interpretation of a statute is a question of law." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, L.L.C. v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "This Court may interpret statutes, and therefore resolve this case, 'without any deference to the court below.'" *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (quoting *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881).

B.

We are presented with the following question—did the legislature intend that the Chamber be a public body for FOIA purposes due to its receipt and expenditure of accommodation tax funds? While the Chamber technically expends public funds, we are firmly persuaded that the General Assembly did not intend the Chamber to be considered a public body for FOIA purposes based upon its receipt and expenditure of accommodation tax funds.

We begin with an analysis of FOIA. To further its purpose of a transparent government, "FOIA subjects a 'public body' to record disclosure." *Disabato, v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013). As this Court has recognized, "[i]f public bodies were not subject to the FOIA, governmental bodies could subvert the FOIA by funneling State funds to nonprofit corporations so that those corporations could act, outside the public's view, as proxies for the State." *Id.* at 455, 746 S.E.2d at 340. "Among those entities defined as a public body subject to the statute are '*any* organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . .'" *Id.* at 442, 746 S.E.2d at 333 (emphasis added) (quoting S.C. Code Ann. § 30-4-20(a)). FOIA's record disclosure requirement provides that a "person has a right to

inspect, copy, or receive an electronic transmission of *any* public record of a public body" subject to certain exceptions. S.C. Code Ann. § 30-4-30(a) (emphasis added). A "public record" is defined to include "*all* books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body" with certain exclusions. S.C. Code Ann. § 30-4-20(c) (emphasis added).

Moreover, FOIA imposes additional disclosure requirements on public bodies, such as all meetings must be open to the public, subject to limited exceptions. S.C. Code Ann. § 30-4-60. Also, a public body must provide advance notice of all meetings and keep written minutes, which include statutorily specified information. S.C. Code Ann. §§ 30-4-80, -90. In addition, FOIA provides that a citizen of the State may seek a declaratory judgment and injunctive relief to enforce the provisions of FOIA. S.C. Code Ann. § 30-4-100.

Thus, the General Assembly has evidenced its intent to ensure transparency is provided to the public with regard to the general expenditure of public funds.

C.

We now turn our attention to the A-Tax statute and Proviso 39.2. With regard to the specific expenditure of the accommodation tax funds involved in this case, the General Assembly enacted section 6-4-10(3), which sets forth the following:

> To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, *such as a chamber of commerce*, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program. . . . Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them. . . .

S.C. Code Ann. § 6-4-10(3) (emphasis added).[5] The reporting and accountability provisions directly governing the expenditure of these funds control the disposition of this appeal.

Under the A-Tax statute, to evidence compliance in expending these funds, a local government must fulfill several requirements. Importantly, the A-Tax statute provides three layers of review for these expenditures—a local advisory committee, a statewide oversight committee, and an expenditure review committee. First, it requires a local government receiving over $50,000 in revenue from A-Tax funds to appoint an advisory committee "to make recommendations on the expenditure of revenue generated from the accommodations tax." *Id.* § 6-4-25(A).[6] Second, the local government must submit certain information to the

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[5] In addition, Proviso 39.2 requires the DMO to submit a proposal and final report regarding the expenditures:

> Organizations applying for a grant must include in the grant application, information on how the organization proposes to measure the success of the marketing and public relations program, including the estimated return on investment to the state. . . . An organization receiving a grant must use the public and private funds only for the purpose of destination specific marketing and public relations designed to target international and/or domestic travelers outside the state to destinations within the state. . . . Grant recipients shall provide an annual report by November first, to the Chairmen of the Senate Finance Committee and the House Ways and Means Committee and the director of the Department of Parks, Recreation and Tourism on the expenditure of the grants funds and on the proposed outcome measures.

Act No. 288, 2012 S.C. Acts 402–03 (Proviso 39.2).

[6] The local governments in this case are subject to this provision, which requires the advisory committee to "submit written recommendations to a municipality or county at least once annually" and these "recommendations must be considered by the municipality or county in conjunction with the requirements of this chapter." S.C. Code Ann. § 6-4-25(C). The Chamber, as DMO, may provide the proposed

South Carolina Accommodations Tax Oversight Committee, to include a "list of how funds from the accommodations tax are spent," which is due "before October first and must include funds received and dispersed during the previous fiscal year." *Id.* § 6-4-25(D). Finally, these reports are provided to the Tourism Expenditure Review Committee (TERC) for review to ensure that the local government complies with the basic requirements for expenditures set forth in the statute. *Id.* § 6-4-35; *Id.* § 6-4-25(D). TERC may consider "further supporting information" from the local government or find "an expenditure to be in noncompliance," resulting in certification to the State Treasurer who will withhold the noncompliant amount from the local government. *Id.* § 6-4-35(B)(1)(a). In addition, TERC "has jurisdiction to investigate and research facts on written complaints submitted to it with regard to the appropriate tourism-related expenditures and resolve these complaints." *Id.* § 6-4-35(B)(2). Any citizen may file such a complaint.

Thus, these provisions provide that the local governments must select a qualified DMO to receive the funds designated for promoting tourism, but the local governments remain accountable for the expenditure of these funds as they must review and, if appropriate, approve the budget proposed by the DMO, receive an accounting of expenditures from the DMO, and submit evidence of their compliance to proper committees. Likewise, the expenditure of the funds received through the PRT Grant are provided in an annual report to the Senate Finance Committee, the House Ways and Means Committee, and the Department of Parks, Recreation, and Tourism.

D.

FOIA is a general statute; the A-Tax statute is a specific statute. "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).

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budget to this committee for its review and recommendation before obtaining approval from the local government.

According to FOIA, any organization that is "supported in whole or in part by public funds or *expending public funds*" is a public body. S.C. Code Ann. 30-4-20(a) (emphasis added). Accommodation tax funds are, of course, public funds. Therefore, if we look only to FOIA as Domains suggests and go no further, it would appear that the Chamber is subject to FOIA as a public body. The subsequently enacted A-Tax statute and Proviso 39.2, however, provide a specific and comprehensive approach for the receipt, expenditure, and oversight of these funds. The presence of the specific A-Tax statute and Proviso 39.2 play the lead role in our disposition of this case.

Moreover, even in the absence of a specific statute, this Court has recognized that the applicability of FOIA to a non-governmental entity is more involved than classification as a public body due to the receipt of public funds. *See Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991).

Both parties cite *Weston* in support of their respective positions. 303 S.C. 398, 401 S.E.2d 161. We find *Weston* supports the Chamber's position.[7] In *Weston*, this

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[7] This is the main point of divergence with the dissenting opinion. While we take no issue with the important, indeed vital, goals served by FOIA, as we acknowledged above, the dissent would classify the Chamber as a public body for FOIA purposes simply as a result of its receipt of public funds. This is so, according to the dissent, because we must apply the plain language of one phrase in the FOIA statute. The dissent would apply all of FOIA to any organization that receives any public funds. While we acknowledge that in many instances the receipt of public funds will subject the organization to FOIA, the dissent's categorical rule is contrary to this Court's discernment of legislative intent in *Weston*. The dissent goes further and accuses us of "employ[ing] an elaborate analysis to avoid the plain language of the FOIA." Not so. We are remaining faithful to this Court's decisional framework in *Weston*, to which the legislature for more than a quarter century has not responded, much less superseded. If the dissent's "look only to FOIA" approach were dispositive, *Weston* could not stand as the Court held that FOIA does not always and automatically apply when public funds are received by an organization. As is our general stance, we elect to honor our precedents and respect the authority of the legislature to respond to (including superseding) our construction of statutes. If the General Assembly now disagrees with *Weston*, or our decision today, it lies within the province of the legislature to respond and overrule our precedents.

Court evaluated whether a nonprofit foundation—operated exclusively for the benefit of the University of South Carolina—was a public body pursuant to FOIA on the bases of four transactions in which public funds were transferred to the foundation. *Id.* We rejected the suggestion that the mere receipt or expenditure of public funds automatically and categorically transformed an otherwise private entity into a public body triggering the full panoply of FOIA requirements. We made clear that the mere receipt or expenditure of public funds did not mean "that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis." *Id.* at 404, 401 S.E.2d at 165. We ultimately concluded in *Weston* that the nonprofit foundation in that case was a public body under FOIA, as the Court observed that the public needed access to the records of the organization "when a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds" as otherwise the public is unable to determine how the funds were spent. *Id.* Significantly, in that case, there was not a statute or proviso governing the procedure and oversight for the expenditure of the specific funds at issue or mandating the public reporting and accountability as exists with respect to A-Tax funds and the PRT Grant.

Here, as noted, there is a specific statute (or proviso) that directs the local governments to select a DMO to manage the expenditure of certain tourism funds and requires the governments to maintain oversight and responsibility of the funds by approving the proposed budget and receiving an accounting from the DMO. Thus, this is not the situation found in *Weston* wherein the funds were intended to be given to a public body and, instead, were diverted to a private organization to be spent without oversight. Through the A-Tax statute (and Proviso 39.2) there are accountability measures in place and the public has access to information regarding how the funds are spent. Therefore, the concern in *Weston* regarding the lack of a legislatively sanctioned process mandating oversight, reporting, and accountability is not present in the expenditure of these funds.

We do agree with Domains that the A-Tax statute does not provide for the expanse of disclosure requirements that are available under FOIA. Indeed, Domains makes no pretense that FOIA would be imposed on the Chamber so that *all* of the Chamber's procedures and activities would be controlled by *all* of FOIA's provisions. This would subject the Chamber to all of the various requirements of FOIA, such as advance notice of meetings, in every area of the Chamber's

activities. Unlike some other states, South Carolina's FOIA provisions do not provide a limitation to the extent of FOIA's reach within an organization once it is classified as a public body. *Compare* S.C. Code Ann. § 30-4-20(a) (stating "'Public body' means . . . *any organization*, corporation, or agency supported in whole or in part by public funds or expending public funds" (emphasis added)), *with* Tex. Gov't Code Ann. § 552.003(1)(A)(xii) (West 2013) (defining a "Governmental body" as including "*the part, section, or portion of an organization*, corporation, commission, committee, institution, or agency *that spends* or that is supported in whole or in part by *public funds*" (emphasis added)). The degree of oversight and reporting requirements are policy decisions which lie in the province of the legislature. Here, the General Assembly has specified a detailed process for the expenditure and accountability of these tourism funds and that determination is controlling.

III.

Contrary to Domains' suggestion, the receipt and expenditure of these accommodation tax funds in no manner allows the Chamber (or any DMO) to spend public funds free from public accountability and oversight. We fully appreciate the need for some measure of transparency and public accountability in the expenditure of public funds. Yet, in this case, the A-Tax statute and Proviso 39.2 set forth the General Assembly's determination of the required level of oversight, transparency, and accountability.

FOIA, of course, remains vibrant as it provides the General Assembly's determination for the optimum transparency in connection with the general expenditure of public funds. Following the passage of FOIA, the General Assembly enacted the more narrow and targeted A-Tax statute (and Proviso 39.2) to provide what it determined were the necessary accountability safeguards with regard to the expenditure of these specific funds while simultaneously protecting the private nature of the organizations selected to perform this marketing function. The General Assembly deemed these provisions sufficient to ensure that the funds are being properly expended, and Domains has presented no valid legal basis to contravene this legislative determination. Accordingly, the judgment of the trial court is reversed.

REVERSED.

BEATTY, C.J., HEARN and JAMES, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: The Freedom of Information Act (FOIA) applies to any "public body," which is defined as "any organization . . . expending public funds." S.C. Code Ann. § 30-4-20(a) (2007). The Hilton Head-Bluffton Chamber of Commerce agreed to serve as the organization to "receive" and "direct the expenditure" of accommodations sales tax revenues collected by the towns of Hilton Head and Bluffton and Beaufort County "for advertising and promotion of tourism" pursuant to subsection 6-4-10(3) of the South Carolina Code (Supp. 2017). In fiscal year 2013-14, as a representative year, the Chamber "expended" $1,531,000 of these public funds to promote tourism. The FOIA provides any "person has a right to inspect . . . any public record of a public body." S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2017). It requires no elaborate analysis to apply the plain words of the FOIA and reach the conclusion that the Chamber's agreement to expend these public funds renders it a public body subject to the record disclosure requirements of the FOIA.

The majority has employed an elaborate analysis to avoid the plain language of the FOIA under the guise of "discerning legislative intent." However, our law does not permit us to look outside the language of a statute unless there is an ambiguity in the statute. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (quoting *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970))); 419 S.C. at 556, 799 S.E.2d at 483 ("Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning."). The majority acknowledges there is no ambiguity, stating,

> According to FOIA, any organization that is "supported in whole or in part by public funds or expending public funds" is a public body. Accommodation tax funds are, of course, public funds. Therefore, if we look only to FOIA as Domains suggests and go no further, it would appear that the Chamber is subject to FOIA as a public body.

