Judicial Merit Selection Commission

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

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

July 30, 2012

The Judicial Merit Selection Commission is accepting applications for the judicial office listed below:

A vacancy exists in the office formerly held by the late Honorable Billy A. Tunstall, Jr., Judge of the Family Court for the Eighth Judicial Circuit, Seat 3. The successor will fill the unexpired term which will expire June 30, 2013, and the subsequent full term which will expire June 30, 2019.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

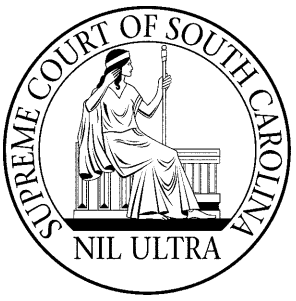
Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th).

Or

Laurie Traywick, JMSC Administrative Assistant at (803)-212-6623

The Commission will not accept applications after 12:00 noon on Wednesday, August 29, 2012.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
August 1, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Adoptive Couple, Appellants,

v.

Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, Respondents.

Appeal from Charleston County
The Hon. Deborah Malphrus, Family Court Judge

Opinion No. 27148
Heard April 17, 2012 – Filed July 26, 2012

AFFIRMED

Mark D. Fiddler, of Minneapolis, Minnesota, Raymond W. Godwin and Julie M. Rau, both of Greenville, and Robert Norris Hill, of Newberry, all for Appellants.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, Lesley Ann Sasser and Shannon Phillips Jones, both of Charleston, all for Respondent, Birth Father.

Chrissi R. Nimmo, of Tahlequah, Oklahoma, for Respondent, Cherokee Nation.

James Fletcher Thompson, of Spartanburg, and Philip McCarthy, of Flagstaff, Arizona, for Amicus Curiae, the American Academy of Adoption Attorneys.

Dione Cherie Carroll, of Miami, Florida, for Amici Curiae, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs.

Thomas P. Lowndes, Jr., of Charleston, for the Guardian *ad Litem*.

CHIEF JUSTICE TOAL: This case involves a contest over the private adoption of a child born in Oklahoma to unwed parents, one of whom is a member of the Cherokee Nation. After a four day hearing in September 2011, the family court issued a final order on November 25, 2011, denying the adoption and requiring the adoptive parents to transfer the child to her biological father. The transfer of custody took place in Charleston, South Carolina, on December 31, 2011, and the child now resides with her biological father and his parents in Oklahoma. We affirm the decision of the family court denying the adoption and awarding custody to the biological father.

FACTS / PROCEDURAL HISTORY

Father and Mother are the biological parents of a child born in Oklahoma on September 15, 2009 ("Baby Girl"). Father and Mother became engaged to be married in December 2008, and Mother informed Father that she was pregnant in January 2009.[1] At the time Mother became pregnant, Father was actively serving in the United States Army and stationed at Fort Sill, Oklahoma, approximately four hours away from his hometown of Bartlesville, Oklahoma, where his parents and Mother resided.[2] Upon learning Mother was pregnant, Father began pressing

[1] Father has a daughter from a prior marriage whom he supports through a deduction in his military pay and who was six years old at the time of the engagement. Mother claims that Father has another daughter whom he does not support, but this was never substantiated by the evidence. Mother has two other children from a prior relationship.

[2] Father served honorably in both Operation Iraqi Freedom and Operation New Dawn and received a Bronze Star for his service. He is now a member of the National Guard and works as a security guard.

Mother to get married sooner.[3] The couple continued to speak by phone daily, but by April 2009, the relationship had become strained. Mother testified she ultimately broke off the engagement in May via text message because Father was pressuring her to get married. At this point, Mother cut off all contact with Father. While Father testified his post-breakup attempts to call and text message Mother went unanswered, it appears from the Record Father did not make any meaningful attempts to contact her.

It is undisputed that Mother and Father did not live together prior to the baby's birth and that Father did not support Mother financially for pregnancy related expenses, even though he had the ability to provide some degree of financial assistance to Mother.[4]

In June 2009, Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother. Father explained: "In my mind I thought that if I would do that I'd be able to give her time to think about this and possibly maybe we would get back together and continue what we had started." However, under cross-examination Father admitted that his behavior was not conducive to being a father. Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would have never considered relinquishing his rights.

