Judicial Merit Selection Commission

Erin B. Crawford, Chief Counsel
Patrick Dennis, Counsel

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

June 12, 2023

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below. Please note that the seats listed in this media release are those that are currently vacant, those for which a vacancy will exist, or those whose terms will expire in 2024. The media release announcing vacancies in the newly created seats as per Act 232 of 2022, will follow on Monday, July 3, 2023 (pending funding by the General Assembly).

A vacancy will exist in the office currently held by the Honorable Donald W. Beatty, Chief Justice of the Supreme Court, upon his retirement on or before July 31, 2024. The successor will serve the new term of that office, which expires July 31, 2034.

The term of office currently held by the Honorable Jerry Deese Vinson, Jr., Judge of the Court of Appeals, Seat 8, will expire June 30, 2024.

A vacancy exists in the office formerly held by the Honorable David Garrison "Gary" Hill, Judge of the Court of Appeals, Seat 9, upon his election to the Supreme Court, Seat 4. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2028.

A vacancy will exist in the office currently held by the Honorable Ralph Ferrell Cothran, Jr., Judge of the Circuit Court, Third Judicial Circuit, Seat 1, upon his retirement on or before December 31, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2028.

The term of office currently held by the Honorable Kristi Fisher Curtis, Judge of the Circuit Court, Third Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable Michael S. Holt, Judge of the Circuit Court, Fourth Judicial Circuit, Seat 2, will expire June 30, 2024.

A vacancy exists in the office formerly held by the Honorable Deandre Gist Benjamin, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 1, upon her appointment to the United States Court of Appeals for the Fourth Circuit. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

The term of office currently held by the Honorable Daniel McLeod Coble, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 2, will expire June 30, 2024.

A vacancy will exist in the office currently held by the Honorable J. Derham Cole, Judge of the Circuit Court, Seventh Judicial Circuit, Seat 1, upon his retirement on or before December 31, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

The term of office currently held by the Honorable Grace Gilchrist Knie, Judge of the Circuit Court, Seventh Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable Eugene C. Griffith, Jr., Judge of the Circuit Court, Eighth Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable Bentley Douglas Price, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable R. Scott Sprouse, Judge of the Circuit Court, Tenth Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable William Paul Keesley, Judge of the Circuit Court, Eleventh Judicial Circuit, Seat 1, will expire June 30, 2024.

The term of office currently held by the Honorable Walton J. McLeod, IV, Judge of the Circuit Court, Eleventh Judicial Circuit, Seat 2, will expire June 30, 2024.

The term of office currently held by the Honorable Michael G. Nettles, Judge of the Circuit Court, Twelfth Judicial Circuit, Seat 1, will expire June 30, 2024.

A vacancy exists in the office formerly held by the Honorable Letitia H. Verdin, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 2, upon her election to the Court of Appeals, Seat 2. The successor will serve the new term of that office, which expires June 30, 2030.

A vacancy will exist in the office currently held by the Honorable Alex Kinlaw, Jr., Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 4, upon his retirement on or before December 31, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2028.

The term of office currently held by the Honorable Robert Bonds, Judge of the Circuit Court, Fourteenth Judicial Circuit, Seat 1, will expire June 30, 2024.

A vacancy will exist in the office currently held by the Honorable Edward W. "Ned" Miller, Judge of the Circuit Court, At-Large, Seat 4, upon his retirement on or before December 31, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2027.

A vacancy will exist in the office currently held by the Honorable David Craig Brown. Judge of the Circuit Court, At-Large, Seat 8, upon his retirement on or before July 1, 2023. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2027.

A vacancy exists in the office formerly held by the Honorable Alison Renee Lee, Judge of the Circuit Court, At-Large, Seat 11, upon her retirement on May 16, 2023. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2026.

A vacancy will exist in the office currently held by the Honorable Donald Bruce Hocker, Judge of the Circuit Court, At-Large, Seat 16, upon his retirement on or before December 31, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

A vacancy will exist in the office currently held by the Honorable Wayne M. Creech, Judge of the Family Court, Ninth Judicial Circuit, Seat 4, upon his retirement on or before December 31, 2023. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

A vacancy exists in the office formerly held by the Honorable Jack A. Landis, Judge of the Family Court, Ninth Judicial Circuit, Seat 6. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2028.

A vacancy exists in the office formerly held by the Honorable Edgar H. Long, Judge of the Family Court, Tenth Judicial Circuit, Seat 1. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

A vacancy will exist in the office currently held by the Honorable Thomas H. White, IV, Judge of the Family Court, Sixteenth Judicial Circuit, Seat 1, upon his retirement on or before July 1, 2024. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2028.

The term of office currently held by the Honorable Ralph King "Tripp" Anderson, III, Judge of the Administrative Law Court, Seat 1, will expire June 30, 2024.

The term of office currently held by the Honorable W. H. Porter, Master-in-Equity of Florence County, will expire March 1, 2024.

In order to receive application materials, a prospective candidate, including judges seeking re-election, must notify the Commission in writing of his or her intent to apply. Note that an email

will suffice for written notification. Note that according to SC Code § 2-19-20(C), no person may concurrently seek more than one judicial vacancy .

Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
ErinCrawford@scsenate.gov or (803) 212-6689

JUDICIAL MERIT SELECTION COMMISSION
S C R E E N I N G S C H E D U L E
2023

GROUP A	GROUP B: Newly Created Seats (Pending Funding)
Media Release I Announcing Vacancies/ Notice to Supreme Court **Monday, June 12, 2023**	Media Release II Announcing Vacancies/ Notice to Supreme Court **Monday, July 3, 2023**
Deadline for Applications **12:00 Noon on Friday, July 14, 2023**	Deadline for Applications **12:00 Noon on Friday, August 4, 2023**
Media Release I Announcing Candidates/ Notice to Citizens Advisory Committees **Friday, July 14, 2023**	Media Release II Announcing Candidates/ Notice to Citizens Advisory Committees **Friday, August 4, 2023**
Ballotbox to E-Mail Survey to Bench and Bar **Tuesday, August 8, 2023**	Ballotbox to E-Mail Survey to Bench and Bar **Tuesday, August 8, 2023**
PDQ Summaries to SC Bar and Citizens Committees **Friday, August 11, 2023**	PDQ Summaries to SC Bar and Citizens Committees **Friday, August 25, 2023**

Citizens Committees Interviews ..... **Week of September 11, 2023**

Deadline for Ballotbox Surveys ..... **12:00 Noon on Tuesday, September 12, 2023**

SC Bar Interviews ..... **Week of September 18, 2023**

Reports of Citizens Committees due ..... **Friday, September 29, 2023**

SLED Reports due ..... **Monday, October 2, 2023**

Reports of SC Bar due ..... **Friday, October 6, 2023**

Interviews ..... **Week of October 16, 2023**

Deadline for Complaints ..... ***12:00 Noon on Monday, October 23, 2023***

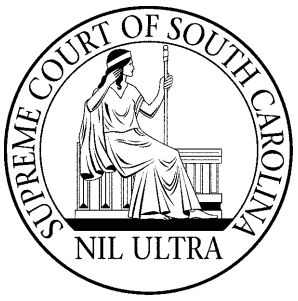
**Public Hearings Begin ..... Week of November 6, 2023
..... Week of November 13, 2023
..... Week of November 27, 2023

Nominations Submitted/Report Printed in Journals ..... **Thursday, January 11, 2024

End of 48-Hour Period ..... ***12:00 Noon, Tuesday, January 16, 2024***

Election ..... ***12:00 Noon on Wednesday, February 7, 2024*

**Dates to be confirmed.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 14, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

28149 – State v. Mary Ann German Pending

28151 – Ani Creation Inc., et al. v. City of Myrtle Beach Pending

28153 – Town of Sullivan's Island v. Michael Murray Denied 06/08/2023

28155 – Amy Garrard, et al. v. Charleston County School District, et al. Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5986 – The State v. James E. Daniels, Jr. Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

None

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5839 – In the Matter of Thomas Griffin Pending