Under *Smith* and *Timmons*, therefore, we must "look only to FOIA," because there is no ambiguity in it. Based on the plain language in subsection 30-4-20(a), the Chamber is a public body and therefore subject to the record disclosure requirements of the FOIA.

Even if we did look beyond the FOIA, however, the majority's justification for finding the Act does not apply in this circumstance fails. First, the majority's decision is inconsistent with the policy behind the FOIA, which is set forth in section 30-4-15 of the South Carolina Code (2007). The General Assembly found "it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." § 30-4-15. Therefore, the General Assembly enacted the FOIA "to make it possible for citizens . . . to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." *Id.*; *see also Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) ("The essential purpose of FOIA is to protect the public from secret government activity.").

The majority states the accommodations tax statute and Proviso 39.2 "play the lead role in our disposition of this case" because they "provide a comprehensive approach for the receipt, expenditure, and oversight of these [public] funds." In other words, the majority finds the policy of the FOIA is fulfilled through the accommodations tax statute and Proviso 39.2. This conclusion is wrong. Although the accommodations tax statute does have specific provisions relating to the "receipt" and "expenditure" of public funds, its provisions concerning "oversight" of spending public funds fall far short of meeting the policy goals of the FOIA.

Specifically, the accommodations tax statute does not address the disclosure of records at the core of the FOIA policy. In fact, the statute's "three layers of review" the majority finds to be sufficient "oversight" is contrary to the policy. By placing the responsibility for the expenditure of public funds in the hands of a private entity such as the Chamber, and then relying on public officials for "oversight," with no right of access by the public, the accommodations tax statute actually inhibits citizens from being "advised of the performance of public officials and of the decisions that are reached in public activity," thereby frustrating—not furthering—the "vital" policy of open government.

To the extent the policy behind the FOIA could be furthered by "oversight" from public officials, the record in this case reveals the information provided to those public officials does not allow the officials to determine how the funds are being spent. For example, I asked counsel for the Chamber at oral argument about a specific line item contained in the Chamber's proposed budget for spending

accommodations sales tax funds in fiscal year 2013-14. The line appears under the headings "Expenses" and "Digital Marketing," and reads, "SEM Marketing [$]200,000."[8] I asked, "In the town's relationship with the Chamber, . . . as a matter of course, the town doesn't know what the $200,000 represents for SEM marketing?" Counsel responded, "Well, it may. I don't know." After several other questions and answers, counsel agreed with the following assertion:

> Unless somehow the town takes the initiative to learn from the Chamber what the $200,000 represents, then in our scenario, a member of the public would never be able to gain access to the individual vendors, whether they submitted bids, what were the bids, what was the highest bid, and on and on and on.

This demonstrates the reality that the accommodations tax statute does not allow the public to learn how public funds are being spent with any degree of specificity, and therefore the statute does not meet the policy goals of the FOIA.

Second, the majority relies heavily on the principle that a more specific statute (subsection 6-4-10(3)—the accommodations tax statute) controls the more general one (FOIA). That principle is inapplicable in this case because the two statutes do not address the same subject. In *Capco of Summerville, Inc. v. J.H. Gayle Construction Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006), the case cited by the majority to support its application of the principle, we held the principle applied only if the statutes address "the identical issue." 368 S.C. at 142, 628 S.E.2d at 41. The FOIA requires that a public body disclose its records; the accommodations tax statute does not even address that issue.

Third, the majority's reliance on *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), is misplaced. We did not create

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[8] SEM marketing—or search engine marketing—is defined as "a process by which multiple methods are utilized to improve market visibility and exposure for a brand, product or service" and includes "search engine optimization (SEO), social networking, bid placement, pay-per-click (PPC), contextual advertising, paid inclusion, geomapping, . . . as well as multiple media formats, such as YouTube and geospecific marketing, like Foursquare." Techopedia, *Search Engine Marketing (SEM)*, https://www.techopedia.com/definition/25079/search-engine-marketing-sem (last visited Apr. 2, 2018).

any "decisional framework," *see supra* note 7, in *Weston* that permits us to ignore the plain language of the FOIA. Rather, we applied that plain language to transactions that are factually indistinguishable from the Chamber's receipt and expenditure of accommodations sales tax revenues in this case, and held the FOIA applies. We stated "the unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body." 303 S.C. at 403, 401 S.E.2d at 164.

The majority in this case refers to the following passage from *Weston*:

> [T]his decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm's length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent. However, when a block of public funds is diverted en masse from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

303 S.C. at 404, 401 S.E.2d at 165. The purpose of this passage was to point out different types of transactions and to explain that transactions made on an "arm's length basis" would not trigger the FOIA because "there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent." This passage was never intended to create any additional requirement—or a "more involved" analysis—to determine the applicability of the FOIA.

In contrast to the majority's proposition, the quoted language from *Weston* requires a finding that the FOIA does apply to the Chamber. The Chamber's agreement to expend these funds does not involve the type of "arm's length" transaction that is an "exchange of money for identifiable goods or services" we said in *Weston* would not be subject to the FOIA. Rather, the Chamber's decision to play this role

required it to "manage and direct the expenditure of these tourism promotion funds," § 6-4-10, which is precisely the type of transaction we held in *Weston* is always subject to the FOIA, 303 S.C. at 404, 401 S.E.2d at 165 (finding the FOIA applies when an "organization undertakes the management of the expenditure of public funds"). As such, "the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds." *Id.* Therefore, *Weston* does not support the majority's proposition that "the applicability of FOIA to a non-governmental entity is more involved than classification as a public body due to the receipt of public funds." In fact, *Weston* rejects the majority's proposition that there is any "decisional framework" for the FOIA except that set forth in the FOIA.

Finally, the majority expresses concern over the Chamber being exposed to other requirements under the FOIA if we find it is a public body. Those other requirements include open meetings, advanced notice of meetings, and the requirement that public bodies keep written minutes. *See* S.C. Code Ann. §§ 30-4-60, -80, and -90 (2007 & Supp. 2017). There are two simple solutions to this problem. One, if the Chamber does not wish to subject itself to all of the requirements of the FOIA, it may choose not to serve as the designated marketing organization to "receive" and "direct the expenditure" of accommodations sales tax revenues. Two, if the Chamber is unwilling to give up its position as the designated marketing organization, it can easily create a separate subsidiary or related entity devoted solely to that function. The majority's concerns are unfounded.

For these reasons, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Estate of Marion M. Kay.

Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, Petitioner-Respondent,

v.

Martha Brown and Mary Moses, Respondents-Petitioners.

Appellate Case No. 2016-002337

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Donald B. Hocker, Probate Court Judge

Opinion No. 27804
Heard March 7, 2018 – Filed May 23, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Daryl G. Hawkins, of the Law Office of Daryl G. Hawkins, LLC, of Columbia, for Petitioner/Respondent.

John R. Ferguson, of Cox Ferguson & Wham, LLC, of Laurens, for Respondents/Petitioners.

JUSTICE HEARN: This cross-appeal primarily concerns the amount of compensation owed to Petitioner/Respondent Edward Sullivan as personal representative (PR) of Marion Kay's estate. Sullivan filed a petition to settle the estate and sought probate court approval for his commissions as PR together with fees and costs. In response, Respondents/Petitioners Martha Brown and Mary Moses (Brown and Moses), cousins of the deceased and two of multiple beneficiaries under the will, challenged his compensation as excessive, and the probate court agreed, reducing Sullivan's commissions, disallowing certain fees and costs, and awarding attorney's fees to Brown and Moses. The circuit court affirmed, and both sides appealed. In a 2-1 opinion, the court of appeals affirmed in part and reversed in part. *In re Estate of Kay*, 418 S.C. 400, 792 S.E.2d 907 (Ct. App. 2016). We affirm in part, reverse in part, and remand to the probate court.

STANDARD OF REVIEW

A proceeding before the probate court may sound in equity or at law. *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). Brown and Moses demanded a hearing to challenge Sullivan's compensation for his services in administering Kay's estate—an action in equity. *Lee v. Lee*, 251 S.C. 533, 534, 164 S.E.2d 308, 308 (1968) (holding an action for an accounting to determine whether the guardian received improper compensation was in equity). Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility. *Lewis v. Lewis*, 392 S.C. 381, 391, 709 S.E.2d 650, 655 (2011).

A threshold issue in this case is the applicability of the "two-judge rule" to a decision of a probate judge which is affirmed by a circuit court judge. The majority of the court of appeals employed the two-judge rule in affirming, while the dissenting judge, then-Acting Judge Few, posited that the standard of review in an appeal from an equity case should not change simply because two judges have made the same factual determination, and would have applied a preponderance of the evidence standard of review in this case. We take this opportunity to clarify the

appropriate standard of review in cases where the probate court's decision is affirmed by the circuit court.

What has become known as the two-judge rule had its genesis in *Townes*, wherein the Supreme Court undertook to explain the applicable standards of appellate review in various types of cases. In *Townes*, a master made findings of fact and conclusions of law which were concurred in by the circuit court, and the Court stated that: "In an action in equity, tried first by a master or a special referee and concurred in by the judge, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence." 266 S.C. at 86, 221 S.E.2d at 775–76.

Both the court of appeals and this Court have applied the two-judge rule to probate cases where the circuit court judge has agreed with the decision of the probate court. *See Geddings v. Geddings*, 319 S.C. 213, 216, 460 S.E.2d 376, 378 (1995) (applying the two-judge rule where the circuit court affirmed the probate court's decision that a wife had not waived her right to invoke her elective share); *Dean v. Kilgore*, 313 S.C. 257, 260, 437 S.E.2d 154, 155 (Ct. App. 1993) ("Although *Townes* sets forth the two-judge rule for equity cases first tried by a master or special referee and subsequently affirmed or concurred in by the circuit court, we see no reason not to apply the same rule to an affirmance or concurrence of the circuit court with the probate court."). Relying on this precedent, a majority of the court of appeals held the two-judge rule applied.

Under the framework set out in *Townes*, prior to our master in equity system, when circuit judges referred matters to special referees or masters to make findings of fact, the limited scope of appellate review over factual findings concurred in by two judges may have been appropriate. However, we hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence. Accordingly, we analyze this case through this broad lens.

FACTUAL/PROCEDURAL BACKGROUND

Marion Kay died on May 3, 2007, leaving a will that named Sullivan, her close friend and estate planning attorney, as personal representative. At the time of

Kay's death, she owned a house, a ten acre parcel of land, and a one-half undivided interest in 330 acres (the Farm); the remaining one-half interest belonged to Brown and Moses. Kay left the residuary of her estate as follows: (1/4) to Lisbon Presbyterian Church, (1/4) to Lisbon Presbyterian Church Cemetery fund, and the remaining (1/2) to five beneficiaries who each received (1/10), consisting of Marla Elizabeth Heard, Bart Edward Heard, Brown, Moses, and the Presbyterian Home of South Carolina. Brown and Moses had believed Kay would leave them her interest in the Farm, but instead, they simply were named as (1/10) residuary beneficiaries.

The will also granted an option to Kay's neighbor, Charles Copeland, to purchase the real estate within eight months of her death "at the fair market price on the date of my death, the decision of my PR regarding the fair market price to be final." (Copeland Option). Additionally, the will provided "reasonable compensation for [Sullivan's] services rendered and reimbursement for reasonable expenses," granted him the authority to sell personal and real property, and authorized him:

> To exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right…to execute and deliver any and all instruments, and to do all acts which my Personal Representative may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

During Sullivan's administration of the estate, he learned the majority of beneficiaries preferred their interests in cash rather than a fractional ownership interest in land. Accordingly, Sullivan decided the best course of action was to negotiate a sale of the real estate, and if that failed, to file a partition action.

At the outset, Sullivan believed at least three "novel issues" posed potential impediments to his ability to convey marketable title and heavily discounted the property's value. First, Sullivan discovered that a 1973 agreement purportedly granted Brown and Moses a right of first refusal; however, he questioned whether the right was enforceable under the rule against perpetuities.[1] Second, if the right of

[1] The 1973 right of first refusal purportedly gave Brown and Moses the right to purchase Kay's undivided interest in the Farm. At the probate court, Sullivan testified the rule against perpetuities created potential problems as to its enforceability.

first refusal was enforceable, he believed the Copeland Option created a competing interest in the land. Third, Brown alleged an earlier agreement—which could not be produced— entitled her to an undivided interest in five acres of the estate's property. According to Sullivan, these issues had the potential to prolong the administration of the estate. While Copeland indisputably did not exercise his option during the eight months following Kay's death, Sullivan believed the eight month time period was tolled until an appraiser determined the Farm's fair market value. Sullivan hired Paul Major, who appraised the Farm's value at approximately $614,000, of which Kay's interest represented $307,000. Sullivan received this appraisal in February of 2008, nearly nine months after Kay's death.