Mother testified she chose the adoption route because she already had two children by another father, and she was struggling financially. In June 2009, Mother

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[3] The testimony of Mother and Father surrounding the circumstances of the parties' relationship during this time is conflicting. For example, Father testified he was "very happy" when he learned they were expecting a child and claimed he desired to get married sooner so that the child would not be born out of wedlock. On the other hand, Mother testified Father "didn't really have a reaction" and "every time [she] would bring it up, he really didn't say a whole lot," and stated Father pressured her to get married for monetary purposes because the military would increase his pay for "family living."

[4] Mother testified she asked Father for financial assistance before she made her first pre-natal doctor's appointment, and Father stated he would not assist her financially unless they were married. Father denies that Mother asked for financial assistance and testified he would have supported her if she had asked.

connected with Appellants (or "Adoptive Mother" or "Adoptive Father") through the Nightlight Christian Adoption Agency (the "Nightlight Agency"). She testified she chose them to be the parents of the child because "[t]hey're stable . . . . they're a mother and father that live inside a home where she can look up to them and they can give her everything she needs when needed."

Appellants reside in Charleston, South Carolina, and were married on December 10, 2005. Adoptive Mother has a Master's Degree and a Ph.D. in developmental psychology and develops therapy programs for children with behavior problems and their families. Adoptive Father is an automotive body technician currently working for Boeing. They have no other children. After connecting, Mother spoke with Appellants weekly by telephone, and Adoptive Mother visited Mother in Oklahoma in August 2009. Appellants provided financial assistance to Mother during the final months of her pregnancy and after Baby Girl's birth. Adoptive Mother testified Mother consistently represented that the birth father was not involved.

Mother testified that she knew "from the beginning" that Father was a registered member of the Cherokee Nation, and that she deemed this information "important" throughout the adoption process.[5] Further, she testified she knew that if the Cherokee Nation were alerted to Baby Girl's status as an Indian child, "some things were going to come into effect, but [she] wasn't for [sic] sure what." Mother reported Father's Indian heritage on the Nightlight Agency's adoption form and testified she made Father's Indian heritage known to Appellants and every agency involved in the adoption. However, it appears that there were some efforts to conceal his Indian status. In fact, the pre-placement form reflects Mother's reluctance to share this information:

> Initially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he's registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption.

Appellants hired an attorney to represent Mother's interests during the adoption. Mother told her attorney that Father had Cherokee Indian heritage. Based on this information, Mother's attorney wrote a letter, dated August 21, 2009, to the Child Welfare Division of the Cherokee Nation to inquire about Father's status as an

[5] Mother testified that she believed she also had Cherokee heritage, but she was not a registered member of the Cherokee Nation.

enrolled Cherokee Indian. The letter stated that Father was "1/8 Cherokee, supposedly enrolled," but misspelled Father's first name as "Dust*in*" instead of "Dust*en*" and misrepresented his birthdate. (emphasis added).

Because of these inaccuracies, the Cherokee Nation responded with a letter stating that the tribe could not verify Father's membership in the tribal records, but that "[a]ny incorrect or omitted family documentation could invalidate this determination." Mother testified she told her attorney that the letter was incorrect and that Father was an enrolled member, but that she did not know his correct birthdate. Adoptive Mother testified that, because they hired an attorney to specifically inquire about the baby's Cherokee Indian status, "when she was born, we were under the impression that she was not Cherokee."[6] Any information Appellants had about Father came from Mother.

When Mother arrived at the hospital to give birth, she requested to be placed on "strictly no report" status, meaning that if anyone called to inquire about her presence in the hospital, the hospital would report her as not admitted.[7] Mother testified that neither Father nor his parents contacted her while she was in the hospital.

Adoptive Mother and Adoptive Father were in the delivery room when Mother gave birth to Baby Girl on September 15, 2009. Adoptive Father cut the umbilical cord. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption.