5855 – SC Department of Consumer Affairs v. Cash Central Pending

5882 – Donald Stanley v. Southern State Police Pending

5903 – State v. Phillip W. Lowery Pending

5906 – Isaac D. Brailey v. Michelin N.A. Pending

5911 – Charles S. Blackmon v. SCDHEC Pending

5912 – State v. Lance Antonio Brewton Pending

5914 – State v. Tammy D. Brown Pending

5916 – Amanda Huskins v. Mungo Homes, LLC Pending

5922 – State v. Olandio R. Workman Pending

5925 – Patricia Pate v. College of Charleston Pending

5930 – State v. Kyle M. Robinson Pending

5933 – State v. Michael Cliff Eubanks Pending

5934 – Nicole Lampo v. Amedisys Holding, LLC Pending

5946 – The State v. Frankie L. Davis, III	Pending
5947 – Richard W. Meier v. Mary J. Burnsed	Pending
5948 – Frankie Padgett v. Cast and Crew Entertainment	Pending
5951 – State v. Xzariera O. Gray	Pending
5953 – State v. Nyquan T. Brown	Pending
5954 – State v. Rashawn Carter	Pending
5955 – State v. Philip Guderyon	Pending
5956 – Trident Medical v. SCDHEC (Medical University)	Pending
5957 – SCDSS v. Brian Frank	Pending
5969 – Wendy Grungo-Smith v. Joseph Grungo	Pending
5963 – Solesbee v. Fundamental Clinical	Pending
2021-UP-242 – G. Allen Rutter v. City of Columbia	Pending
2022-UP-095 – Samuel Paulino v. Diversified Coatings, Inc.	Pending
2022-UP-113 – Jennifer McFarland v. Thomas Morris	Denied 6/7/2023
2022-UP-118 – State v. Donald R. Richburg	Pending
2022-UP-119 – Merilee Landano v. Norman Landano	Denied 6/7/2023
2022-UP-175 – Brown Contractors, LLC v. Andrew McMarlin	Pending
2022-UP-189 – State v. Jordan M. Hodge	Denied 6/7/2023
2022-UP-197 – State v. Kenneth W. Carlisle	Denied 6/6/2023
2022-UP-205 – Katkams Ventures, LLC v. No Limit, LLC	Pending

2022-UP-213 – Dr. Gregory May v. Advanced Cardiology Pending

2022-UP-228 – State v. Rickey D. Tate Denied 6/7/2023

2022-UP-245 – State v. John Steen d/b/a John Steen Bail Bonding Denied 6/7/2023

2022-UP-251 – Lady Beaufort, LLC v. Hird Island Investments Pending

2022-UP-252 – Lady Beaufort, LLC v. Hird Island Investments (2) Pending

2022-UP-253 – Mathes Auto Sales v. Dixon Automotive Pending

2022-UP-269 – Steven M. Bernard v. 3 Chisolm Street Pending

2022-UP-270 – Latarsha Docena-Guerrero v. Government Employees Insurance Pending

2022-UP-296 – SCDOR v. Study Hall, LLC Granted 6/6/2023

2022-UP-298 – State v. Gregory Sanders Pending

2022-UP-303 – Daisy Frederick v. Daniel McDowell Pending

2022-UP-307 – Frieda H. Dortch v. City of Columbia Pending

2022-UP-309 – State v. Derrick T. Mills Granted 6/6/2023

2022-UP-314 – Ronald L. Jones v. Rogers Townsend & Thomas, P.C. Pending

2022-UP-319 – State v. Tyler J. Evans Pending

2022-UP-326 – Wells Fargo Bank v. Michelle Hodges Pending

2022-UP-340 – State v. Amy N. Taylor Denied 5/24/2023

2022-UP-380 – Adonis Williams v. State Pending

2022-UP-382 – Mark Giles Pafford v. Robert Wayne Duncan, Jr. Pending

2022-UP-402 – Todd Olds v. Berkeley County Pending

2022-UP-413 – Lucas Marchant v. John Doe Pending

2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust Pending

2022-UP-422 – Paula Russell v. Wal-Mart Stores, Inc. Pending

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

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

2022-UP-435 – Andrew Desilet v. S.C. Dep't of Motor Vehicles Pending

2022-UP-437 – Nicholas Thompson v. Bluffton Township Fire District Pending

2022-UP-444 – State v. James H. Baldwin Pending

2022-UP-452 – In the Matter of Kevin Wright Pending

2022-UP-462 – Karrie Gurwood & Howard Gurwood v. GCA Services Group, Inc. Pending

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

2023-UP-020 – Bridgett Fowler v. Fedex Pending

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

2023-UP-041 –Joy Wymer v. Floyd Hiott Pending

2023-UP-044 – Deutsche Bank National Trust Company v. Doris J. Dixon Pending

2023-UP-051 – State v. Jason E. Stoots Pending

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

2023-UP-062 – Raglins Creek Farms, LLC v. Nancy D. Martin	Pending
2023-UP-064 – Karen K. Baber v. Summit Funding, Inc.	Pending
2023-UP-070 – James Kincannon v. Ashely Griffith	Pending
2023-UP-075 – Dana Dixon v. SCDMH (2)	Pending
2023-UP-121 – Mathew C. Dwyer v. State	Pending
2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-164 – Randall G. Dalton v. The Muffin Mam, Inc.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

James Caleb Williams, Respondent.

Appellate Case No. 2021-001493

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 28157
Heard March 8, 2023 – Filed June 14, 2023

REVERSED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Ernest Adolphus Finney, III, of Sumter, all for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

PER CURIAM: James Caleb Williams was indicted for the attempted murder of Ashley R., the attempted murder of Malik Myers, and one count of possession of a weapon during the commission of a violent crime, related to a shooting at a nightclub in Sumter County. A jury convicted Williams of the attempted murder of Ashley R. and the possession charge. The court of appeals reversed Williams' convictions in a 2-1 opinion. *State v. Williams*, 435 S.C. 288, 867 S.E.2d 430 (Ct. App. 2021). The majority concluded the trial court erred in not granting Williams' directed verdict motion as to the attempted murder of Ashley R. because the State relied on the doctrine of transferred intent to prove Williams had the intent to kill Ashley R. The majority held the doctrine of transferred intent does not apply to specific intent crimes, such as attempted murder. The dissent disagreed, but found the issue unpreserved. We granted the State's petition for a writ of certiorari to address whether transferred intent applies to specific intent crimes. However, after oral argument and further deliberation, we find this issue was not preserved at trial. We therefore reverse the court of appeals' majority opinion.

I.

The facts of this case are adequately presented in the court of appeals' opinion. Pertinent to our resolution is Williams' motion for directed verdict. Williams moved for a directed verdict on the sole ground that the State had not presented sufficient evidence as to the identity of the person who shot at Myers and Ashley R. The State responded that it had presented enough evidence to create a jury question as to whether Williams was the shooter. As to Ashley R., the State argued, "just specifically because he was not shooting directly at Ashley, I would point out that we're proceeding under transferred intent and we do believe that he was firing his gun with malice and the bullet struck Ashley R." The trial court denied the motion for a directed verdict, reasoning, in part, that the evidence supported the charges against Williams because there was testimony Williams was firing at Myers and–"by transferred intent"–Ashley R. After presenting his defense, Williams renewed his motion for a directed verdict "for the reasons I stated earlier." The trial court denied the renewed motion. The trial court later instructed the jury on transferred intent without objection.

Williams never asserted there was insufficient evidence of intent or claim the doctrine of transferred intent did not apply to attempted murder as grounds for his directed verdict motion. Transferred intent was brought up only by the State and the trial court. We therefore conclude Williams failed to preserve the issue of whether

the doctrine of transferred intent applies to specific intent crimes for our review. *See State v. Jordan*, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (holding issue not raised as a ground for a directed verdict motion was not preserved); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) (same). The trial court never had the chance to consider the transferred intent issue against the arguments Williams now unveils on appeal. We are "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). We therefore agree with Judge Huff's dissent and hold the issue of transferred intent was not preserved. Accordingly, we reverse the opinion of the court of appeals and affirm Williams' convictions and sentences for the attempted murder of Ashley R. and possession of a weapon during the commission of a violent crime.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hicks Unlimited, Inc., Petitioner,

v.

UniFirst Corporation, A Massachusetts Corporation, Respondent.

Appellate Case No. 2021-001042

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Anderson County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 28158
Heard March 29, 2023 – Filed June 14, 2023

REVERSED

James S. Eakes, of Allen & Eakes, and David James Brousseau, of McIntosh, Sherard, Sullivan & Brousseau, both of Anderson, for Petitioner.

Ian Douglas McVey, of Turner Padget Graham & Laney, PA, of Columbia, and Jude C. Cooper, of Fort Lauderdale, Florida, both for Respondent.

JUSTICE HILL: Hicks Unlimited, Inc. contracted to rent uniforms for its employees from UniFirst Corporation. The contract contained an arbitration provision stating all disputes between them would be decided by binding arbitration to be conducted "pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association [AAA] and shall be governed by the Federal Arbitration Act [FAA]."

A dispute arose. After some procedural wrangling, UniFirst moved to compel arbitration. Hicks contended the arbitration agreement was unenforceable because it did not comply with the notice requirements of South Carolina's Arbitration Act (SCAA). S.C. Code Ann. §§ 15-48-10 to –240 (2005 & Supp. 2022). UniFirst responded that the arbitration provision was governed by the FAA, which preempts the SCAA's notice provision. The circuit court denied the motion to compel arbitration, ruling the contract did not implicate interstate commerce and, therefore, the FAA did not apply. The circuit court further ruled the arbitration provision was not enforceable because it did not meet the SCAA's notice requirements.

UniFirst appealed. The court of appeals reversed, holding arbitration should have been compelled because the contract involved interstate commerce and, therefore, the FAA preempted the SCAA. We granted Hicks' petition for a writ of certiorari to review the court of appeals' ruling that the FAA applied.

I.

Whether a contract involves interstate commerce and, therefore, whether the FAA preempts the SCAA, is a question of law we review *de novo*. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). We will not, however, disturb the factual findings of the circuit court that have rational support in the record. *Id*.