Three months later, in May of 2008, Sullivan sent a letter to all the beneficiaries proposing a compromise whereby Brown would receive the five acres at no charge, Copeland would exercise his option as to approximately 46 acres of land, and Brown and Moses would release their right of first refusal but would retain the option to purchase Kay's remaining interest at the fair market value. If Brown and Moses elected not to purchase the remaining interest, Sullivan would sell it to the highest bidder. After the sale, the cash proceeds would be distributed according to the will's residuary clause.

When Brown and Moses failed to respond to the proposed settlement, Sullivan attempted another compromise a few months later in July of 2008 by arranging a meeting with church officials, Brown, Moses, and the appraiser. Again, Brown and Moses did not respond, later explaining they felt "ambushed" by having to take part in a meeting with other beneficiaries. Having exhausted repeated attempts to resolve the matter amicably, Sullivan hired his law firm to file a partition and declaratory judgment action. The parties ultimately settled whereby Sullivan sold the Farm, the lot, and the home to a cousin of Brown and Moses for

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Counsel for Brown and Moses argued any violation of the rule would be academic if Brown and Moses consented to the sale, which they ultimately did when the property was sold in 2010.

approximately 94% of the 2007 appraised value. Sullivan then filed a petition for settlement in the probate court as required by the Probate Code.[2]

In his petition for settlement and proposal for distribution, filed approximately three years after Kay's death, Sullivan sought approval of $93,775.00 owed for services rendered as PR.[3] Sullivan notified all the beneficiaries, but only Brown and Moses sent a letter to the probate court requesting a hearing.[4]

At the hearing which ensued before the probate court, counsel for Brown and Moses argued Sullivan had received excessive compensation because he unnecessarily complicated the estate administration. Brown and Moses maintained Sullivan should have simply filed a deed of distribution instead of hiring his law firm to seek a partition order. Sullivan testified the numerous "novel issues" in the estate's administration prompted him to file a declaratory judgment action, and he defended his actions by asserting that he attempted to carry out Kay's intent by selling the real estate, thereby generating cash proceeds to distribute to the beneficiaries. To support his position, he pointed to the fact that Kay had hired him approximately four years prior to her death to negotiate a proposal with Brown and Moses to divide and sell the Farm, but Brown and Moses never responded to his requests.

After two days of testimony, the probate court found Sullivan should have executed a deed of distribution to all the beneficiaries rather than have filed a partition action. According to the probate court, Sullivan's decision to partition the property and his concern over the Copeland Option complicated what should have been a rather simple and straightforward estate administration. Finding the commissions sought by Sullivan to be excessive, the probate court reduced the amount to $51,300.00—approximately 10% of the estate's value—directed him to reimburse the estate $42,775.00 for commissions previously received, and awarded

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[2] Under the statute in effect at the time, "a personal representative must file with the court…a petition for settlement of the Estate…." S.C. Code Ann. § 62-3-1001(a)(3) (2009).

[3] Sullivan requested approval of $93,775.00 for commissions paid as of November 2010 and an additional $13,447.05 in unpaid commissions for services rendered from the last payment date until the settlement hearing.

[4] Brown and Moses did not file any pleadings.

Brown and Moses attorney's fees under the common fund doctrine, concluding that all beneficiaries benefitted from their counsel's representation.

The circuit court affirmed the probate court, and both parties appealed to the court of appeals, which affirmed on all grounds except for the award of attorney's fees to Brown and Moses. Both parties sought certiorari from this Court. Sullivan seeks to retain the $93,775.00 which he paid himself as PR, approval of an additional $13,447.05 in commissions, and fees and costs incurred at the settlement hearing. Brown and Moses seek to limit Sullivan's compensation to 5% of the estate, as provided by South Carolina Code Section 62-3-719. We now affirm in part, reverse in part, and remand for further proceedings.

ANALYSIS

I. Personal Representative's Commission

Sullivan contends the probate court's reliance on section 62-3-719 of the South Carolina Code—setting the default limit for PR compensation at 5% of the estate—is misplaced because he asserts that statute is inapplicable. Additionally, Sullivan asks the Court to adopt a new test to assist probate courts in the determination of reasonable compensation.[5] In contrast, Brown and Moses assert that because the will does not define reasonable compensation, the probate court properly resorted to section 62-3-719 as a basis for determining compensation.

The Probate Code establishes a default rule for PR compensation in section 62-3-719, which provides,

> Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus

[5] Sullivan's eighteen-part test, which we decline to adopt, includes factors such as the time and labor required; time limitations imposed by clients; results obtained; the PR's professional education, experience, or accolades; and whether the PR is a member of the South Carolina Bar, is drawn from a Florida statute. *See* Fla. Stat. § 733.617 (1973).

> the sales proceeds of real property of the probate estate received on sales directed or authorized by will. . . .

S.C. Code Ann. § 62-3-719(a) (2009 & Supp. 2017). However, subsection (c), an exception to the 5% default rule, states, "The provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs*…." (emphasis added). Sullivan contends the will's authorization of "reasonable compensation" falls within this exception. While the probate court did not specifically find that section 62-3-719(a) applied, it clearly considered the statute in arriving at its approval of $51,300 in commissions, which represented approximately 10% of the estate.

We believe the language in the will is not sufficient to bring Sullivan's commissions within the exception expressed in subsection (c). The will merely contemplates "reasonable compensation," and absent any directive in the will, that determination was left to the probate court. Even though the probate court did not expressly find that Sullivan's actions constituted "extraordinary services," pursuant to the statute, we believe its decision to award Sullivan compensation of 10% of the estate's value is tantamount to such a finding.

Moreover, our own view of the preponderance of the evidence supports the award of $51,300. While Sullivan testified he spent approximately 450 hours on the estate, he could not definitively answer the probate court's question as to how he charged for his services—whether it was a set percentage of the estate or based on his time. Sullivan discussed a number of factors he had considered in arriving at his fee, and appeared to put significant weight on the "exceptional result" he ultimately garnered for the estate through the property's sale. While we disagree with the probate court that Sullivan simply "pull[ed] a figure out of the air" in determining compensation, the total commissions sought constituted 21% of the estate's value, a figure the probate court deemed "clearly excessive." We believe the probate court was correct in this assessment, and we affirm the reduction in Sullivan's compensation to $51,300.[6]

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[6] Additionally, Sullivan contends the probate court's disagreement with his decision to seek a partition improperly influenced its determination to reduce compensation. Because our own view of the preponderance of the evidence supports the $51,300 award, it is unnecessary to address this argument. *16 Jade St., LLC v. R. Design*

II. Expenses Incurred at the Settlement Hearing

Sullivan contends the court of appeals erred in affirming the probate court's decision not to award reasonable fees and expenses incurred at the settlement hearing. Brown and Moses assert the court of appeals properly affirmed the decision by differentiating costs incurred defending the estate as PR from costs incurred by Sullivan seeking more compensation in his individual capacity.

Under the Probate Code, when a "personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." S.C. Code Ann. § 62-3-720 (2009 & Supp. 2017). Each court below concluded that section 62-3-720 does not apply to instances where the personal representative primarily acts for the benefit of himself in procuring compensation for his services. However, under the plain language of the statute, it applies when (1) the PR defends or prosecutes, (2) *any proceeding* in *good faith*, whether successful or not. Here, citing a different statute—section 62-3-715(20)[7]—the court of appeals stressed section 62-3-720 was intended to apply only to proceedings when the personal representative acted reasonably for the benefit of the estate as opposed to requesting approval of the PR's compensation. We find this distinction erroneous as applied to Sullivan.

Once requested by Brown and Moses, it was incumbent on Sullivan to attend the settlement hearing, and he necessarily incurred attorney's fees and costs to prepare and travel to Laurens County. At that hearing, Sullivan was called upon to

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Const. Co., LLC., 405 S.C. 384, 390, 747 S.E.2d 770, 773 (2013) (declining to address an issue after reaching a dispositive issue).

[7] Section 62-3-715, titled "Transactions authorized for personal representatives; exceptions," concerns a personal representative's authority, not necessarily compensation. This provision states, "Except as restricted or otherwise provided by the will…a personal representative, acting reasonably for the benefit of the interested persons, may properly:

> (20) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

S.C. Code Ann. § 62-3-715(20) (2009 & Supp. 2017).

defend his decision to seek a partition rather than issue a deed of distribution. Additionally, he defended against Brown's claim that she was entitled to an additional five acres of property by virtue of an unproduced agreement entered into years before Kay's death. While this claim may not have been the primary reason for the hearing, Sullivan was required to defend it. Therefore, we find the hearing constituted a "proceeding" which Sullivan was required to defend within the meaning of section 62-3-720.

Section 62-3-720 also requires the proceeding be advanced in good faith. Significantly, the probate court, as affirmed by the circuit court and the court of appeals, concluded that Sullivan acted in good faith. Taking our own view of the preponderance of the evidence, we agree all actions by Sullivan as PR were taken in good faith. Sullivan had the authority under the will to sell the real estate, and while the probate court determined Sullivan prolonged the estate by seeking a partition order, we question whether a deed of distribution was even a viable alternative under these facts. We believe Sullivan acted well within his authority under the will when he sought partition of the property. Moreover, prior to filing the action, Sullivan repeatedly attempted to reach an amicable solution among the beneficiaries. However, without advancing a solution of their own, Brown and Moses failed to respond to Sullivan, instead voicing their displeasure only when the end of the estate administration was in sight. Before the probate court, Sullivan testified Bart Heard, the Lisbon Presbyterian Church, and the Presbyterian Home all preferred the real estate be sold in order to receive cash proceeds. Moreover, Major, a forestry consultant and real estate broker, testified Sullivan reached an extraordinary result by selling the real estate in 2010 for 94% of the 2007 appraisal—at a time when real estate prices remained stagnant after severe declines during the recession.

Bart Heard testified not only did he approve of Sullivan's charges and expenses, but he felt it would be unfair if Brown and Moses did not pay for the proceeding before the probate court because they were the individuals who had prolonged the administration of the estate. Penelope Arnold, the Director of Charitable Foundation and Church Relations for the Presbyterian Home, also testified the church did not object to Sullivan's purported compensation. Additionally, Sullivan's law firm reduced its hourly rate by about 35%, and the firm further discounted its invoices, the total of which represented approximately $20,000.

Accordingly, because we find ample evidence demonstrating Sullivan defended the claim in good faith, we reverse the court of appeals' decision refusing to award him necessary expenses. We remand to the probate court to calculate these expenses, including attorney's fees.

III. Remaining Issues

On cross-appeal, Brown and Moses assert the court of appeals erred in holding they abandoned their argument that Sullivan should be responsible for all fees and costs incurred at the settlement hearing because he acted in his individual interest to recover additional compensation rather than in the Estate's interest in defending a claim. While we disagree that the issue was abandoned, because we hold Sullivan defended the claim in good faith, we find their argument unavailing.

Additionally, Brown and Moses assert the court of appeals erred in reversing the award of their attorney's fees under the common fund doctrine. We disagree.

Under the common fund doctrine, a court in its equitable jurisdiction may award reasonable attorney's fees to the party "who, at [the party's] own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). As a method of fee-spreading, the doctrine's rationale is that "'one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses.'" *Id.* at 452, 658 S.E.2d at 329 (quoting *Johnson v. Williams,* 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). To recover under the doctrine, there must be an express or implied contract of employment between the successful party's counsel and all individuals who hold an interest in the fund. *Johnson*, 196 S.C. at 532–33, 14 S.E.2d at 23. Moreover, if the parties' interests are adverse, the doctrine does not apply. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943). Significantly, recovery under the common fund doctrine is subject to abuse and should be exercised cautiously. *Johnson*, 196 S.C. at 532, 14 S.E.2d at 23.

While all the beneficiaries arguably benefited from Brown and Moses' efforts to challenge Sullivan's compensation, we find the beneficiaries of the estate were not united in pursuit of this cause. A majority of the beneficiaries supported Sullivan's efforts to sell the Farm and distribute the cash proceeds according to Kay's will. Furthermore, there was no express contract of employment between counsel for Brown and Moses and the other beneficiaries. Moreover, because the

beneficiaries did not acquiesce in Brown's and Moses' representation but instead commended Sullivan's performance and opined that Brown and Moses should bear the costs incurred before the probate court, we find no implied contract existed. Therefore, we conclude the common fund doctrine does not apply; accordingly, we affirm the court of appeals' decision that Brown and Moses are responsible for their own attorney's fees.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the court of appeals' decision to uphold the award of $51,300 in commissions for Sullivan's services as personal representative and the determination that Brown and Moses are responsible for their own attorney's fees. We **REVERSE** the court of appeals' conclusion that Sullivan is not entitled to recover necessary expenses, including reasonable attorney's fees, incurred at the settlement hearing under section 62-3-720 and **REMAND** to the probate court for that determination.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., and Acting Justice Amy W. McCulloch, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerome Curtis Buckson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001430

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Trial Court Judge
J. Mark Hayes II, Post-Conviction Relief Judge

Opinion No. 27805
Heard December 13, 2017 – Filed May 23, 2018

REVERSED

Tricia A. Blanchette, of the Law Office of Tricia A. Blanchette, LLC, of Leesville, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Valerie Garcia Giovanoli, both of Columbia, for Respondent.