Appellants were required to receive consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children ("ICPC") as a prerequisite to removing Baby Girl from that state. Mother signed the necessary documentation, which reported Baby Girl's ethnicity as "Hispanic" instead of "Native American." After Baby Girl was discharged from the hospital, Appellants remained in Oklahoma with Baby Girl for approximately eight days until they received ICPC approval, at which point they took Baby Girl to South Carolina. According to the testimony of Tiffany Dunaway, a Child Welfare Specialist with the Cherokee Nation, had the Cherokee Nation known about Baby Girl's Native

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[6] Adoptive Mother testified that the Nightlight Agency's pre-placement report was "probably . . . something I read and didn't think twice about it."

[7] Mother testified that she chose this option in both of her previous births primarily to prevent the father from contacting her.

American heritage, Appellants would not have been able to remove Baby Girl from Oklahoma.[8]

Father was aware of Mother's expected due date, but made no attempt to contact or support Mother directly in the months following Baby Girl's birth.[9]

Appellants filed the adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth, but did not serve or otherwise notify Father of the adoption action until January 6, 2010, approximately four months after Baby Girl was born and days before Father was scheduled to deploy to Iraq. On that date outside of a mall near his base, a process server presented Father with legal papers entitled "Acceptance of Service and Answer of Defendant," which stated he was not contesting the adoption of Baby Girl and that he waived the thirty day waiting period and notice of the hearing. Father testified he believed he was relinquishing his rights to Mother and did not realize he consented to Baby Girl's adoption by another family until after he signed the papers. Upon realizing that Mother had relinquished her rights to Appellants, Father testified, "I then tried to grab the paper up. [The process server] told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper."

After consulting with his parents and a JAG lawyer at his base, Father contacted a lawyer the next day, and on January 11, 2010, he requested a stay of the adoption proceedings under the Servicemember's Civil Relief Act ("SCRA"). On January 14, 2010, Father filed a summons and complaint in an Oklahoma district court to

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[8] Dunaway testified that had "Native American" been circled on the ICPC form, the ICPC administrator would have contacted her supervisor directly. Whether or not the Cherokee Nation would have ultimately allowed the adoption to go forward is a matter of tribal law. However, the testimony establishes the tribe would not have consented to Baby Girl's removal at that time, triggering the denial of Appellants' ICPC application, and Appellants would not have been able to transport Baby Girl to South Carolina.

[9] Father testified he asked friends and family if they had seen Mother because she would not reply to his text messages. His mother testified she attempted to contact Mother on several occasions and once left Mother a voice message before Baby Girl's birth to tell Mother she had money and some gifts for the baby, including items she hand-knitted, but Mother never returned her telephone calls. Mother testified that none of Father's family members contacted her regarding gifts for Baby Girl.

establish paternity, child custody, and support of Baby Girl. The complaint named Appellants and Mother as defendants.[10] Paragraph 12 of this Complaint stated, "Neither parent nor the children have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do not apply." Father departed for Iraq on January 18, 2010, with his father acting as power of attorney while he was deployed overseas.[11]

On March 16, 2010, Appellants, with Mother joining, filed a Special Appearance and Motion to Dismiss Father's Oklahoma action on jurisdictional grounds. The motion was granted, thereby ending the Oklahoma custody action.

Meanwhile, in January 2010, the Cherokee Nation first identified Father as a registered member and determined that Baby Girl was an "Indian Child," as defined under the Federal Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* (the "ICWA"). It is not apparent from the Record when Appellants were made aware of this change, but on March 30, 2010, Appellants amended their South Carolina pleadings to acknowledge Father's membership in the Cherokee Nation. Accordingly, on April 7, 2010, the Cherokee Nation filed a Notice of Intervention in the South Carolina action.[12]

On May 6, 2010, the family court ordered paternity testing which conclusively established Father as the biological father of Baby Girl, and Appellants have since acknowledged Father's paternity. Furthermore, the family court issued an order confirming venue and jurisdiction in Charleston County Family Court and lifting the automatic stay of proceedings under the SCRA. On May 25, 2010, Father answered Appellants' amended complaint, stating he did not consent to the adoption of Baby Girl and seeking custody. By temporary order dated July 12, 2011, the family court set a hearing date for the case, and found separately that the ICWA applied to the case.