II.

Hicks contends the court of appeals erred in ruling the contract involved interstate commerce. UniFirst, on the other hand, argues there is no need to address the interstate commerce issue because the parties agreed by contract that any dispute between them would be resolved by binding arbitration and that the arbitration "shall be governed by" the FAA. UniFirst believes this is enough to summon the FAA's preemption power, knocking out the SCAA notice requirement. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)

(although the FAA contains no express preemption provision, state laws are preempted to the extent they conflict with federal law in the sense that their application would undermine the goals and policies of the FAA).

We reject UniFirst's argument. A provision in an arbitration agreement declaring that the FAA applies is not a *fait accompli*. The FAA owes its existence to Congress' constitutional power to regulate interstate commerce. The heart of the FAA is 9 U.S.C. § 2, which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

We construe UniFirst's argument to be that parties may agree to have their dispute arbitrated by the FAA's methods and procedure, even if their contract only involves intrastate commerce. But the FAA does not furnish a set procedure for how the arbitration should go; that type of architectural detail is found in the AAA rules, which the parties had already settled on. What UniFirst is really asking us to do is to bless the principle that parties may agree—preemptively—that a court may apply the FAA's federal preemption power to their contract without first peeking behind the curtain to ensure interstate commerce is involved.

This we cannot do. The FAA is a sequential whole whose enforcement and preemption power may only be called upon when the dispute arises against the backdrop of a written provision in a "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court long ago announced that the FAA menu is not a la carte. In *Bernhardt v. Polygraphic Co. of America*, the Court confronted an issue instructive to the problem before us. 350 U.S. 198 (1956). Mr. Bernhardt sued his employer in a Vermont state court. The employer removed the suit to federal district court and then sought to stay the court action and compel arbitration pursuant to 9 U.S.C. § 3, contending the parties had an agreement to arbitrate all disputes before the AAA. *Id*. at 199. The district court

denied the stay, ruling Vermont law provided arbitration agreements were revocable by any party up to the time of award. The Court of Appeals reversed. *Id*. The Supreme Court reversed the Court of Appeals, holding the FAA did not apply because there was no evidence the contract evidenced a maritime transaction or one involving interstate commerce. *Id*. at 200–02.

What is revealing for our purpose here is that the Court in *Bernhardt* took direct aim at and shot down the notion that a party could invoke the stay provision of § 3 of the FAA even when the underlying contract did not satisfy § 2's interstate commerce requirement. *Id*. at 201 (noting the Court of Appeals had floated the idea that § 3 "stands on its own footing. It concluded that while § 2 makes enforceable arbitration agreements in maritime transactions and in transactions involving commerce, § 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions in commerce. We disagree with that reading of the Act"). The Court has since reaffirmed *Bernhardt* and this core principle. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) ("[A]ntecedent statutory provisions limit the scope of the court's powers under §§ 3 and 4. Section 2 provides that the [FAA] applies only when the parties' agreement to arbitrate is set forth as a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce.'"). As the Court explained:

> [T]o invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.

Id. at 537–38; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) ("[I]t is clear beyond dispute that the federal arbitration statute is *based upon and confined to* the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" (emphasis added) (quoting H.R.Rep.No.96, 68th Cong., 1st Sess., 1 (1924); S.Rep.No.536, 68th Cong., 1st Sess., 3 (1924))). In *Southland Corp. v. Keating*, the Supreme Court explained that Congress had to rely on its Commerce Clause power to make the FAA apply in state courts, which meant the FAA's "reach would be limited to transactions involving interstate commerce." 465 U.S. 1, 14 (1984); *see also id.* at 14–15 ("We therefore

view the 'involving commerce' requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.").

We hold that a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce. Just as the parties may not prove the requisite connection to interstate commerce by agreeing their transaction or relationship "contemplates" interstate commerce, they may not make the connection by declaring or contemplating the FAA will govern. Instead, the party pushing arbitration must prove the contract involves "commerce in fact." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not. *Munoz*, 343 S.C. 531, 542 S.E.2d 360 (2001); *Damico*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020), *aff'd in part, rev'd in part*, 437 S.C. 596, 879 S.E.2d 746 (2022). Consistent with our holding here, the *Munoz* and *Damico* courts held the FAA preempted South Carolina law only after finding the contracts at issue involved interstate commerce in fact. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363–64; *Damico*, 430 S.C. at 196, 844 S.E.2d at 70.

There are Texas cases to the contrary. *See, e.g.*, *In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App. 2002) ("We hold that when, as here, the parties agree to arbitrate under the FAA, they are not required to establish that the transaction at issue involves or affects interstate commerce.") This line of cases has proceeded unadorned by any logic or reasoning that we can find, and we decline to join it.

III.

Although we have held the parties may not avail themselves of FAA preemption without satisfying 9 U.S.C. § 2's commerce requirement, we must still address the court of appeals' conclusion that the contract between Hicks and UniFirst implicated interstate commerce. The court of appeals reached its conclusion after noting the following points: UniFirst shipped the uniforms from Kentucky to South Carolina, and Hick's payments were made to and deposited by UniFirst in Massachusetts, the site of UniFirst's headquarters and board of directors.

The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal

the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000); *see also Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013).

To ascertain whether a contract involves interstate commerce, the court examines "the agreement, the complaint, and the surrounding facts," including any affidavits submitted. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (quoting *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("Both the United States Supreme Court and this Court have relied on affidavits when determining whether a transaction involves interstate commerce."). The inquiry is fact dependent and focuses on what the specific contract terms require for performance. The party claiming the FAA preempts state law bears the burden of proving the contract involves interstate commerce. *Bradley*, 398 S.C. at 458, 730 S.E.2d at 317–18.

Under the FAA, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Citizens Bank*, 539 U.S. at 56–57 (citation omitted). Unlike the banking industry at issue in *Citizens Bank*, the uniform supply business is not an activity that is, in general, subject to federal control. Reviewing the contract, the pleadings, and surrounding facts reveals that the contract was between a Massachusetts company and a South Carolina company. There is no other sign the contract was to be performed using instrumentalities or channels of interstate commerce, or that the uniform supply involved any thing or matter located beyond South Carolina's borders.

The problem we see with the court of appeals' conclusion is that the points it relied upon to find the contract between Hicks and UniFirst involved interstate commerce debuted too late: they first appeared in UniFirst's motion to alter or amend and were never mentioned by the circuit court. The court of appeals could not use them to rescue UniFirst's interstate commerce argument. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Spreeuw v. Barker*, 385 S.C. 45, 68–69, 682

S.E.2d 843, 855 (Ct. App. 2009) (stating evidence that first appeared as attachment to a Rule 59(e), SCRCP motion cannot be considered on appeal). At any rate, the points came from assertions made by UniFirst's counsel. They are not mentioned in the pleadings, not apparent from the language of the contract, nor supported by affidavits or other evidence. It was error to rely on them in deciding whether the contract involves interstate commerce. *See McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) ("[A m]emorandum in support of a motion is not evidence."); 6 C.J.S. Arbitration § 70 ("Statements in motions and briefs do not constitute evidence to be considered by a trial court when ruling on a motion to compel arbitration.").

In sum, because the contract between Hicks and UniFirst did not involve interstate commerce in fact, the order of the circuit court denying UniFirst's motion to compel arbitration is affirmed, and the court of appeals' opinion is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Justin Jamal Lewis, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000998

ON WRIT OF CERTIORARI

Appeal from Florence County
D. Craig Brown, Post-Conviction Relief Judge

Opinion No. 28159
Submitted April 17, 2023 – Filed June 14, 2023

REVERSED IN PART AND REMANDED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Assistant Attorney General Danielle Dixon, all of Columbia, for Respondent.

JUSTICE JAMES: Petitioner Justin Jamal Lewis represented himself at trial and was convicted of distribution of heroin. Lewis timely filed an application for post-

conviction relief (PCR), alleging pretrial counsel was ineffective in several respects. The PCR court summarily dismissed Lewis's application, and we granted his petition for a writ of certiorari to review the PCR court's order. We reverse the order in part and remand for further proceedings consistent with this opinion.

Background

On the morning of trial, Lewis moved to relieve pretrial counsel, claiming counsel did not communicate with him and was not prepared for trial. Pretrial counsel insisted he was ready for trial. The trial court concluded pretrial counsel was prepared and denied Lewis's motion. Lewis then requested to represent himself. After conducting a *Faretta* hearing,[1] the trial court allowed Lewis to represent himself and appointed pretrial counsel as standby counsel. During the *Faretta* hearing, Lewis made clear he did not want a continuance. Just before trial began, Lewis—again, representing himself—stipulated to the admissibility of the "buy video" and of the substance alleged to have been heroin. Lewis did not object to the introduction of the chemical analysis report stating the substance was heroin.