JUSTICE FEW: The post-conviction relief (PCR) court granted Jerome Curtis Buckson relief and ordered a new trial. The State appealed, arguing no probative evidence supports the findings of the PCR court. The court of appeals reversed the PCR court. We reverse the court of appeals.

I. Facts and Procedural History

Buckson and Tiffany Foggie lived together in Foggie's apartment in Spartanburg until at least early to mid-January 2006. At approximately three o'clock in the morning on Monday, January 30, 2006, Buckson entered the apartment through a kitchen window, and proceeded up the stairs to Foggie's bedroom. The door to the bedroom was closed and locked. Foggie and Buckson had been yelling to one another from the time he was outside, and Foggie told Buckson to leave. Instead, he forced the door open to find another man in the room. After a brief struggle, Foggie was shot. Buckson fled the apartment and called 911. He told the 911 operator the man shot at him, and that he heard other shots as he fled. He later learned Foggie was dead from a gunshot wound.

The State charged Buckson with murder and first degree burglary. At trial, Buckson testified the man approached him with a gun, and when Foggie tried to "swat" the gun down, it discharged. The jury found Buckson not guilty of murder. As to the burglary, the State presented evidence that Buckson no longer lived in the apartment on the night Foggie died, and Buckson's trial counsel presented evidence that he did. The jury found Buckson guilty of first degree burglary. The trial court sentenced him to twenty years in prison. The court of appeals affirmed. *State v. Buckson*, Op. No. 2010-UP-282 (S.C. Ct. App. filed May 20, 2010).

Buckson filed a PCR application alleging ineffective assistance of counsel. Buckson's primary claim was trial counsel was ineffective in his presentation of evidence that Buckson still lived in the apartment on the night Foggie died. *See State v. Singley*, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011) (stating "'one cannot commit the offence of burglary by breaking into his own home'" (quoting *State v. Trapp*, 17 S.C. 467, 470 (1882))).[1] The PCR court found "trial counsel was [deficient] when he failed to prepare and investigate, failed to call witnesses, and failed to utilize trial witnesses to establish that the apartment . . . was . . . his . . . residence," and Buckson "was prejudiced as a result of counsel's [deficient performance]." The PCR court granted Buckson a new trial.

The State appealed by filing a petition for a writ of certiorari in which it raised four separate issues. Three of the issues relate to Buckson's primary claim. As to these

[1] In *Trapp*, we used the word "house." 17 S.C. at 470. In *Singley*, we used "home." 392 S.C. at 276, 709 S.E.2d at 606.

three issues—which we address collectively—the State argued only that the PCR court's findings of deficiency and prejudice were not supported by any probative evidence. The State raised no questions of law, and did not make any argument that the PCR court failed to defer to the strategic considerations of trial counsel. The State's other issue related to a different claim we need not address.[2]

We transferred the State's certiorari petition to the court of appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules. The court of appeals granted the petition, and reversed in an unpublished opinion. *Buckson v. State*, Op. No. 2016-UP-174 (S.C. Ct. App. filed Apr. 13, 2016). We granted Buckson's petition for a writ of certiorari, and now reverse the court of appeals.

II. Analysis

We begin our analysis by summarizing the evidence trial counsel presented on the question of whether Buckson still lived with Foggie on January 30th. First, counsel called Buckson's mother, who testified she was very close to Foggie and talked to her "almost every day," including Sunday night, the 29th. When asked "where was Buckson staying," she replied "with Tiffany Foggie. . . . That's where he lived." Buckson's mother also testified the reason Buckson was not at the apartment earlier Sunday evening is that he was at the mother's house babysitting her youngest son. Chad Tate—who fathered two children with Foggie—testified he called his children daily, and Buckson was still answering the phone "most every day" in January 2006. Tate also testified that when he would pick his children up at Foggie's apartment, "I would usually see Jerome Buckson." Counsel called Buckson's aunt, who testified she "didn't miss a week" stopping by Foggie's apartment, and "[Buckson] lived there. He definitely lived there." However, none of these witnesses specifically testified Buckson still lived with Foggie on January 30th.

Finally, Buckson explained "I was her boyfriend," and that she asked him to move in with her "a year before the crime happened." He testified he spent Friday night

[2] The State's other issue relates to Buckson's claim that trial counsel was ineffective for not objecting to the jury's completed verdict form. Because we reinstate the PCR court's ruling that Buckson is entitled a new trial based on his primary claim, we do not address the verdict form issue. *See Workman v. State*, 412 S.C. 128, 133, 771 S.E.2d 636, 639 (2015) (recognizing that because the applicant will receive PCR on one claim, "we need not address" the remaining issues) (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

the 28th at the apartment, but he spent Saturday night at his Mom's house because "she was having health issues and I wanted to look after them, but I went back to the apartment basically Sunday morning." Buckson testified Foggie sent him text messages on Sunday, and "she called me and asked me what time I was coming home." He testified the last time he talked to Foggie on the phone was 11:30 Sunday night. Counsel introduced photographs of the interior of Foggie's apartment taken by law enforcement. Buckson identified a number of his personal items shown in the photographs, including his toothbrush and some clothing. Buckson explained the reason he did not have a key on January 30th, and that it was common for him to use the window to enter the apartment. Buckson specifically testified he still lived with Foggie "the weekend of January 30th."

At his PCR trial, Buckson presented the testimony of five witnesses he claims trial counsel should have called at the criminal trial. Much of this testimony is similar to testimony elicited by trial counsel. However, some of the testimony was new and was not presented to the jury. For example, Elliot Cannady was in Foggie's apartment during the day on Sunday with his co-worker Mark Watson, the man Buckson later found in Foggie's bedroom with a gun. Cannady testified it appeared that "a man had been living in the apartment," and Foggie appeared "jittery, afraid" and made comments about being worried that her "boyfriend" was coming home. Referring to Foggie and Watson, Cannady testified "it appeared from their actions and conduct that they were concerned about that man, whether it be a friend or boyfriend, returning to the apartment that night."

Antwan Martin testified he spent the entire day on Sunday the 29th with Buckson. Martin explained it was his understanding "that on January 29th, . . . Mr. Buckson . . . lived at that apartment with Ms. Foggie," and "everything appear[ed] to [me] as if they were still dating and living together on January 29th." Martin also testified Buckson had numerous missed calls from Foggie that day.

Lloyd Williams was Foggie's stepfather. He testified at the PCR trial that he visited Foggie and her children at the apartment "at least once a week," and Buckson was there "most of the time." He explained his understanding "that they were still dating on the night of January 29, 2006," and he talked to Foggie "often enough that [he] would know if they were not dating." Williams went to the apartment on Sunday the 29th, and Foggie would not come to the door. When Foggie finally let Williams in, she explained to him "she didn't want to come to the door because she thought it was [Buckson]." Williams testified Watson was there, and Williams said "Oh, y'all over here creeping." PCR counsel asked, "And would that be 'creeping' because you knew that Mr. Buckson wasn't home at the time and it was something that she was

doing behind his back?" Williams equivocated, responding, "Well, not directly in that order." PCR counsel pushed the question again later, asking, "And was it your understanding that Mr. Buckson was just merely going home that night?" After Williams equivocated again, PCR counsel had Williams silently read a portion of a written statement he gave PCR counsel's investigator, and the following took place,

> Counsel: Reading that statement, does that help refresh your memory as to whether or not you knew he was living there?
>
> Did you, in fact, believe he was living there?
>
> Williams: Yeah, I kind of -- I believed that, but that was in the early stages, and when I would go over there and she would tell me he's upstairs asleep or something like that. So, I make the assumption that he was living there.

Williams also testified "it was common knowledge that [Foggie] would keep the kitchen window . . . unlocked so that they could . . . get in to unlock the back door."[3] Cannady, Martin, and Williams each testified they were never contacted by trial counsel or his investigator prior to Buckson's trial, but were willing to testify if they had been called.

Based on this testimony, the PCR court found trial counsel's failure to call the PCR witnesses at the criminal trial was unreasonable. The PCR court specifically found Cannady, Martin, and Williams "to be credible," and that Buckson's defense to the burglary charge "would have been aided by [their] testimony." The PCR court recited several specific reasons he found this testimony would have made a difference in the outcome of the trial. First, he found the testimony would have contradicted the State's witnesses and corroborated Buckson's trial testimony. The fact that none of the trial witnesses were in Foggie's apartment on Sunday, but Cannady and Williams were, and Martin was with Buckson all day Sunday, supports the PCR court's finding. In addition, the PCR court stated,

[3] It appears as though this testimony may be Williams reading from his previous written statement. We cannot tell, however, as the State did not include the statement in the Appendix at the court of appeals.

> Even though the [trial] witnesses provided some pertinent testimony, trial counsel called only one non-family member when these other vital non-family member witnesses were available. Interestingly, Lloyd Williams and Elliott Cannady were listed as potential State witnesses and were willing to testify for the defense despite being Ms. Foggie's stepfather and Mr. Watson's friend.

The PCR court found "these factors combined with the credibility of the witnesses' testimony would have been highly persuasive to the jury and would have likely affected the outcome of the trial." *See Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) ("A PCR applicant claiming trial counsel rendered ineffective assistance must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). In this case, the court of appeals failed to observe this standard for appellate review. In its opinion, the court of appeals stated it conducted "a thorough review of the record" from which it concluded, "In our view, trial counsel acted reasonably." On the prejudice question, the court of appeals stated, "We find [Buckson] failed to demonstrate he was prejudiced."

Under the proper standard of review, the appellate court's "view" must be limited to whether there is probative evidence to support the PCR court's factual findings. Ordinarily, the appellate court is not free to make its own factual findings. *Compare Simmons v. State*, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016) (remanding to the PCR court for findings, and stating, "We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting") *with Smalls v. State*, 422 S.C. 174, ___, 810 S.E.2d 836, 847 (2018) (finding under unique circumstances the appellate court may make the findings itself). The State appealed the PCR court's award of relief on purely factual arguments, and this decision by the State restricted the court of appeals to the deferential review we give factual findings in PCR cases. Because there is ample evidence to support the PCR court's findings, the court of appeals erred by not giving those findings deference.

In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks. *See, e.g.*, *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); *Jackson v. State*, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same). A PCR court's analysis of counsel's strategic decisions must be "highly deferential" to counsel's judgment, and "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*.

In his testimony at the PCR trial, Buckson's highly-experienced trial counsel explained the strategic basis for the decisions he made. He testified,

> Every witness, while he brings something good, . . . brings cross-examination with him and sometimes that can be a disaster. You can lose more ground than you can gain. I try to call witnesses that I can get something out of and that the State won't have a stronger case when I sit down.

Counsel then articulated specific reasons he did not call Cannady, Martin, and Williams. The State used the words "strategy" and "strategic decisions" in isolated places in its brief to the court of appeals, and even refers to trial counsel's testimony we quote above. Nevertheless, our law provides that issues must be raised in the Statement of Issues on Appeal. Rule 208(b)(1)(B), SCACR. While we seek to be flexible interpreting issue statements, "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id.* In this case, the issue statements in the State's brief to the court of appeals say nothing whatsoever about the strategic considerations of counsel. In addition, the State's arguments in the body of the brief relate to the sufficiency of the evidence, not strategy, and the State does not cite any legal authority on the issue of strategy.

III. Conclusion

We **REVERSE** the court of appeals, reinstate the PCR court's judgment granting Buckson relief, and remand to the court of general sessions for a new trial.

HEARN, J., concurs. JAMES, J., concurring in a separate opinion in which BEATTY, C.J., concurs. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE JAMES: I concur in the majority opinion, but I write separately to emphasize that our—and the court of appeals'—resolution of this appeal must be guided by application of the correct standard of review. As the majority recites, and as the dissent agrees, an appellate court must give deference to the PCR court's factual findings and must uphold these findings if there is any evidence of probative value to support them. While the court of appeals *articulated* the correct standard of review, its analysis is proof it did not *apply* the correct standard of review in reversing the PCR court.