In his PCR application, Lewis alleges pretrial counsel was ineffective in (1) failing to adequately investigate the criminal charge, (2) failing to file pretrial motions challenging the admissibility of evidence, (3) failing to communicate with material witnesses whose testimony would have been favorable to the defense, (4) failing to request or procure a copy of the chemical analysis report and affidavits that would establish the chain of custody for physical evidence, (5) failing to timely request a preliminary hearing, (6) failing to advise Lewis of his right to appeal, (7) failing to provide the necessary information for filing a notice of appeal, and (8) failing to file a notice of appeal on Lewis's behalf.

The PCR court granted the State's motion to dismiss Lewis's application with prejudice for failure to state a claim upon which relief can be granted. *See* Rule 12(b)(6), SCRCP. The PCR found Lewis was "not entitled to [PCR] on the basis of ineffective assistance of counsel, even for pretrial conduct," because he "represented himself at trial" and, in doing so, "assumed responsibility for correcting any pretrial errors . . . ." Additionally, the PCR court found Lewis "explicitly told [the trial court] he was not asking for a continuance" and "cannot complain now of counsel's

[1] *Faretta v. California*, 422 U.S. 806 (1975). Lewis does not challenge the sufficiency of the *Faretta* hearing, nor does he challenge the propriety of his waiver of the right to counsel.

alleged lack of pretrial investigation, failure to review discovery, or trial preparation." We granted Lewis's petition for a writ of certiorari to review the PCR court's order.

Discussion

Lewis argues his PCR application "present[s] genuine issues of material fact requiring a hearing."[2] Lewis further argues a defendant who represented himself at trial can claim ineffective assistance of pretrial counsel if he "did not have the opportunity to correct" an alleged error by counsel. *See Cook v. Ryan*, 688 F.3d 598, 610-12 (9th Cir. 2012). Lewis maintains he did not have an opportunity to correct pretrial counsel's errors because he decided to represent himself the morning of trial, and the trial court repeatedly told him the case would not be continued. Lewis also argues he "did not make a knowing and intelligent decision to waive [his right to] direct appeal" because neither the trial court nor pretrial counsel advised him of that right.

Some of Lewis's PCR claims are patently meritless. First, while he claims pretrial counsel failed to timely request a preliminary hearing, the record shows Lewis himself requested a preliminary hearing eight days after arrest. *See* Rule 2(a), SCRCrimP ("In all cases, the request for a preliminary hearing shall be made within ten days after [notice of his right to a preliminary hearing]."). Second, the PCR court also properly dismissed Lewis's evidentiary claims. While representing himself, Lewis stipulated to the admission of the buy video, a still photograph from the video, and the heroin. Similarly, Lewis did not object to the admission of the chemical analysis report into evidence. *See Faretta*, 422 U.S. at 834, n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

Two of Lewis's claims—pretrial counsel's alleged failure to adequately investigate the criminal charge and failure to communicate with material witnesses whose testimony would have been favorable to the defense—require us to determine whether a pro se defendant may allege ineffective assistance of pretrial counsel.

---

[2] "[S]ummary dismissal without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Al-Shabazz v. State*, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

Citing *Cook*, 688 F.3d at 609, the PCR court summarily dismissed these claims. The PCR court found Lewis "assumed responsibility for correcting any pretrial errors when he elected to represent himself." We disagree. The defendant in *Cook* began representing himself two weeks before trial, while Lewis began representing himself the morning trial began. Under the circumstances present here, there is a genuine issue of material fact as to whether Lewis had an opportunity to correct pretrial counsel's alleged errors.

We have never adopted a bright-line rule forbidding pro se defendants from alleging ineffective assistance of pretrial counsel, and we decline to do so today. Rather, we acknowledge a pro se defendant may present a colorable claim of pretrial ineffective assistance of pretrial counsel.[3]

Lewis also claims pretrial counsel failed to advise him of the right to appeal, failed to provide the necessary information for filing a notice of appeal, and failed to file a notice of appeal on his behalf. It appears PCR counsel moved for a new trial on behalf of Lewis. We are not prepared to determine on the record before us whether this required pretrial counsel to advise Lewis of his right to appeal or to take the other steps Lewis complains pretrial counsel did not take.

As in all PCR cases, *Strickland v. Washington* ensures PCR will be limited to instances where counsel's performance was deficient and that deficient performance prejudiced the defendant. 466 U.S. 668, 687 (1984).

Conclusion

We reverse the PCR court's order in part and remand for a hearing on Lewis's claims that pretrial counsel failed to adequately investigate the criminal charge, failed to communicate with material witnesses whose testimony would have allegedly been favorable to the defense, failed to advise him of the right to appeal, failed to provide the necessary information for filing a notice of appeal, and failed to file a notice of appeal on his behalf. We express no opinion on the merits of these claims.

---

[3] *See, e.g.*, *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008) (stating that because counsel's allegedly defective conduct occurred before the defendant waived his right to counsel, "the logic . . . that exercising the *Faretta* right to represent oneself necessarily eliminates claims of ineffective assistance does not apply").

REVERSED IN PART AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Anthony Anderson, Appellant.

Appellate Case No. 2019-001406

Appeal From Williamsburg County
Clifton Newman, Circuit Court Judge

Opinion No. 5989
Heard September 14, 2022 – Filed June 14, 2023

AFFIRMED

Appellate Defender Breen Richard Stevens, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Tommy Evans, Jr., all of Columbia; and Solicitor Ernest A. Finney, III, of Sumter, all for Respondent.

LOCKEMY, A.J.: In this criminal matter, Anthony Anderson appeals his convictions for two counts of murder, possession of a weapon during the commission of a violent crime, and aggregate sentence of sixty years'

imprisonment. On appeal, Anderson argues the trial court erred by (1) finding he willingly, intelligently, and voluntarily waived his rights against self-incrimination and to counsel and (2) refusing to admit an unavailable, third party's statement as a hearsay exception. For the reasons stated below, we affirm.

FACTS/PROCEDURAL HISTORY

In August 2011, a Williamsburg County grand jury indicted Anderson for the murders of Rosa Lee McCray, his grandmother, and Theward McCray, his uncle, (collectively, Victims) and for the weapon charge. Anderson proceeded to trial in May 2014. Prior to trial, Anderson moved to suppress the statement he gave to law enforcement after the shooting on June 5, 2011. The trial court conducted a pretrial hearing pursuant to *Jackson v. Denno*[1] to determine the admissibility of Anderson's statement.

At the *Jackson v. Denno* hearing, Investigator Neil Frebowitz, of the Horry County Police Department, testified that Horry County law enforcement responded to a call from Joani Burroughs, Anderson's mother, requesting law enforcement come to her home because Anderson came there, crying, and she believed he was delusional.

Investigator Frebowitz stated that after speaking with Williamsburg County law enforcement and learning of Victims' deaths, Horry County law enforcement placed Anderson under arrest. He recalled he conducted Anderson's interview, which lasted for about an hour, at approximately 6 AM or 6:30 AM. According to Frebowitz, he read Anderson his *Miranda*[2] rights by using a standard form. Investigator Frebowitz testified Anderson appeared to understand his questions and gave appropriate, clear, and concise responses. He stated he did not make any promises to Anderson for his statement nor did he threaten or coerce him. He also stated the interview took place in a relatively comfortable interview room, with only him and Anderson in the room, and he offered Anderson a beverage. According to Investigator Frebowitz, Anderson did not stop the interview or ask for an attorney. Investigator Frebowitz stated he believed Anderson freely, voluntarily, and knowingly gave his statement. He further confirmed Court's Exhibit 2 was a transcribed version of Anderson's interview. Investigator

[1] 378 U.S. 368 (1964).
[2] 384 U.S. 436 (1966).

Frebowitz testified that at no point during the interview did Anderson express any delusions or report hearing or seeing anything that was not there.

On cross-examination, Investigator Frebowitz testified he did not recall if he or Anderson checked the boxes on the *Miranda* form but stated protocol was to ensure interviewees understood their rights. He acknowledged he spoke with and interviewed Burroughs prior to Anderson's interview. When asked if Burroughs made him aware of Anderson's 1995 accident—when Anderson suffered a significant brain injury—and that she believed Anderson was delusional when he came to her home, Investigator Frebowitz answered affirmatively. Investigator Frebowitz also acknowledged he was unsure if Anderson had taken his antipsychotic medication prior to speaking with him but stated he did not observe Anderson to be delusional during the interview.

During the June 2011 interview, the following occurred: Investigator Frebowitz began by giving Anderson a bottle of water and reading Anderson his rights from a *Miranda* advisory form. He asked Anderson if he understood what he read; Anderson replied that he did and signed the form. Investigator Frebowitz notified Anderson that he spoke with Burroughs and she told him "a little of what happened." Anderson confirmed that he called his mother to tell her he was upset with Theward regarding a life insurance policy for which Anderson was the insured. According to Anderson, Theward would not give him specific information about the policy and Rosa Lee wanted Anderson to repay her the premium amount. Anderson told Investigator Frebowitz he believed Theward was going to kill him for the insurance proceeds. When asked about the shootings, Anderson recalled he became angry with Theward over the life insurance policy and obtained a twelve-gauge shotgun from Theward's bedroom closet. Anderson told Investigator Frebowitz that Theward asked what he was doing with the gun and in response, he shot Theward, who was unarmed, while in the living room. Anderson further stated that Rosa Lee ran into her bedroom and he followed, kicked open the door, and shot her. According to Anderson, he "walked right out" after the shootings and threw the gun out his car window as he drove to Burrough's home in Conway. Anderson could not recall where he threw the gun. When Investigator Frebowitz recounted the events of the shootings back to Anderson, Anderson answered affirmatively to Investigator Frebowitz's questions.