The majority correctly concludes the court of appeals failed to apply the correct standard of review. The dissent agrees with that statement but argues the State should not be penalized because "the State did not ask the court of appeals to utilize an incorrect standard of review." Therefore, the dissent concludes, we should remand to the court of appeals to allow for reconsideration by the court of appeals pursuant to the correct standard of review. I respectfully disagree with a remand, as the only decision the court of appeals could correctly reach on remand would be the one reached by the majority. That is the nature of the standard of review by which we and the court of appeals are bound. Another PCR court may have analyzed the same facts and the same issues and denied relief to Buckson; in such an instance, we would likely be constrained to affirm that conclusion as well. However, based upon the evidence presented at the PCR hearing, *this* particular PCR court concluded trial counsel was deficient and that this deficiency prejudiced Buckson. Those conclusions were driven by the PCR court's analysis of facts in the record. Our role as a reviewing court is to determine whether evidence of probative value supports the PCR court's factual conclusions. As the majority explains, probative evidence in the record supports the PCR court's factual conclusions. That is the end of the appellate inquiry, regardless of whether the inquiry is conducted by the court of appeals or by this Court.

I also agree with the majority's discussion of the issue of a valid trial strategy. At oral argument, the State argued that we should affirm the court of appeals because trial counsel's actions were guided by a valid trial strategy. Until oral argument before us, the State never advanced the argument that trial counsel's decisions were guided by valid strategic considerations.[4] Therefore, the majority properly declined to address that issue.

BEATTY, C.J., concurs.

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[4] Counsel for the State at oral argument before us did not author the State's briefs to the court of appeals or to this Court.

JUSTICE KITTREDGE: While I agree with the majority that the court of appeals applied the incorrect standard of review, I dissent from the Court's decision to reverse the court of appeals and reinstate the judgment of the PCR court. Rather than an outright reversal of the court of appeals, I would vacate the opinion and remand to the court of appeals for reconsideration of the State's appeal in accordance with the proper standard of review.

On certiorari from the court of appeals to the PCR court, the State argued that, as to several particulars, there "was no probative evidence to support the PCR court's finding[s]." The State's brief is significant in two respects. First, the assertion of "no probative evidence" is tantamount to arguing that the PCR court erred as a matter of law. The characterization by the majority that the State appealed "on purely factual arguments" is unfair, in my judgment. Second, the State did not ask the court of appeals to utilize an incorrect standard of review. I believe the State is entitled to a proper consideration by the court of appeals of its appeal under the proper standard of review.

If the issue were merely whether there is any evidence to support the finding of deficient representation, I would likely join the majority and not waste time and judicial resources by a remand to the court of appeals. It is my judgment that a substantial question is presented as to whether there is any evidence to support the finding of prejudice under the proper standard of review. By reversing the court of appeals for utilizing the wrong standard of review, the Court gives Petitioner a pass on the prejudice prong. Moreover, and in respectful response to the concurring opinion, I see long-term value in remanding the case and requiring the court of appeals to apply the proper standard of review.

The Supreme Court of South Carolina

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

Appellate Case No. 2015-002439

ORDER

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

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Dorchester County. Effective June 19, 2018, all filings in all common pleas cases commenced or pending in Dorchester County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Chester
Clarendon	Colleton	Edgefield	Fairfield
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Laurens
Lee	Lexington	McCormick	Newberry
Oconee	Pickens	Richland	Saluda
Spartanburg	Sumter	Union	Williamsburg
York	Lancaster	**Dorchester—Effective June 19, 2018**	

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

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

Columbia, South Carolina
May 17, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nataschja Tonya Urban, Appellant,

v.

Leo W. Kerscher, Mary Jean Crew, and Jeffrey Brain Poston, Respondents.

Appellate Case No. 2016-001213

Appeal From Orangeburg County
Michael S. Holt, Family Court Judge

Opinion No. 5560
Heard April 11, 2018 – Filed May 23, 2018

REVERSED and REMANDED

Leon Edward Green, of Leon E. Green, PC, of Aiken, for Appellant.

James B. Jackson, Jr., of Nester & Jackson, PA, of Orangeburg, for Respondents.

GEATHERS, J.: This is a child custody dispute between Nataschja Urban and family friends, Leo Kerscher and Mary Crew, over Urban's minor daughter (Child). Urban appeals the ruling of the family court granting custody of Child to Kerscher and Crew. Urban argues the factors outlined in *Moore v. Moore*, 300 S.C. 75, 386

S.E.2d 456 (1989) govern and militate the return of Child to her custody. Alternatively, Urban argues she has met the higher burden of demonstrating a substantial change in circumstances warranting the return of Child to her custody.[1] We reverse and remand.

FACTS/PROCEDURAL HISTORY

Urban and Jeffrey Poston were in a romantic relationship resulting in the birth of Child in October 2009. Urban and Poston never married, and until May 2014, Urban had sole custody of Child. On May 16, 2014, Urban left Child in the care of family friends, Kerscher and Crew, in Orangeburg, South Carolina, while Urban left to pursue and secure a permanent home and employment in Pennsylvania. At the time, Urban intended for Child to stay with Kerscher and Crew only for the summer of 2014. Urban's Pennsylvania employment fell through after a week, and she relocated to Mississippi, where she worked for a few months at a convenience store.

Prior to leaving Child with Kerscher and Crew, Urban signed a letter that purported to allow them to care for Child's medical and educational needs in Urban's absence. However, Crew claimed the letter was ineffectual because her last name was incorrectly stated and the letter could not be notarized. As a result, on June 11, 2014, while Urban was still in Mississippi, Kerscher and Crew filed a complaint seeking permanent custody of Child. Specifically, Kersher and Crew requested "temporary and permanent custody of [Child], which they need[ed] for purposes of educating [Child] and providing for her medical needs." Urban was served with the complaint and filed an answer agreeing to let Kerscher and Crew have custody of Child.[2] On September 5, 2014, the family court held a final hearing on the complaint for custody and issued its final order on September 16, 2014, granting Kerscher and Crew permanent custody. Urban did not attend the final hearing, and despite the court's reference to Urban's Mississippi residence, Urban had returned to South Carolina in August.

Two months later, on November 14, 2014, Urban filed a complaint seeking the return of Child to her custody. In April 2015, Urban filed a motion for temporary

[1] Kerscher and Crew did not file a brief in response to this appeal.
[2] Urban's answer was not included in the record on appeal.

relief, seeking custody of Child during litigation. The family court held a hearing on the motion in June 2015 and issued its order maintaining Child's custody with Kerscher and Crew but granting Urban visitation.

The final hearing was held in March 2016, and the court issued its order the following month. The court declined to return custody of Child to Urban but continued to allow Urban visitation. The court also required the child support being paid by Child's father to be sent to Kerscher and Crew. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err in granting custody to third parties over a natural parent?

2. Did the family court err in finding there was not a substantial change in circumstances warranting a change in custody?

STANDARD OF REVIEW

"[T]he proper standard of review in family court matters is de novo . . . ." *Stoney v. Stoney*, Op. No. 27758 (S.C. Sup. Ct. filed April 18, 2018) (Shearouse Adv. Sh. No. 16 at 11); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52. "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, Op. No. 27758 (Shearouse Adv. Sh. No. 16 at 10, n.2).

LAW/ANALYSIS

The family court denied Urban's petition for custody by applying two competing analyses—finding Urban had not met the factors established in *Moore v.*

Moore, 300 S.C. 75, 386 S.E.2d 456 (1989) or the higher burden of demonstrating a substantial change in circumstances. Urban argues the family court should have applied only the *Moore* factors but also contends she has met the burden of proof under either theory. We find the *Moore* factors govern exclusively.

I. Appropriate Standard

Our supreme court in *Moore* outlined certain criteria for a court to apply when a natural parent seeks to reclaim custody of his or her child after having temporarily relinquished custody to a third party. 300 S.C. at 79–80, 386 S.E.2d at 458. Beginning with "a rebuttable presumption that it is in the best interest of any child to be in the custody of its biological parent," the court outlined the following four factors:

> (1) "[t]he parent must prove that he [or she] is a fit parent, able to properly care for the child and provide a good home";
>
> (2) "[t]he amount of contact, in the form of visits, financial support[,] or both, [that] the parent had with the child while [he or she] was in the care of a third party";
>
> (3) "[t]he circumstances under which temporary relinquishment occurred"; and
>
> (4) "[t]he degree of attachment between the child and the temporary custodian."

Id. The question is not who has the most suitable home at the time of the hearing but whether circumstances "overcome the presumption that a return of custody to the biological parent is in the best interest of the child." *Sanders v. Emery*, 317 S.C. 230, 234, 452 S.E.2d 636, 638–39 (Ct. App. 1994).

The *Moore* court found these factors best addressed the dilemma between safeguarding the welfare of a child and ensuring "parents who temporarily relinquish custody for the child's best interest can regain custody when conditions become more

favorable." 300 S.C. at 79, 386 S.E.2d at 458. The court reasoned a parent should be able to regain custody by showing the condition requiring relinquishment has been resolved. *Id.* at 81, 386 S.C. at 459. The court further noted a third party should not be awarded custody of a child over a biological parent through "adverse possession." *Id.*

Because *Moore* is limited to situations involving the temporary relinquishment of custody to a third party, it stands to reason that *Moore* would not apply when custody of a child is transferred permanently, involuntarily, or to the other natural parent. *See, e.g.*, *Baker v. Wolfe*, 333 S.C. 605, 610, 510 S.E.2d 726, 729 (Ct. App. 1998) (finding the *Moore* factors did not apply because a mother voluntarily relinquished custody of her children to the children's father, not a third party). Here, it is undisputed Urban voluntarily transferred custody of Child to third parties, Kerscher and Crew. The question remains, however, whether Urban's relinquishment was temporary or permanent.

On one occasion, this court has addressed the temporary nature of a biological parent's relinquishment of custody to a third party. *See Harrison v. Ballington*, 330 S.C. 298, 302, 498 S.E.2d 680, 682 (Ct. App. 1998). In *Harrison*, a father and mother divorced, and the mother had sole custody of their son. *Id.* at 301, 498 S.E.2d at 681. Six months later, the mother passed away, and the child's grandparents took physical custody of the child. *Id.*, 498 S.E.2d at 681–82. The grandparents filed an action seeking custody of the child, and the parties reached an agreement, which the family court adopted, granting the grandparents custody and allowing the father visitation. *Id.*, 498 S.E.2d at 682. A year and a half later, the father filed for legal custody of the child based on changed circumstances. *Id.* This court determined the family court erred in applying a changed-circumstances analysis because the family court order did not specify the father's relinquishment was permanent or that the father "waived his priority status as a biological parent to reclaim custody"; and, the agreement upon which the order was based indicated the parties had contemplated the eventual return of the child to the father. *Id.* at 302, 498 S.E.2d at 682–83. Therefore, the *Moore* factors applied. *Id.* at 303, 498 S.E.2d at 683.

We interpret *Harrison* as allowing for an examination of the circumstances surrounding relinquishment to determine the nature of the relinquishment, with particular focus on the biological parent's intent. *Id.* at 302–03, 498 S.E.2d at 682–

83 (examining the initial custody agreement, which was not incorporated into the order, and determining the father never intended to permanently relinquish custody or waive "his priority status as a biological parent to reclaim custody"). We find this reading of *Harrison* best comports with our state's public policy of reuniting children with their families in timely manner and this court's duty to zealously safeguard the rights of minors. *See* S.C. Code Ann. § 63-1-20(D) (2009) ("It is the policy of this [s]tate to reunite the child with his family in a timely manner, whether or not the child had been placed in the care of the [s]tate voluntarily."); *Harrison*, 330 S.C. at 303, 498 S.E.2d at 683 (stating the public policy of South Carolina, in child custody disputes, is to reunite children with their parents); *see also S.C. Dep't of Soc. Servs. v. Roe*, 371 S.C. 450, 463, 639 S.E.2d 165, 172 (Ct. App. 2006) ("The duty to protect the rights of minors and incompetents has precedence over procedural rules otherwise limiting the scope of review . . . .").

Additionally, examining the circumstances surrounding relinquishment and focusing on the biological parent's intent, even in the face of an award of permanent custody, reinforces the repeated recognition by our supreme court and the Supreme Court of the United States of a biological parent's fundamental liberty interest in "the companionship, care, custody, and management of his or her children." *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)); *Moore*, 300 S.C. at 79, 386 S.E.2d at 458 ("[T]his [c]ourt [has] placed a substantial burden on any third party attempting to take custody over a biological parent and ' . . . recognize[s] the superior rights of a natural parent in a custody dispute with a third party.'" (quoting *Kay v. Rowland*, 285 S.C. 516, 517, 331 S.E.2d 781, 782 (1985))); *cf. Ex parte Reynolds*, 73 S.C. 296, 303, 53 S.E. 490, 492 (1906) ("Those who receive children from parents without the deed provided by statute, relying upon estoppel of the parents, are charged with notice that the presumption is very strong that a right so precious as that of a parent to a child will not be unconditionally given away except for very cogent reasons . . . .").

Accordingly, pursuant to our interpretation of *Harrison*, we find Urban's custody dispute is governed exclusively by the *Moore* factors. Although the family court's 2014 order awarded "permanent" custody to Kerscher and Crew, the record on appeal does not establish that Urban waived her priority status as a biological parent to have custody of Child returned and the circumstances surrounding relinquishment indicate the parties contemplated the eventual return of Child. Urban

left South Carolina to pursue permanent employment and to establish a home for Child and herself. Prior to leaving, Urban wrote a letter allowing Kerscher and Crew to care for Child in Urban's absence. However, due to Crew's alleged concern that the letter was ineffective, Kerscher and Crew filed a complaint for custody while Urban was in Mississippi. Urban, unrepresented, accepted service and answered the complaint, agreeing to relinquish custody. Urban later testified she thought she was signing a waiver to allow Crew to care for Child in case of emergency. After her out-of-state employment fell through, and three months after she had left the state, Urban returned to South Carolina and attempted to have Child returned. Text messages between Urban and Crew that were read into the record at trial show Crew was willing to return Child if Urban could demonstrate her ability to provide for Child to Crew's satisfaction. Furthermore, the appealed 2016 family court order recognized the temporary duration of Kerscher and Crew's custody of Child, stating Child was supposed to be in their custody only for the summer of 2014. Therefore, Urban's custody dispute is governed by the *Moore* factors.

II. *Moore* Factors

1. Fitness as a Parent

"The parent must prove that he [or she] is a fit parent, able to properly care for the child and provide a good home." *Moore*, 300 S.C. at 79, 386 S.E.2d at 458. In determining the natural parent's fitness, courts consider the quality of the home the natural parent can provide as well as the parent's employment stability. *See Dodge v. Dodge*, 332 S.C. 401, 411–12, 505 S.E.2d 344, 349 (Ct. App. 1998) (noting the natural parent rented a large, clean home and had stable employment as a property manager). Further, the willingness of a parent's spouse and his or her ability to provide for the child weighs in favor of finding the parent is fit and able to care for the child. *Malpass v. Hodson*, 309 S.C. 397, 399, 424 S.E.2d 470, 472 (1992). However, the natural parent's history of instability and financial dependence upon others can factor against finding the parent is fit. *See Kramer v. Kramer*, 323 S.C. 212, 219, 473 S.E.2d 846, 849 (Ct. App. 1996).

Here, the court found Urban was not fit and not able to properly care for Child and provide a good home. The court acknowledged Urban was in a better place—in a clean and stable home with her fiancée Brittany Carter. However, the court was

concerned because Urban was unemployed and dependent on her fiancée for financial support and housing. The court also noted Urban was receiving child support from Child's father, Poston, but not passing that on to Kerscher and Crew.

Pursuant to our de novo review, we find Urban is a fit parent, able to properly care for Child and provide a good home. Urban lives with her fiancée in a clean and stable home. Child has her own room and has a good relationship with Urban and Carter. Urban's character references, as discussed in the Guardian ad Litem's report, indicated Urban was a good mother, and no one indicated issues with temper, alcohol, or drugs. Further, during oral argument, the Guardian ad Litem stated that Urban was a fit parent and expressed no concerns with Urban's ability to care for Child. We find the family court gave undue weight to Urban's financial dependence on her fiancée. At the time of the hearing, Urban was unemployed and her fiancée testified she was willing to use her income to support Child and Urban. The family court was concerned with the dependence, but we take an opposite view. Financial dependence on a significant other should not reflect poorly on a natural parent's ability to provide a good home unless the significant other is not in a position to provide financial support. *Compare Malpass*, 309 S.C. at 399, 424 S.E.2d at 472 (finding a husband's willingness and ability to provide for his wife's child weighed in favor of finding the wife was a fit parent, able to care for the child), *with Kramer*, 323 S.C. at 219, 473 S.E.2d at 849 (holding neither a mother's past conduct nor her present financial dependence on her husband supported finding she was a fit parent; the husband's $16,000 in child support arrearages did not suggest he was "in a position to provide financial support" for the child).

Additionally, despite Urban's unemployment, she was attending Phoenix University, receiving $2,500 quarterly in financial aid, and receiving child support from Poston. Moreover, we are less concerned than the family court that Urban kept the child support rather than relinquishing it to Kerscher and Crew for two reasons. First, there is evidence in the record that Urban offered to forward the money to Kerscher and Crew but they refused it. Second, Urban has been using that money to specifically provide for Child's needs, and thus, it contributes to Urban's ability to care for Child. Urban used the child support to provide for the care of Child when Child visited Urban, and the Guardian ad Litem's report indicated Child had "her own room[] with adequate facilities and toys" at Urban's home. Therefore, we find the first *Moore* factor weighs in favor of returning custody of Child to Urban.

2. Contact in the Form of Visits and Financial Support

The second *Moore* factor considers "[t]he amount of contact, in the form of visits, financial support[,] or both, [that] the parent had with the child while [the child] was in the care of a third party." *Moore*, 300 S.C. at 79, 386 S.E.2d at 458. The more the natural parent visits his or her child and provides financial support, the more likely a court is to return custody to the parent. *Compare Dodge*, 332 S.C. at 413, 505 S.E.2d at 350 (acknowledging father faithfully exercised his visitation and, while imprisoned, frequently called his children and sent them letters), *with Kramer*, 323 S.C. at 219, 473 S.E.2d at 849–50 (noting the mother visited once or twice a year over a four-year period, didn't provide financial support, did not send Christmas presents, and never petitioned the court for visitation after the father had acquired custody). Additionally, courts consider whether the third party limited the natural parent's contact with the child or refused financial assistance from the natural parent. *See Moore*, 300 S.C. at 80, 386 S.E.2d at 459 (noting the third party refused increased financial contribution from the natural parent, limited the natural parent's visitation, and rebuffed the natural parent's attempts to regain custody).

It is undisputed Urban did not visit Child while in Pennsylvania or Mississippi, did not promptly notify Kerscher and Crew of her return to South Carolina in August 2014, and did not relinquish the child support paid by Child's father to Kerscher and Crew. However, even though Urban did not physically visit Child while she was out of state, she spoke with Child on the phone and messaged Crew via phone and social media to check on Child. Considering Urban's financial status, her contact with Child was what she could accomplish within her means. *See Dodge*, 332 S.C. at 413, 505 S.E.2d at 350 (acknowledging the father frequently called his children and sent them letters while imprisoned). Furthermore, on more than one occasion, Kerscher and Crew would not allow Urban to speak with Child. Despite Urban's failure to promptly notify Kerscher and Crew when she returned to South Carolina in August 2014, Urban frequently contacted Crew through phone and social media, checking on Child's well-being and requesting to talk with or visit Child, but Crew ignored or rebuffed those attempts. After Crew's repeated refusal to allow contact and visitation, Urban filed for custody of Child in November 2014; however, a visitation schedule was not established by the court until June 2015.

Moreover, we find that Urban's failure to forward the child support to Kerscher and Crew does not reflect so poorly on Urban. Similar to our analysis under the first *Moore* factor, there is evidence Urban offered to forward the child support to Kerscher and Crew, but they refused it, and Urban used the child support to provide for Child when Child visited Urban once she returned to South Carolina. Considering Urban's circumstances and Kerscher and Crew's actions in refusing visitation, we find the second *Moore* factor weighs in favor of returning custody of Child to Urban.

3. Circumstances of Temporary Relinquishment

In addressing this factor, courts examine whether the circumstances surrounding the relinquishment have been resolved. *See Malpass*, 309 S.C. at 400, 424 S.E.2d at 472 (noting mother relinquished custody of child while she was a victim of an abusive spouse but had since remarried and was capable of providing for the child); *Kramer*, 323 S.C. at 220, 473 S.E.2d at 850 (stating this factor weighed against returning custody as mother's relinquishment was markedly different from *Moore*—she abandoned her child on his first birthday, left the state to pursue a life of her own, and did not contact the child for months).

When Urban left Child with Kerscher and Crew in May 2014, Urban was leaving South Carolina to pursue an employment opportunity in Pennsylvania because she was unemployed, essentially homeless, and did not own a vehicle. At the time of the hearing, Urban had returned to South Carolina and established a home with her fiancée. Although Urban was unemployed,[3] she was attending school, receiving excess financial aid, and her fiancée had committed to supporting her and Child. Urban still did not own a vehicle but had access to her fiancée's vehicle if she needed it. We find the circumstances surrounding Urban's relinquishment of custody have substantially been resolved. Therefore, we find this factor weighs in favor of returning custody of Child to Urban.

4. Degree of Attachment between Child and Temporary Custodian

[3] At the hearing, Urban indicated she had a job lined up but was waiting for management's final approval before being extended a formal offer of employment.

The fact that a strong bond exists between a third party and a child is not sufficient to award custody to the third party. *Harrison*, 330 S.C. at 304–05, 498 S.E.2d at 684. Courts will consider whether a third party's actions in limiting the natural parent's contact with the child allowed the bond between the third party and the child to foster. *See Moore*, 300 S.C. at 80–81, 386 S.E.2d at 459 (noting the existence of strong relationship between the third party and the child is an insufficient ground on which to award permanent custody; especially when that relationship was allowed to flourish due to the third party's overt acts inhibiting "the development of a normal relationship between the natural parent and his child"). Under this factor, a court is more likely to award custody to the third party when the third party is the only parent the child has ever known. *Compare Malpass*, 309 S.C. at 400, 424 S.E.2d at 472 (finding a child had bonded with his mother despite living with his grandparents), *with Kramer*, 323 S.C. at 220, 473 S.E.2d at 850 (finding the temporary custodians were the only parents the child had ever known).

Here, the family court's consideration of this factor extended merely to the recognition that Child "is very attached to [Kerscher and Crew] and is thriving in their care." Although we recognize the close degree of attachment between Child and Kerscher and Crew, the "existence of such a bond is an inadequate ground to award custody to" Kerscher and Crew. *Harrison*, 330 S.C. at 305, 498 S.E.2d at 684. Moreover, unlike *Kramer*, Kerscher and Crew are not the only parents Child has known. Child considers herself as having two families—one with Urban and Carter and another with Kerscher and Crew. Therefore, we find this factor does not favor granting Kerscher and Crew custody of Child.

We acknowledge Kerscher and Crew are able to provide a good home for Child. However, the question is not who has the most suitable home at the time of the hearing but whether circumstances "overcome the presumption that a return of custody to the biological parent is in the best interest of the child." *Sanders*, 317 S.C. at 234, 452 S.E.2d at 638–39; *Harrison*, 330 S.C. at 305, 498 S.E.2d at 684; *see also McCann v. Doe*, 377 S.C. 373, 390, 660 S.E.2d 500, 509 (2008) (citing the presumption from *Moore* that, in custody matters, it is in the best interest of a child to be placed with a biological parent over a third party and determining custody should be returned to a biological parent because the biological parent's consent to adoption was invalid and both parties had "an equal ability to care for the child").

We find the presumption has not been overcome and custody of Child should be returned to Urban.

Furthermore, it is commendable that Urban recognized her previous inability to care for Child and, in good faith, left Child with people willing and able to provide for Child while Urban attempted to better her family's circumstances. Child's custody should not be subject to adverse possession when Urban is a fit parent who has substantially remedied the circumstances surrounding custodial relinquishment. *See Moore*, 300 S.C. at 81, 386 S.E.2d at 459 ("If a party relinquishes custody in good faith because of some temporary inability to provide for the child, such parent should be able to regain custody upon a showing that the condition [that] required relinquishment has been resolved. Child custody should not be subject to change because of adverse possession."). In conclusion, we reverse the family court's order maintaining custody with Kerscher and Crew and remand for an order granting Urban custody of Child.

REVERSED and REMANDED.

HUFF and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Innovative Waste Management Inc., Crest Energy Partners LP, Edward H. Girardeau, Plaintiffs,

Of Whom Innovative Waste Management, Inc. is the Appellant,

v.

Crest Energy Partners GP, LLC, Dunhill Products GP, LLC, Henry Wuertz, Innovative Waste Management Inc., Crest Energy Partners LP, Dunhill Products LP, Edward H. Girardeau, C. Russ Lloyd, Defendants,

Of Whom Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau are the Respondents.

Appellate Case No. 2015-002024

Appeal From Dorchester County
Maité Murphy, Circuit Court Judge

Opinion No. 5561
Submitted December 5, 2017 – Filed May 23, 2018

REVERSED AND REMANDED

Frederick John Jekel, of Jekel Law, LLC, of Columbia, Patrick Aulton Chisum and William Michael Gruenloh, both of Gruenloh Law Firm, of Charleston, and Brian

Ross Holmes, of Green Law Firm, LLC, of Columbia, all for Appellant.

David B. Marvel, of Charleston for Respondents.