Anderson also stated during the interview that "[he] messed [his] life up," he made "a big [mistake]," he "[felt] like a failure," and he killed Theward because Theward would often ridicule him. When Anderson asked if he would be provided

counseling, Investigator Frebowitz inquired whether he thought he needed counseling. Anderson responded he was taking medication to control his temper and, in the past he attended mental health counseling. Investigator Frebowitz asked Anderson if there was anything else he wished to talk about because he felt "people [did not] talk to [Anderson] much." When Anderson asked how Victims were doing, Investigator Frebowitz clarified for Anderson that Victims were deceased and Anderson stated, "[T]hat's two murder charges." During the interview, Investigator Frebowitz told Anderson he could shut his eyes and get some rest while Investigator Frebowitz stepped out. At the conclusion of the interview, Investigator Frebowitz explained the next steps of the process to Anderson.

Burroughs testified Anderson came to her home crying and told her to call law enforcement when he arrived at her home after the shooting. She recounted to police the events of Anderson's 1995 accident, resulting injuries, and treatment. According to Burroughs, she notified Investigator Frebowitz about Anderson's accident and mental issues. Burroughs stated she gave Anderson his antipsychotic medication around 5 AM, before Investigator Frebowitz arrived.

Dr. Richard Frierson, a professor of psychiatry with the School of Medicine, testified he did not have an opinion as to whether Anderson was able to understand the *Miranda* warnings he received from Investigator Frebowitz. He stated that after reviewing the transcribed interview, he believed Anderson "appear[ed] to understand the questions" and gave responsive answers. Dr. Frierson acknowledged that during the interview, Anderson expressed sentiments consistent with delusional thinking, such as believing Victims planned to kill him to obtain life insurance proceeds.

The State argued Anderson's statement to Investigator Frebowitz was admissible because Anderson's mental deficiencies alone were not enough to make his statements involuntary. It asserted the evidence showed Anderson was not delusional at the time he gave the statement, and Investigator Frebowitz indicated he had not promised anything to Anderson or coerced him into making the statement. Finally, the State contended Anderson voluntarily, knowingly, and intelligently waived his *Miranda* rights and gave his statement to Investigator Frebowitz.

In response, Anderson argued that because Investigator Frebowitz was on notice that he suffered from mental deficiencies, Investigator Frebowitz should have

taken additional steps to ensure he understood his rights and could knowingly and intelligently waive them. He contended the questions Investigator Frebowitz asked him were closed and leading. Anderson asserted that under the totality of the circumstances, Investigator Frebowitz knew he was delusional and knew he could not voluntarily, knowingly, and intelligently waive his *Miranda* rights.

The trial court denied Anderson's motion to suppress, finding that under the totality of the circumstances, Anderson "sufficiently understood the nature of [the] *Miranda* warnings" and freely and voluntarily gave his statement to Investigator Frebowitz. It also determined there was no coercion by law enforcement. The trial court noted "[t]here [was] always a question . . . whether or not . . . the defendant had the mental ability to understand the implications of *Miranda*" but found the State had met its burden by a preponderance of the evidence.

At trial, Investigator Frebowitz testified similarly as he did during the *Jackson v. Denno* hearing. Anderson renewed his objection to the admission of the statement, and the trial court overruled his objection.

During the State's presentation of its case, Anderson renewed his motion to compel compulsory process of Devin Hedman, a resident of New York.[3] According to Anderson, in December 2012, Hedman provided a statement to the Livingston County Sheriff's Office in New York, confessing to the murders of Victims.[4]

---

[3] Anderson stated he filed the motion to compel compulsory process in August 2013.

[4] In summary, Hedman's statement contained the following information. Hedman indicated the Livingston County Sheriff's Office arrested him for driving while intoxicated in December 2012, and while being processed, he confessed to the murders of Victims. He stated Livingston County law enforcement informed him of his *Miranda* rights and he voluntarily gave his statement. According to Hedman, in the late 1990s, he and Anderson were arrested and Hedman took the blame for possessing drugs he claimed were Anderson's; he stated he was angry with Anderson for making him take the blame. Hedman stated that in July 2010, he took a bus from Rochester, New York to Kingstree with the intent to kill Anderson. He claimed his friend "Joe" provided him with a handgun and drove him to an area close to Victims' home. When Anderson and Victims arrived at the house, Hedman went inside, picked up a shotgun from in the house, and fired it at Anderson. He believed he shot Rosa Lee through the wall and proceeded to shoot Theward in the chest. Hedman went after Anderson, who ran out of the house, but

Anderson stated he requested the State produce Hedman or, in the alternative, the trial court allow him to admit Hedman's statement into evidence as a hearsay exception under Rule 804(b)(3), SCRE. Anderson acknowledged that while Victims were killed in June 2011 and Hedman claimed to have killed them in July 2010, the statement otherwise provided "great detail" into the shooting deaths of Victims and exonerated him.

The State asserted the Livingston County Sheriff's Office investigated the claims in Hedman's statement and were told by Hedman's wife that he was in New York when the shootings occurred. The trial court noted the inconsistencies of Hedman's statement with the facts of the case and determined the statement was "something close to wild speculation that attempt[ed] to come close to what occurred." The trial court denied Anderson's motion to compel compulsory process and denied his motion to admit Hedman's statement.

At the conclusion of the State's case, Anderson again sought to compel the State to produce Hedman or be allowed to present Hedman's statement. Anderson proffered the testimonies of Lieutenant Debra Collins and Officer Pamela Wrenn.

During the proffer, Lieutenant Collins, of the Williamsburg County Sheriff's Department, testified she received Hedman's statement from Investigator Jeffery Wiedrick with the Livingston County Sheriff's Office and gave the statement to Officer Wrenn. She stated Investigator Wiedrick investigated Hedman's claims and was told by Hedman's wife that Hedman was in New York in June 2011. According to Lieutenant Collins, details of Hedman's statement were not factually consistent with the investigation of the shootings. She stated Hedman's statement alleged he killed Victims in July 2010 but Victims were killed in June 2011; further, Hedman claimed to have shot Rosa Lee through the wall but there was no evidence of bullet holes in the wall at the scene. Lieutenant Collins noted Hedman claimed to have thrown the shotgun behind a dumpster at the end of the road where Victims' home was located, but she did not see a dumpster at the end of the road when she investigated. Additionally, she testified it was not logical that Hedman claimed to use a shotgun he found in Victims' home when he stated he came to the home with a handgun.

---

when he was unable to find Anderson, he threw the shotgun behind a dumpster at the end of the road. He stated Joe then drove him to a bus station in Kingstree and he returned to New York.

Officer Wrenn testified there was not a dumpster at the end of the road by Victims' house. She stated although Hedman claimed to have returned to New York after the shooting by going to a bus station in Kingstree, she was unaware of a bus station in Kingstree.

Dr. Nicholas Batalis, a forensic pathologist with the Medical University of South Carolina, testified he performed Victims' autopsies. Dr. Batalis stated he performed an internal examination and removed pellets and shotgun wadding from Rosa Lee. He opined the end of the shotgun was three to five feet away from Rosa Lee when it was fired. Dr. Batalis classified Victims' deaths as homicides.

Anderson asserted that pursuant to his constitutional rights, the State was responsible for producing Hedman as an exonerating witness. Alternatively, he argued Hedman's statement was admissible as a hearsay exception because it was a statement against penal interest. He contended the factual issues in Hedman's statement went to credibility and were issues for the jury to determine.

The State argued Anderson made no attempt to subpoena Hedman from New York. In regards to Anderson's alternative, it asserted Anderson did not present any corroboration of Hedman's claims.

The trial court denied Anderson's motion to compel compulsory process of Hedman, finding (1) he made no attempts to utilize the compulsory process procedure under section 19-9-70 of the South Carolina Code (2014); (2) he did not seek a continuance or the trial court's assistance in producing the witness; and (3) he failed to bring the motion to the court's attention in a timely manner. The court noted it was "incumbent upon the parties to bring these matters to the [c]ourt's attention." Additionally, the trial court denied Anderson's motion to admit Hedman's statement, finding there was "no corroborating evidence" and it was not exculpatory based on its untrustworthiness.

During Lieutenant Collins's trial testimony, Anderson again sought to admit Hedman's statement, and the State objected based on hearsay and lack of foundation. The trial court sustained the State's objection.

The jury found Anderson guilty as indicted, and the trial court sentenced him to thirty years' imprisonment for each count of murder and five years' imprisonment for the weapon charge.

Anderson filed a motion for a new trial, arguing the trial court erred by (1) admitting his statement to law enforcement; (2) denying his motion for compulsory process; and (3) failing to allow him to admit Hedman's statement into evidence. The trial court denied Anderson's motion, finding Anderson's arguments were the same issues the court previously ruled on at trial. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding Anderson knowingly, intelligently, and voluntarily waived his rights against self-incrimination and to counsel?

2. Did the trial court err in refusing to allow Anderson to admit Hedman's statement as a statement against penal interest?

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

"The trial [court] determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Kirton*, 381 S.C. 7, 25, 671 S.E.2d 107, 116 (Ct. App. 2008). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.*

The decision to admit evidence remains in the sound discretion of the trial court, and an appellate court will not disturb such a ruling absent an abuse of that discretion. *State v. Barnes*, 421 S.C. 47, 53-54, 804 S.E.2d 301, 305 (Ct. App. 2017). "An abuse of discretion standard is applied to a trial [court's] ruling on the issue of whether a statement is admissible as a declaration against penal interest." *State v. Kinloch*, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000).

LAW/ANALYSIS

I. Anderson's Statement to Law Enforcement

Anderson argues the trial court erred in admitting his statement into evidence. He asserts that under the totality-of-the-circumstances, he did not knowingly, intelligently, and voluntarily waive his rights against self-incrimination and to counsel. Anderson suggests that because Investigator Frebowitz was aware of his prior injury and mental deficiencies, Investigator Frebowitz was required to take additional precautions to ensure Anderson understood his rights and their waiver. According to Anderson, his actions during the interview, such as his stuttered speech, multiple references to his belief that Victims were planning to kill him, him falling asleep when Investigator Frebowitz left the room, and his "non-sensical" responses, established that he failed to understand the circumstances of the interview and his rights. We disagree.

"A confession is not admissible unless it was voluntarily made." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "If a defendant was advised of his *Miranda* rights, but chose to make a statement anyway, the 'burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived.'" *State v. Collins*, 435 S.C. 31, 43, 864 S.E.2d 914, 920 (Ct. App. 2021) *cert. granted* (Dec. 15, 2022) (quoting *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989)). "The State bears this burden of proof even [when] a defendant has signed a waiver of rights form." *Id.*

"Under *Jackson v. Denno*, [a defendant] is entitled to a reliable determination as to the voluntariness of his confession by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010). "The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" *Miller*, 375 S.C. at 384, 652 S.E.2d at 451 (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). "Appellate entities in South Carolina have recognized that appropriate factors to consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor

from his or her parent; threats of violence; and promises of leniency." *Id*. at 386, 652 S.E.2d at 452 (quoting *Childs*, 299 S.C. at 475, 385 S.E.2d at 842).

"Absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary. A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process." *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999). "[U]nder State law, a confession is not inadmissible because of mental deficiency alone." *Id.*

"On appeal, the trial [court's] ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." *Myers*, 359 S.C. at 47, 596 S.E.2d at 492. "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

In *Collins*, this court found a trial court abused its discretion in finding a defendant voluntarily gave his statement to law enforcement and determined it improperly admitted the statement into evidence. *Collins*, 435 S.C. at 54, 864 S.E.2d at 926. There, Collins received his *Miranda* warnings but the interviewing officers subsequently told him any statement he made would not be used against him. *Id.* at 51, 864 S.E.2d at 924. Additionally, law enforcement officers told Collins they only sought information to prosecute the co-defendant; they were there to assist Collins; that "no matter what he told them, [Collins] was going to get to go home after the interview"; and if he did not cooperate, they would seek to prosecute him. *Id.* at 52, 864 S.E.2d at 925. This court also noted that Collins suffered from an intellectual deficit. *Id.* at 53, 864 S.E.2d at 925. It found, under the totality-of-the-circumstances, including Collins's characteristics and the details of the interrogation, law enforcement had overborne Collins's will and induced him into making the inculpatory statement. *Id*. This court reversed Collins's convictions and remanded for a new trial. *Id.* at 55, 864 S.E.2d at 926.

We hold the trial court did not abuse its discretion in admitting Anderson's statement. *See Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829 (stating that "[i]n criminal cases, the appellate court sits to review errors of law only" and it is "bound by the trial court's factual findings unless they are clearly erroneous"); *Kirton*, 381 S.C. at 25, 671 S.E.2d at 116 ("An abuse of discretion occurs when the

ruling is based on an error of law or a factual conclusion that is without evidentiary support."). We find evidence supports the trial court's finding that Anderson voluntarily, knowingly, and intelligently gave his statement. *See Saltz*, 346 S.C. at 136, 551 S.E.2d at 252 ("When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.").

Although Anderson argues his mental deficiency made the waiver of his rights and subsequent statement involuntary, based on South Carolina law, Anderson's mental deficiency alone was not enough to render his statement to law enforcement involuntary. *See Miller*, 375 S.C. at 385, 652 S.E.2d at 452 (stating the mental condition of the suspect is one factor to consider in the totality-of-the-circumstances analysis to determine the voluntariness of a statement); *Hughes*, 336 S.C. at 594, 521 S.E.2d at 505 ("A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process."); *id.* ("[U]nder State law, a confession is not inadmissible because of mental deficiency alone.").

We also find Investigator Frebowitz did not employ coercive tactics to obtain Anderson's statements. *See Miller*, 375 S.C. at 386, 652 S.E.2d at 452 ("Coercive police activity is a necessary predicate to finding a statement is not voluntary."); *Hughes*, 336 S.C. at 594, 521 S.E.2d at 505 ("Absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary."). First, prior to discussing the events surrounding Victims' deaths, Investigator Frebowitz read Anderson his *Miranda* rights, asked if he understood them, and utilized a *Miranda* rights form, which Anderson signed. *See Miller*, 375 S.C. at 386, 652 S.E.2d at 452 (stating that a factor to consider in the totality analysis is whether law enforcement advised the accused of his right to remain silent and right to have counsel present). Second, he stated the interview room was relatively comfortable, he was the only other person present, and he ensured Anderson had a beverage. *See id.* (stating a factor to consider in the totality analysis is the location of the interview). Third, Anderson did not stop the interview or ask for an attorney at any point in time. Finally, the circumstances surrounding Anderson's confessions do not show that his statement was the product of an oppressive and coercive environment. *See id.* ("Coercive police activity is a necessary predicate to finding a statement is not voluntary."). Investigator Frebowitz testified he did not make any promises to Anderson and he did not

threaten or coerce him. Moreover, he stated the interview lasted approximately one hour and Anderson appeared to understand his questions and gave appropriate, clear, and concise responses.

Furthermore, Anderson failed to provide evidence establishing coercive behavior on law enforcement's part, generally, or law enforcement's actions being coercive given his mental deficiencies, specifically. Unlike the appellant in *Collins*, who also suffered from a mental deficiency, Anderson failed to show any coercive behavior on law enforcement's part that, given his mental deficiency and under the totality, would have caused his will to be overborne and rendered his statement involuntary. *Collins*, 435 S.C. at 53, 864 S.E.2d at 925. Additionally, while not dispositive under the totality test, Anderson did not provide any expert witnesses who testified to the impact his mental deficiencies had on his ability to comprehend and voluntarily waive his rights. *See Miller*, 375 S.C. at 386, 652 S.E.2d at 452 ("Coercion is determined from the perspective of the suspect.").

Thus, we hold the trial court did not abuse its discretion by finding Anderson voluntarily, knowingly, and intelligently waived his rights and gave his statement. Accordingly, we affirm as to this issue.

II. Admissibility of Hedman's Statement[5]

Anderson argues the trial court erred in excluding Hedman's statement because the statement was admissible as a hearsay exception against penal interest. He contends the trial court erred in reviewing the truth of Hedman's statement rather than only reviewing the making of the statement. Anderson argues that though the

---

[5] Although Anderson argues the State should have brought his pending motion for compulsory process to the attention of the trial court sooner, the State had no such obligation. Further, nothing prevented Anderson from requesting a hearing on the motion before trial. *See* § 19-9-70 (outlining the procedure for securing the testimony of a material, out-of-state witness through the courts of states that have also adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings); N.Y. Crim. Proc. Law § 640.10 (McKinney, 2012) (New York's codification of the reciprocal Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Cases); Rule 13, SCRCrimP (allowing for the issuance of a subpoena or subpoenas duces tecum by an officer of the court and requiring the person subpoenaed to attend as a witness in the General Sessions Court).

trial court characterized Hedman's statement as "wild speculation," accurate information in the statement supported its truthfulness. According to Anderson, the statement accurately described the people in the house, the house itself, the murder weapon, and Theward's wounds. Anderson asserts the circumstances surrounding Hedman's statement "were clearly corroborative" of the statement because Hedman was aware of his *Miranda* rights and confessed to law enforcement of committing a double murder. He also argues the testimonies of Lieutenant Collins and Officer Wrenn supported the foundation for admitting the statement as an authenticated business record. We disagree.