HILL, J.: After mediation, Innovative Waste Management (IWM) and Respondents signed an agreement promising to settle their claims and dismiss their lawsuit in exchange for Respondents paying IWM $450,000.00 within 30 days. The agreement further stated the parties "hereby authorize and direct their attorneys to execute and file a stipulation of dismissal with prejudice" once payment was received.

A few days later, Respondents' counsel emailed the circuit court's law clerk and copied an employee at the Dorchester County clerk of court, advising of the settlement and noting "we will file a stipulation of dismissal once the settlement is consummated." Less than a week later, the clerk of court generated and filed a Form 4 dismissal order, which reflected: "It is Ordered and Adjudged: ☒See attached order, (formal order to follow)", and "This order ☒ends . . . the case." The Form 4, entitled "Judgment in a Civil Case," was signed by the clerk of court, not a circuit judge. No order was attached, but the Form 4 was accompanied by the mediator's "Proof of ADR" form, which indicated: "As a result of the ADR, this case should be considered . . . ☒Fully Settled . . . ☒Voluntary Dismissal to be filed by [counsel for Respondents]."

After Respondents failed to meet the payment deadline, IWM's counsel contacted the clerk of court to restore the case to the active roster, only to learn the lawsuit had been dismissed. IWM then filed a Rule 60(b), SCRCP, motion to vacate the settlement and restore the case to the active docket, which the trial court denied after hearing. After the trial court denied its motion to alter or amend, IWM filed this appeal.

I.

Rule 60(b)(4), SCRCP, provides a court may, "upon such terms as are just," relieve a party from a void judgment or order. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017) (quoting *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002)). Void judgments are defined as those from courts

that lacked personal or subject matter jurisdiction, or failed to provide due process. *Id*. at 617–18, 799 S.E.2d at 316.

A void judgment is far different from one merely "voidable." *Thomas & Howard Co., Inc. v. T.W. Graham & Co.,* 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A voidable judgment is nothing more than one made in error by a court with jurisdiction, as our facts can show.

Given the stage of IWM's case, it could have been voluntarily dismissed only by a stipulation of dismissal signed by all parties. Rule 41(a)(1), SCRCP. Consequently, even if, after notice and hearing, a circuit judge had signed the Form 4 purportedly ending the case pursuant to Rule 41(a), it would have been error. But it would have been an error fixable by the trial court on reconsideration, or by this court on appeal: the error not being one of jurisdiction, the judgment would have been voidable, not void. *See Thomas & Howard Co.*, 318 S.C. at 291, 457 S.E.2d at 343 ("Irregularities which do not involve jurisdiction do not render a judgment void."); *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961) ("There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack . . . ." (citation omitted)). But the Form 4 ending IWM's case was signed without notice or hearing and by the clerk of court, who had no authority to do so. The tasks of the clerk of court are ministerial, always subject to judicial control and the rules of court. *See* S.C. Code Ann. § 14-7-220 (2017); Rules 58 and 77(c), SCRCP. A clerk of court may only sign and enter judgment without court direction and approval when the judgment merely confirms a jury's general verdict, or upon the court's decision "that a party shall recover only a sum certain or costs or that all relief shall be denied . . . ." Rule 58(a)(1), SCRCP.

Lyles v. Bolles, 8 S.C. 258 (1876) endorsed the following language: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever." *Id*. at 262 (quoting *Rose v. Himely,* 8 U.S. 241, 268–69 (1808) (Marshall, C.J.)). Both *Lyles* and *Rose* used the traditional term of art, *coram non judice,* "'before a person not a judge' — meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a

judgment." *Burnham v. Superior Court of California, Cty. of Marin*, 495 U.S. 604, 609 (1990).

The record discloses no action of the court authorizing the Form 4 dismissal, much less after notice and hearing, as due process required. It is therefore void, and "is, in legal effect, nothing." *Turner v. Malone*, 24 S.C. 398, 401 (1886). "All acts performed under it, and all claims flowing out of it, are void." *Id*.; *see also Burke v. C. I. R*., 301 F.2d 903 (1st Cir. 1962) ("[C]ourts render judgments; clerks only enter them on the court records. What is determinative therefore is the action of the court, not that of the clerk . . . ."); *Downing v. O'Brien,* 325 A.2d 526, 528 (Me. 1974) *overruled on other grounds by Architectural Woodcraft Co. v. Read*, 464 A.2d 210 (Me. 1983)("It seems obvious that since the Clerk is performing only a ministerial function and is not empowered to perform a judicial function, whenever a Clerk acts in excess of the authority granted by the Rule and purports to enter a judgment in a case where he has no authority to do so, the judgment so entered is void.").

Although we typically review denials of Rule 60, SCRCP, motions for abuse of discretion, a court has no discretion to perpetuate a void judgment. The Form 4 is vacated, and the order of the trial court denying IWM relief from the void judgment is

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, Petitioner,

v.

CAGC Insurance Company, In Liquidation, Respondent.

South Carolina Property and Casualty Insurance Guaranty Association, Appellant,

v.

CAGC Insurance Company, In Liquidation; Raymond G. Farmer, in his capacity as Ancillary receiver of CAGC Insurance Company, In Liquidation; and CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., Respondents.

Appellate Case No. 2016-000192

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5562
Heard November 8, 2017 – Filed May 23, 2018

REVERSED AND REMANDED

Howard A. Van Dine, III, Allen Mattison Bogan, Erik Tison Norton, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Michael A. Molony, Thantus Douglas Concannon, Russell Grainger Hines, all of Young Clement Rivers, of Charleston, for Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., and Geoffrey Ross Bonham, of Columbia, for Respondent Raymond G. Farmer.

HILL, J.: In this declaratory judgment action, the South Carolina Property and Casualty Insurance Guaranty Association ("Association") appeals the circuit court's grant of CompTrustAGC of South Carolina, Inc.'s ("CompTrust") motions to quash discovery and be dismissed as a party. We reverse, finding CompTrust's dismissal improper.

I.

The Association is a nonprofit entity created by the South Carolina Property and Casualty Insurance Guaranty Association Act ("Guaranty Act"), §§ 38-31-10 to -170 of the South Carolina Code (2015), which controls the Association's duties, liabilities, and obligations. The Association, in statutorily prescribed circumstances, protects insureds of insolvent insurance carriers. S.C. Code Ann. § 38-31-60 (2015); *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994). The Association must "pay covered claims to the extent of the [A]ssociation's obligation and deny all other claims . . . ." S.C. Code Ann. § 38-31-60(d) (2015). As we will see, what constitutes a "covered claim" as defined by § 38-31-20(8) is the core of this case.

All insurers who write insurance to which the Act applies must become members of the Association. S.C. Code Ann. §§ 38-31-20(11), 40 (2015). The Association is funded by member assessments, which are passed on to consumers in the form of increased premiums. S.C. Code Ann. § 38-31-60(c) (2015).

CompTrust was created in 1982 as a South Carolina unincorporated business trust and operated as a self-insurance trust, providing workers' compensation coverage to its self-insured members ("Self-Insured Coverage"). Self-insured organizations such as CompTrust are not subject to the Guaranty Act, are not members of the Association, and pay no assessments to it.

CAGC Insurance Company ("CAGC") is a North Carolina insurance company established in 2007 by some of CompTrust's principals. In 2008, CAGC became a licensed insurer in South Carolina and began issuing South Carolina workers' compensation liability insurance policies to prior participants in CompTrust. CAGC was a member of the Association and paid assessments to the Association based on the policies it issued.

On December 28, 2010, CompTrust and CAGC executed a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the "LPT Agreement"), wherein, *inter alia*, CompTrust paid $3,586,527.01 for CAGC to assume all of CompTrust's liabilities on approximately seventy active workers' compensation claims arising out of the Self-Insured Coverage ("Transferred Claims"). The LPT Agreement was approved by the South Carolina Workers Compensation Commission and the North Carolina Department of Insurance. CompTrust voluntarily dissolved on April 1, 2011.

On November 30, 2011, less than a year after execution of the LPT Agreement, the South Carolina Department of Insurance ("Department") determined CAGC was financially unsound. On January 18, 2012, the Department suspended CAGC's authority to transact insurance business in South Carolina. Also in January 2012, CAGC was placed into receivership in North Carolina. On January 6, 2014, a North Carolina court declared CAGC insolvent.

On January 17, 2014, Raymond G. Farmer, Director of Department, petitioned the Richland County Circuit Court to commence this ancillary receivership for CAGC in South Carolina. That court appointed Farmer the Ancillary Receiver of CAGC.

As a result of CAGC's insolvency, claims made by South Carolina workers' compensation claimants against CAGC were brought to the Association. The Association agrees the Guaranty Act requires it to pay claims submitted under

policies issued by CAGC, but disputes its obligation to continue paying the Transferred Claims, i.e. those arising under the Self-Insured Coverage provided by CompTrust prior to the LPT Agreement.

To resolve responsibility for the disputed Transferred Claims, the Association moved to intervene in the ancillary receivership, and join CAGC, the Ancillary Receiver, and CompTrust as parties to seek a declaratory judgment as to the Association's responsibility under the Guaranty Act. On June 9, 2014, the Association's motion for joinder and intervention was granted, and service of the declaratory judgment action on CAGC, the Ancillary Receiver, and CompTrust was authorized.

While discovery was proceeding, CompTrust filed a motion to quash pursuant to Rule 26(c), SCRCP, and a motion to dismiss based on Rules 12(b) and 21. Meanwhile, the Association moved for summary judgment, claiming the Transferred Claims could not be considered covered claims under § 38-31-20(8) as they were: (1) initially claims against a self-insured entity and not a direct insurer obligated to pay into the Association's fund; and (2) they constituted "insurance written on a retroactive basis" to cover claims "known to the insurer at the time the insurance is bound" pursuant to § 38-31-30(6).

After hearing arguments, the circuit court issued an order granting CompTrust's motions to quash discovery and be dismissed from the action, and denying the Association's motion for summary judgment. The circuit court found: (1) the motions raised novel issues, including whether an unincorporated business trust can be sued after it has voluntarily dissolved, (2) any claims against CompTrust relating to the LPT Agreement were barred by the statute of limitations, (3) CompTrust's dissolution rendered any grant of effectual relief against CompTrust or its shareholders impossible, and (4) the Association's complaint asserted no cause of action or prayer for relief against CompTrust. It further ruled that, because CompTrust did not retain any records regarding the transferred claims, "neither the argument nor the resolution of the legal question presented in the Complaint would be prejudiced if [CompTrust] were dismissed as a party."

In denying the Association's motion for summary judgment, the circuit court found the Transferred Claims were "covered claims," therefore the Association was responsible for their payment. The Association did not—and could not—appeal this interlocutory ruling. *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379,

380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case [and] does not establish the law of the case . . . [t]herefore, an order denying a motion for summary judgment is not appealable.").

The Association now appeals the grant of CompTrust's motions to quash discovery and be dismissed as a party.

II.

Initially, CompTrust contends the Association's appeal is untimely because the Association did not serve the presiding judge with a copy of its Rule 59(e), SCRCP, motion. In the alternative, CompTrust argues the Association's arguments on appeal are barred by the two issue rule because it did not appeal the circuit court's finding that the service failure independently warranted dismissal of the Rule 59(e), SCRCP, motion. CompTrust's timeliness argument was answered by *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) ("There is no indication that the failure to transmit a copy of the [Rule 59(e), SCRCP, motion] to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR. Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion . . . ."). We likewise find CompTrust's reliance on the two issue rule meritless. *See, e.g.*, *Jones v. State*, 382 S.C. 589, 594, 677 S.E.2d 20, 22 (2009) *abrogated on other grounds by Smalls v. State*, Op. No. 27764 (S.C. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43) (evaluating the merits of the State's appeal, despite the PCR judge's dismissal of the State's motion for reconsideration for failure to comply with Rule 59(g), SCRCP).

III.

We next consider the propriety of using Rule 21, SCRCP, to dismiss CompTrust. A motion to dismiss a party under Rule 21, SCRCP, is addressed to the court's discretion. *Demian v. S.C. Health & Human Servs. Fin. Comm'n*, 297 S.C. 1, 5, 374 S.E.2d 510, 512 (Ct. App. 1988). Rule 21, SCRCP, provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Because few South Carolina decisions have interpreted our Rule 21, and none to any degree pertinent here, we look to federal cases construing their almost identical Rule 21. Like many of the Federal Rules of Civil Procedure, Rule 21 was designed to remove the traps of common law pleading, where a slight procedural misstep like misjoinder could doom the entire action. 7 Wright & Miller, *Federal Practice and Procedure* § 1681 (3d ed.). Rule 21 should be viewed by the company it keeps; its neighbors, Rules 17, 19, and 20, are provisions that also tell us who are proper parties. Taken together, these rules "'evidence the general purpose . . . to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided.'" *Id.* (quoting *Soc'y of European Stage Authors & Composers v. WCAU Broad. Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940)). Although Rule 21 does not define misjoinder, "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Wright & Miller, *Federal Practice and Procedure* §1683 (3d ed.). As to joining parties as defendants, Rule 20(a), SCRCP, states: "All persons may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence . . . and if any question of law or fact common to all defendants will arise in the action." Misjoinder therefore "occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction." *DirectTV, Inc. v. Leto,* 467 F.3d 842, 844 (3d Cir. 2006); *see also Demian*, 297 S.C. at 6, 374 S.E.2d at 512 (finding no abuse of discretion when the circuit court denied a defendant's motion to be dismissed for misjoinder when a common question of law applied to all defendants).