Hearsay is an out-of-court statement made to prove the truth of the matter asserted. Rule 801(c), SCRE. Generally, hearsay is not admissible. Rule 802, SCRE. However, the Rules of Evidence permit hearsay to be admitted "if the declarant is unavailable as a witness" and the "statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3).

"A defendant seeking to offer a statement pursuant to this exception bears the 'formidable burden' of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement." *State v. Wannamaker*, 346 S.C. 495, 501, 552 S.E.2d 284, 287 (2001). "The rule does not require that the information within the statement be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made." *State v. Cope*, 405 S.C. 317, 342-43, 748 S.E.2d 194, 207 (2013). Our supreme court has recognized that "[i]n many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration." *Id.* at 343, 748 S.E.2d at 207 (alteration in original) (quoting *State v. McDonald*, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000)). "[T]he two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances." *McDonald*, 343 S.C. at 324 n.5, 540 S.E.2d at 466 n.5. "Whether a statement has been sufficiently corroborated is a question 'left to the discretion of the trial judge "after considering the totality of the circumstances under which a

declaration against penal interest was made."'" *Wannamaker*, 346 S.C. at 501, 552 S.E.2d at 287 (quoting *McDonald*, 343 S.C. at 323, 540 S.E.2d at 466).

We hold evidence supports the trial court's determination to exclude Hedman's statement because the statement was uncorroborated. *See Kinloch*, 338 S.C. 385, 388, 526 S.E.2d 705, 706 ("An abuse of discretion standard is applied to a trial [court's] ruling on the issue of whether a statement is admissible as a declaration against penal interest."); *Wannamaker*, 346 S.C. at 501, 552 S.E.2d at 287 ("Whether a statement has been sufficiently corroborated is a question 'left to the discretion of the trial judge "after considering the totality of the circumstances under which a declaration against penal interest was made."'"). Here, the trial court determined there were factual inconsistencies with Hedman's statement, found his statement amounted to "wild speculation that attempt[ed] to come close to what occurred," and concluded Anderson failed to provide the required corroborating evidence to support admitting the statement.

Determining whether Anderson provided evidence clearly corroborating Hedman's statement to deem it admissible under Rule 804(b)(3) requires analyzing two related inquires—the context of the statement and the content of the statement. *See* Rule 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."); *McDonald*, 343 S.C. at 324 n.5, 540 S.E.2d at 466 n.5 ("[T]he two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances."). We find Anderson did not clearly corroborate Hedman's statement to allow for its admission at trial. *See Wannamaker*, 346 S.C. at 501, 552 S.E.2d at 287 ("A defendant seeking to offer a statement pursuant to this exception bears the 'formidable burden' of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement.").

While certain assertions from Hedman's statement were similar to the events surrounding the deaths of Victims, such as the location of the shooting, the weapon used, and the color of Victims' home, other assertions were inconsistent with the facts of the case. Lieutenant Collins testified that in his statement, Hedman claimed to have (1) killed Victims in July 2010; (2) shot Rosa Lee through a wall; and (3) thrown the weapon behind a dumpster at the end of the road. Highlighting the inconsistencies in Hedman's statement, Lieutenant Collins explained (1) Victims were killed in June 2011, (2) there was no evidence of bullet holes in the

wall at Victims' home, and (3) there was no dumpster at the end of the road where Hedman claimed he threw the weapon. She further indicated Hedman's wife told New York law enforcement he was living and working in New York in June 2011. Officer Wrenn also testified there was not a dumpster at the end of the road, and though Hedman stated he returned to New York by taking a bus from the station in Kingstree, she was unaware of a bus station in Kingstree. Furthermore, Dr. Batalis's testimony did not establish that Rosa Lee was shot through a wall; instead, he opined the shooter was three to five feet away, close enough that shell wadding from the shotgun was lodged inside of her. Accordingly, because there is evidence to support the trial court's decision to deny admitting Hedman's statement, we hold the trial court did not abuse its discretion.

We do not address Anderson's argument as to whether there was a proper foundation for admitting Hedman's statement because the determination that Anderson failed to establish the statement's admissibility under Rule 804(b)(3) is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (observing an appellate court need not address remaining issues when the determination of another point is dispositive). Thus, we affirm this issue.

CONCLUSION

For the foregoing reasons, Anderson's convictions are

AFFIRMED.

WILLIAMS, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter Michael Buonaiuto, Sr., individually, and of behalf of all others similarly situated, Appellant,

v.

The Town of Hilton Head Island, South Carolina, Respondent.

Appellate Case No. 2020-000687

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5990
Heard April 10, 2023 – Filed June 14, 2023

AFFIRMED

Taylor Meriwether Smith, IV, of Harrison, Radeker & Smith, P.A., of Columbia, for Appellant.

Curtis Lee Coltrane, of Coltrane & Wilkins, LLC, of Hilton Head Island, for Respondent.

LOCKEMY, A.J.: Peter Michael Buonaiuto, Sr., individually and on behalf of all others similarly situated, appeals the master-in-equity's (the master's) order granting summary judgment to the Town of Hilton Head Island (the Town). On appeal, he argues the master erred in finding a "Contract for Professional Services" (the Contract) between the Town and the Hilton Head Island-Bluffton Chamber of

Commerce (the Chamber) was not a contract for services as defined by the Town's Procurement Code. We affirm.

FACTS/PROCEDURAL HISTORY

The Accommodations Tax (A-Tax) Act involves the imposition of a state sales tax on overnight sleeping accommodations. S.C. Code Ann. § 12-36-920 (2014 & Supp. 2022); *see also Thompson v. Horry County*, 294 S.C. 81, 82, 362 S.E.2d 646, 647 (Ct. App. 1987) ("The [A-Tax] Act was enacted to raise revenue for the purpose of promoting tourism and providing for facilities and services which enhance the ability of counties and municipalities to attract and provide for tourists."). A portion of the tax is remitted to the local government where it was collected and it must expend the A-Tax funds in accordance with the statutory provisions governing allocation. *See* S.C. Code Ann. § 12-36-2630(3) (2014 & Supp. 2022); S.C. Code Ann. §§ 6-4-10 to -35 (2004 & Supp. 2022); *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 298, 814 S.E.2d 513, 515 (2018). Specifically, the A-Tax Act requires the local government to "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.'" *DomainsNewMedia.com*, 423 S.C. at 298, 814 S.E.2d at 515 (quoting § 6-4-10(3)).

In December 2015, the Town entered into the Contract, titled "Contract for Professional Services," with the Chamber, which was for a five-year term that could be extended for an additional five-year term if the Chamber complied with the performance standards as set forth in the Contract. The Contract stated the Town entered into it so the Chamber would satisfy certain compliance and operating standards and noted the Chamber was an independent contractor. The Contract required the Chamber to perform various tasks, including (1) managing and directing the expenditure of a statutorily mandated special fund for advertising and promotion of tourism (the Fund); (2) submitting a budget of planned expenditures for the Fund and a marketing plan, which would include a public relations plan and social media plan, for each fiscal year; (3) submitting a DMO report containing a schedule of revenues of the accommodations tax and expenses for each fiscal year; (4) adopting policies and procedures and operating in a manner which satisfied the standards set forth by Destination Marketing Association International; (5) providing certain tourism metrics and reports; and (6) making at least two public presentations and two additional reports to the

Accommodations Tax Committee each fiscal year. The Contract required the Town to comply with state accommodation tax laws and to properly expend the Fund to the Chamber in order for the budget and marketing plan to be implemented.

In November 2016, Buonaiuto, who operated the Hilton Head Visitors and Convention Bureau, Inc., filed a summons and complaint. He argued the Town violated the Procurement Code because it failed to publicly bid or subject the Contract to its code and maintained the Procurement Code did not exempt certain contracts or other expenditures of public money from it. He sought a declaration that the Town violated the Procurement Code, rescission of the Contract, an injunction requiring the Town to subject any proposed DMO contract to the Procurement Code, and an award of costs and attorney's fees. Buonaiuto attached the Contract to his complaint.

In its answer, the Town, in addition to denying the material allegations in the complaint, argued section 6-4-10 of the South Carolina Code controlled distribution of the Fund and section 4-12-20 of the Municipal Code of the Town of Hilton Head Island (1998) stated the Chamber shall be the DMO. After the case was referred to the master, the Town filed a motion for summary judgment, arguing neither the distribution of the Fund nor the Contract qualified as "procurement" as defined in section 11-1-121 of the Municipal Code of the Town of Hilton Head Island (1983). The Town further asserted (1) there was no evidence the Chamber provided services to it under the Contract; rather, the Contract set out reporting requirements to demonstrate the Chamber's compliance with section 6-4-10 of the South Carolina Code and (2) had the Chamber delivered services to it, the Chamber would have violated section 6-4-10, which restricted the use of the Fund. The Town also argued the selection of the organization to manage the Fund was not the procurement of services; rather, it simply fulfilled the statutory mandate in section 6-4-10(3) of the South Carolina Code. Finally, citing *DomainsNewMedia.com*, it argued section 6-4-10 of the South Carolina Code applied over the Procurement Code because whereas section 6-4-10 was a specific statute, the Procurement Code was a general ordinance.