It appears the circuit court was persuaded CompTrust was misjoined not because CompTrust had no connection to the factual or legal issues in the action, but because it had been dissolved. As the circuit court pointed out, whether an unincorporated business trust can be sued after it has voluntarily dissolved is a novel question in South Carolina. We do not believe it was within the court's discretion to answer this question of first impression with no factual record while ruling upon a Rule 21 motion. Motions to dismiss are no place for novelty. *See generally Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001).

The circuit court also noted the Association asserted no claim of relief against CompTrust. The Association added CompTrust as a party to its complaint for declaratory relief. We find this meets the "right to relief" necessary for proper joinder under Rule 20, SCRCP; after all, the Declaratory Judgment Act commands that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ," and empowers courts to "declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §§15-53-20, 80 (2005). Dismissing CompTrust at this early stage of the lawsuit jeopardizes the judicial economy Rule 21 and the Declaratory Judgment Act strive to foster.

The circuit court further found the three year statute of limitations for breach of contract actions barred any recovery against CompTrust. It reasoned the clock began running at the latest in 2009, when the last policy relating to the Transferred Claims was issued. Although joinder of a party does not remove a statute of limitations defense, *see Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408 (11th Cir. 1998), a motion to dismiss on such grounds is properly brought pursuant to Rule 12(b)(6) rather than Rule 21, SCRCP. Nevertheless, we find the circuit court mischaracterized the Association's declaratory judgment action. The Association is not suing CompTrust for breach of an insurance policy; it brought a declaratory judgment action to determine who is responsible for paying claims presented to it pursuant to the Guaranty Act. The Guaranty Act is triggered—and the statute of limitations begins to run—when a claim arising under a policy issued by an insurer who has become insolvent is attempted to be transferred to the Association, not when the insurer issued the policy. Otherwise an insurer could unilaterally burden the Association and its members with all of its claims, covered and non-covered, simply by becoming insolvent more than three years after the last policy was issued.

The Guaranty Act directs that the Association "shall investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims . . . ." S.C. Code Ann. § 38-31-60(d)(2015). The Association contends this directive, together with section 38-31-60(l), which authorizes it to "perform any other acts necessary or proper to effectuate the purpose of [the Guaranty Act]," allows it to scrutinize the LPT Agreement, an endeavor that would be impaired by CompTrust's absence. We agree, and find the circuit court erred in dropping CompTrust from the Association's declaratory judgment action under Rule 21, SCRCP.

IV.

To the extent the Association's action against CompTrust was dismissed pursuant to Rule 12(b)(6) for failure to state a claim, we find this was also error. In deciding a Rule 12(b)(6) motion, the court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiff's favor, asks whether the complaint would entitle the plaintiff to relief under any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007).

We find the Association's complaint states a valid claim. A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). The Association has alleged a real and substantial controversy concerning whether the Guaranty Act obligates it to pay the Transferred Claims. Resolution of this dispute turns on whether the claims meet § 38-31-20(8)'s definition of "covered claims." The Association's complaint is therefore the precise type of concrete controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a statute to ask a court to define how the statute impacts the party's rights. S.C. Code Ann. § 15-53-30 (2005).

It appears the dismissal order was based on a belief that CompTrust's voluntary dissolution shielded it from being sued at all or, alternatively, any suit would be futile. As we have noted, a voluntarily dissolved business trust's amenability to suit may be a novel issue, which should not be decided on a motion to dismiss when further facts might add form and structure. *Evans*, 344 S.C. at 68, 543 S.E.2d at 551. As T.S. Eliot said: it is easy to carve a goose when there are no bones.

We also find it was premature to toss out CompTrust on grounds of futility given the Associations' argument concerning an employer's residual liability under § 42-1-150 of the South Carolina Code (2015). Finally, as to the circuit court's finding that further pursuit of CompTrust would be fruitless because CompTrust retained no records, we discern no basis for this finding from the face of the complaint.

V.

We hold CompTrust was improperly dismissed from the Association's declaratory judgment action, and reverse the grant of CompTrust's motions to quash discovery and be dismissed under Rules 12(b) and 21, SCRCP.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary, Respondent,

v.

Lowcountry Medical Transport, Inc., American Medical Response, Inc., d/b/a Access2Care, and Eugene A. Kirkland, In re: Charles Gary, Purported Surviving Spouse, Defendants,

Of whom Charles Gary, Purported Surviving Spouse, is the Appellant.

Appellate Case No. 2016-000222

Appeal From Hampton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5563
Heard September 19, 2017 – Filed May 23, 2018

AFFIRMED

Joseph Dawson, III, of North Charleston, for Appellant.

Richard Alexander Murdaugh, Bert Glenn Utsey, III, and Austin Howell Crosby, all of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, for Respondent.

LOCKEMY, C.J.: In this action Charles Gary asserts the circuit court erred by determining he was not Blondell Gary's husband at the time of her death and not an heir to her estate. Charles asserts the estate should be estopped from taking a position contradictory to its pleadings in previous cases. We affirm.

FACTS

Though the record is not clear as to dates, it is clear Charles and Blondell were married and that marriage produced two children. Subsequently, Charles married Doretha Chisolm on July 31, 1982. Charles and Doretha finalized their divorce on January 21, 2001. Prior to finalizing their divorce, Charles remarried Blondell on November 30, 1999, and they lived together as husband and wife until Blondell's death.

On February 16, 2012, Blondell and Charles were traveling in an ambulance operated by Lowcountry Medical Transport when the driver "recklessly and negligently lost control of the vehicle, left the roadway, and collided with a tree." Blondell died as a result of her injuries.

Subsequently, Angel Gary, the natural daughter of Charles and Blondell, filed a petition to be appointed the personal representative of her mother's estate. The application requested the "[n]ames and addresses of intestate heirs who are not devisees." Angel indicated Charles Gary was Blondell's spouse and that Blondell had two daughters and two sons. The probate court appointed Angel as the personal representative of her mother's estate.

On November 8, 2012, Angel filed suit on her mother's behalf against Lowcountry Medical Transport. Angel alleged a single cause of action for negligence and requested actual and punitive damages. In her complaint, Angel alleged, "Blondell Gary (hereinafter Blondell), on behalf of her husband, Charles Gary, contracted with [Lowcountry Medical Transport] to provide non-emergency medical transport on the day in question."

The parties entered into a settlement agreement on September 14, 2015, wherein Angel agreed to dismiss the estate's lawsuit against Lowcountry Medical in exchange for $2,250,000.

On December 14, 2015, Angel Gary filed a petition to determine heirship of her mother's estate. Angel asserted, "Since the time of her initial appointment as Personal Representative, [she] has become aware of certain facts that call into question whether Charles Gary was married to [Blondell]." Specifically, Angel asserted, "(1) Charles Gary was married to another woman when he unlawfully attempted to marry Blondell Gary, (2) Blondell Gary did not possess the requisite intent to marry Charles Gary, (3) no marriage ceremony ever took place, and (4) that any alleged marriage is void." Angel asserted Charles married Doretha Chisholm on July 31, 1982, and the couple divorced between December 13, 2000, and January 22, 2001. Charles and Blondell's marriage certificate stated the couple was married on November 30, 1999. Accordingly, Angel alleged any marriage was void and Charles was therefore not an heir to Blondell's estate.

Charles denied he was already married when he married Blondell.[1] He also alleged "[t]he Estate is judicially bound by the admissions in its pleadings that Mr. Gary is the surviving spouse and a beneficiary of the Estate of Blondell M. Gary." Charles also asserted "[t]he Estate's challenge to Mr. Gary['s] status as a beneficiary is barred[] because Judge Buckner's November 13, 2015, Consent Order of Dismissal with Prejudice [of the wrongful death suit] acts as an adjudication on the merits and therefore precludes subsequent litigation just as if the action had been tried to a final adjudication."

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[1] Charles does not argue on appeal any factual basis to prove he was Blondell's common law spouse. In South Carolina, when "there is an impediment to marriage, such as one party's existing marriage to a third person, no common law marriage may be formed, regardless whether mutual assent is present." *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005). "Further, after the impediment is removed, the relationship is not automatically transformed into a common law marriage. Instead, it is presumed that the relationship remains non-marital." *Id*. "For the relationship to become marital, 'there must be a new mutual agreement either by way of civil ceremony or by way of recognition of the illicit relation and a new agreement to enter into a common law marriage.'" *Id*. (quoting *Kirby v. Kirby*, 270 S.C. 137, 141, 241 S.E.2d 415, 416 (1978)). No evidence was presented of a subsequent agreement that Charles and Blondell entered into a common law marriage after Charles's divorce was finalized. Therefore, the only issue to be determined in this appeal is whether the Estate's assertions in the prior cases bind the Estate to its assertion that Charles was Blondell's husband.

The circuit court held a hearing on the estate's motion on January 13, 2016. The circuit court found it was "clear that Charles Gary was still married to Doretha Chisholm Gary when he purportedly married Blondell Gary." Accordingly, the circuit court found "the purported marriage to Blondell Gary was void from its inception." The circuit court noted Charles did not offer any evidence of a common law marriage to Blondell, "other than the fact that the Estate originally thought he was [Blondell's spouse]." Accordingly, the circuit court declared Charles was not an heir of Blondell's estate. This appeal followed.

LAW

This court has noted "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

> The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Id. "Notwithstanding allegations to the contrary in his or her pleadings, a party is not precluded from showing the facts to be as they really are where his or her allegations are due to an honest mistake or ignorance as to the facts." 71 C.J.S. *Pleadings* § 89 (2011).

ANALYSIS

Charles asserts the Estate is judicially bound by its pleadings in the wrongful death action, and cannot take a position contrary to those pleadings to deny his status as an heir to the Estate. We disagree.

This court encountered a similar issue in *Johns v. Johns*. 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992). Antoinette Johns, the alleged common law wife of James Johns, sued her purported husband for divorce, custody of the parties' child, an increase in child support, alimony, and attorney's fees. *Id*. at 200-01, 420 S.E.2d at 857. The family court found there was no common law marriage and denied her

requested relief because James was married to another woman "[a]t the time the parties began residing together . . . and throughout their cohabitation." *Id*. at 201, 420 S.E.2d at 858.

On appeal, Antoinette argued the issue of common law marriage was established by the doctrine of res judicata. *Id*. at 202, 420 S.E.2d at 858. Prior to filing the divorce action, Antoinette and James entered into a consent order "in which the court found they were married at common law and ordered that they were 'legally separated.'" *Id*. at 201, 420 S.E.2d at 858. Antoinette asserted the consent order precluded the family court's subsequent finding that they were never married. *Id*. at 202, 420 S.E.2d at 858.

The court of appeals affirmed the family court's order finding, "[t]he common law marriage was 'void' as a matter of public policy." *Id*. (quoting S.C. Code Ann. § 20-1-80 ("All marriages contracted while either of the parties has a former wife or husband living shall be void.")). This court also found the public policy underlying res judicata must yield to the competing public policy expressed by the General Assembly that bigamous marriages are void. *Id*. at 203, 420 SE.2d at 859. The court therefore determined, "[a]lthough the parties' consent order is not void, the marriage it affirms is . . . . In balancing the relevant public policies . . . the consent order should not be given *res judicata* effect." *Id*.

We find the same public policy concerns expressed by this court in *Johns* drive our decision in this case. On one side, we have a marriage which contravened public policy as expressed by the General Assembly. *See* § 20-1-80 (2014). On the other, the doctrine of binding a party to its pleadings exists to protect the integrity of the court process. *See, e.g., Hayne Fed. Credit Union*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (noting the purpose behind the related doctrine of judicial estoppel is to "protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries"). While ordinarily the Estate may be bound to its previous assertions, we find that policy should yield to the overriding policy against bigamous marriages, as expressed by the General Assembly. *See Johns*, 309 S.C. at 203, 420 S.E.2d at 859 ("[T]he courts must weigh the competing public policies."); *id*. (finding the public policy of not recognizing bigamous marriages outweighs the public policy favoring finality of judgments).

CONCLUSION

Accordingly the trial court's order is

AFFIRMED.

HUFF and HILL, JJ., concur.