The Town attached affidavits to its summary judgment motion, including those from John Troyer, the director of finance for the Town; William Miles, the president and chief operating officer for the Chamber; and Stephen Riley, the town manager for the Town. Troyer stated the receipt or distribution of the Fund did not appear in the annual budget and the town council did not vote on the distribution of

it. Riley stated the Town had no discretion in the establishment of the Fund and averred the Town had to distribute the entire fund to an organization meeting the requirements in section 6-4-10. Miles stated the Chamber had received the Fund since 1986 and was required to submit reports to the Town, including a budget of planned expenditures and a subsequent accounting of the expenditures. All of the affiants stated the Town and the Chamber entered into the Contract to ensure the Chamber met compliance and operating standards and noted the Chamber was required to deliver information to the Town to demonstrate compliance. They also stated the Chamber did not provide services to the Town; rather, the Chamber used the funds for advertising and promotion of tourism, as required by section 6-4-10. Miles and Riley stated the plain language of section 6-4-10 prohibited using the Fund to provide services to the Town.

Buonaiuto also filed a motion for summary judgment, arguing the Contract's name and terms showed it was one for services and the Town violated its Procurement Code by not subjecting it to the code before ratification. He further argued "services" included (1) the management and direction of the expenditure of the Fund and (2) the submittal of a budget of planned expenditures and a marketing plan. Buonaiuto did not submit any supporting affidavits to his motion.

The master granted the Town's motion for summary judgment, finding the terms of the Contract and what it called for governed whether the Contract was one for services. He concluded the Procurement Code did not apply to the Contract because the Contract established the Chamber did not deliver services to the Town; rather, it set out reporting requirements to be followed by the Chamber to demonstrate its compliance with section 6-4-10(3) of the South Carolina Code. The master noted the plain language of section 6-4-10(3) did not allow the delivery of services. He further found the Town's selection of the organization to manage the Fund was not the procurement of services; rather, it was the fulfillment of statutory mandates imposed on the Town. Finally, the master concluded that under *DomainsNewMedia.com*, the Procurement Code, which was a general ordinance, did not apply to allocation and expenditure of the Fund because it was governed by a specific statute. This appeal followed.

ISSUE ON APPEAL

When the master denied Buonaiuto's motion for summary judgment and granted the Town's motion pursuant to Rule 56(c), SCRCP, did the master err in

determining the "Contract for Professional Services" was not "contract for services" pursuant to the Town's Procurement Code?

STANDARD OF REVIEW

"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). "In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008).

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Questions of law may be decided with no particular deference to the trial court." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008). Furthermore, "[q]uestions of statutory interpretation are questions of law, which [this court is] free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *see also Mikell v. County of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009) ("When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law.").

LAW/ANALYSIS

Buonaiuto argues the master erred in determining the Contract was not one for services and would be subjected to the Town's Procurement Code. First, he asserts the Procurement Code provides that "[i]t shall apply to every expenditure of public funds irrespective of their source."[1] Second, Buonaiuto avers (1) the Contract's

[1] Hilton Head Island, S.C., Mun. Code § 11-1-113.

name provides some indication of its nature and (2) a review of the ordinary meaning of the Contract's words, requiring the Chamber to manage and expend the Fund, establish that it is one for services. Finally, Buonaiuto argues how the various persons of the Town's provided affidavits describe the Contract or A-Tax statutes is not relevant. We disagree.

"It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. In construing ordinances, the terms used must be taken in their ordinary and popular meaning." *Id.* at 68, 459 S.E.2d at 843 (citation omitted). "Further, where two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." *Mikell*, 386 S.C. at 160, 687 S.E.2d at 330. "When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law." *Id.* "The courts will reject an interpretation of a[n] ordinance which leads to an absurd result which could not possibly have been intended by the lawmaking body." *Hist. Charleston Found. v. Krawcheck*, 313 S.C. 500, 507, 443 S.E.2d 401, 405-06 (Ct. App. 1994).

Section 6-4-10(3) of the South Carolina Code states 30% of the funds received by a municipality or county from the local A-Tax "must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity." Section 6-4-10(3) continues:

> 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. . . . To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon allocation to the special fund, a municipality or county

> shall distribute the tourism promotion funds to the organizations selected or created to receive them.

Section 6-4-10(3) requires the selected organization to submit for approval a budget of planned expenditures before the beginning of each fiscal year and an accounting of the expenditures at the end of each fiscal year.

The Procurement Code applies to public purchasing of supplies, services, and construction. *See* Hilton Head Island, S.C., Mun. Code § 11-1-113. The purpose of the Procurement Code is to "provide for the fair and equitable treatment of all purposes involved in public purchasing by the town, to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity." *See* Hilton Head Island, S.C., Mun. Code §11-1-112.

The Procurement Code defines contracts as "[a]ll types of town agreements, regardless of what they may be called, for the procurement of supplies, services, or construction." Hilton Head Island, S.C., Mun. Code § 11-1-121(5). Procurement is defined as "[b]uying, purchasing, . . . or otherwise acquiring any supplies, services, or construction" as well as "all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration." Hilton Head Island, S.C., Mun. Code § 11-1-121(21). "Service" is defined as "[t]he furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance." Hilton Head Island, S.C., Mun. Code § 11-1-121(30).

Section 4-12-10 of the Municipal Code states the chapter regarding the A-Tax funds was enacted pursuant to the authority in section 6-4-10(3) of the South Carolina Code and requires the Town to select "an organization to manage and direct the expenditure of the thirty (30) percent of the special fund for tourism promotion." Section 4-12-20 of the Municipal Code discusses the management of the Fund.

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First South Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443,

454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "Whe[n] the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012)).

We hold the master did not err in granting summary judgment. *See Woodson*, 406 S.C. at 528, 753 S.E.2d at 434 ("In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP."); *Town of Summerville,* 378 S.C. at 109-10, 662 S.E.2d at 41 ("A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."); *Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434 ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law."). We find the Procurement Code does not govern the Contract because the Contract is not the type of procurement agreement that would be subject to Title 11 of the Municipal Code. Hilton Head Island, S.C., Mun. Code § 11-1-121. *See Mikell*, 386 S.C. at 160, 687 S.E.2d at 330 ("When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law."). Further, the Town's intent was not to subject the selection of the Chamber as the Town's DMO to the Procurement Code; rather, section 6-4-10(3) of the South Carolina Code and the applicable provisions of the Procurement Code govern the Contract. *See Rosenberg*, 418 S.C. at 180, 790 S.E.2d at 925 ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract.").

The Procurement Code was enacted to "provide for the fair and equitable treatment of all purposes involved in public purchasing by the town" and "applies to contracts for the procurement of supplies, services, and construction." Hilton Head Island, S.C., Mun. Code §§ 11-1-112 and -113. Procurement is defined as "[b]uying, purchasing, . . . or otherwise acquiring any supplies, services, or construction" as well as "all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration." Hilton Head Island, S.C., Mun. Code § 11-1-121(21). "Service" is defined as "[t]he furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are

merely incidental to the required performance." Hilton Head Island, S.C., Mun. Code § 11-1-121(30).

Section 6-4-10(3) of the South Carolina Code provides that the Town must (1) select one or more nonprofit organizations, such as a chamber of commerce, visitor bureau, or tourism commission, which has an existing, ongoing tourist promotion program to manage and direct the expenditure of the Fund, and (2) distribute the money to the chosen organization immediately after receiving the allocation from the Fund. It further states the Fund can be "used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity" and the organization selected to receive the Fund shall submit a budget and accounting each year to the Town. § 6-4-10. Section 4-12-10 of the Municipal Code requires the selected organization use the Fund allocation for "advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity" and further the selected organization to be "a non-profit organization and have an existing, ongoing tourism promotion program." Section 4-12-20 of the Municipal Code provided the Chamber would be the Town's selected organization to manage and direct the expenditure of the Fund.

We hold the intent of the Town in enacting the Procurement Code was to enable a bidding process for the receipt of funds in exchange for services rendered to the Town. The Town entered into the Contract not to procure services pursuant to Title 11 of the Procurement Code but rather to formalize the duties placed on it under section 6-4-10(3) of the South Carolina Code and establish the Chamber as the Town's chosen organization pursuant to section 6-4-10(3) of the South Carolina Code and section 4-12-10 of the Municipal Code, which reiterated the requirements of section 6-4-10(3). Although the Contract required the Chamber to, among other things, manage and direct the expenditure of the Fund, submit a budget of planned expenditures and a subsequent accounting of the expenditures, submit a DMO report and marketing plan, and submit tourism metrics, two Town officials and the president and chief operating officer for the Chamber stated the purpose of the Contract was to ensure the Chamber met compliance and operating standards rather procure services. Therefore, given the evidence in the record, there was not a genuine issue of material fact and the master did not err in granting summary judgment. Accordingly, we affirm.

CONCLUSION

Based on the foregoing, the master's grant of summary judgment is

AFFIRMED.

KONDUROS and VINSON, JJ., concur.