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[10] Upon receipt of this complaint, Appellants were first put on notice that Father was contesting the adoption.

[11] Father did not return to the United States until December 26, 2010.

[12] On April 19, 2010, Father filed an amended complaint that modified paragraph 12 of his previous complaint to read: "Both the father and the child have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do apply."

The trial of the case took place from September 12–15, 2011. A Guardian *ad Litem* ("GAL") represented the interests of Baby Girl. On November 25, 2011, the family court judge issued a Final Order, finding that: (1) the ICWA applied and it was not unconstitutional; (2) the "Existing Indian Family" doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) Appellants failed to prove by clear and convincing evidence that Father's parental rights should be terminated or that granting custody of Baby Girl to Father would likely result in serious emotional or physical damage to Baby Girl. Therefore, the family court denied Appellants' petition for adoption and ordered the transfer of custody of Baby Girl to Father on December 28, 2011.

Appellants filed a motion to stay the transfer and to reconsider on December 9, 2011, which the family court denied on December 14, 2011.[13] Appellants then filed a notice of appeal in the court of appeals on December 20, 2011, along with a petition for a writ of supersedeas. Judge Aphrodite Konduros temporarily granted the petition for a writ of supersedeas pending the filing of a return by Father. On December 30, 2011, Judge Konduros issued an order lifting the temporary grant of supersedeas and denying the petition for a writ of supersedeas. On December 31, 2011, Appellants transferred Baby Girl to Father, and Father and his parents immediately traveled with Baby Girl back to Oklahoma.

This Court certified the appeal pursuant to Rule 204(b), SCACR. In addition to briefs filed by the parties, the American Academy of Adoption Attorneys, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs have filed briefs as amici curiae.

ISSUES

I. Whether Appellants properly transferred Baby Girl to South Carolina.

II. Whether the ICWA defers to state law in determining whether an unwed father is a "parent" as defined by the ICWA.

III. Whether Appellants proved grounds to terminate Father's parental rights under the ICWA.

[13] The GAL also filed a motion to reconsider, which was denied.

STANDARD OF REVIEW

When reviewing a decision by the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). "However, this broad scope of review does not require this Court to disregard the findings of the family court" judge who is in a superior position to make credibility determinations, nor does it relieve an appellant of demonstrating the error of the family court. *Id.* at 384, 389, 709 S.E.2d at 651, 654.

LAW/ ANALYSIS

I. The ICWA

This case is unique in that it involves an Indian child,[14] and thus, any child custody proceeding must be decided within the parameters of the ICWA, 25 U.S.C. § 1901–1963 (1978).

The ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988). The evidence presented to Congress during the 1974 hearings revealed that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Id.* (citation omitted). Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children" and "[a]pproximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33 (citation omitted). At the Congressional hearings, a Tribal Chief described the primary reason for such removal as follows:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the

[14] An "Indian Child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Id. at 34–35 (citation and footnote omitted).[15]

Although Congress primarily sought to prevent the involuntary removal of American Indian or Alaska Native Indian children from their families and tribal communities and placement of these children into both foster care and adoptive placements, *see* 25 U.S.C. §§ 1912(e)–(f), 1915(b), it is clear that Congress was likewise concerned with the voluntary adoptions of Indian children. *See* 25 U.S.C. § 1915(a) ("In *any* adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (emphasis added)).

Aside from the avoidance of culturally inappropriate removal of Indian children, Congress intended the ICWA to preserve tribal sovereignty with respect to its familial affairs. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988), the only United States Supreme Court case addressing the ICWA, the Court determined that the Choctaw Indian Tribe had the sole authority to determine the adoptive placement of twin babies under the ICWA. In that case, both Indian parents desired to have their twin babies adopted by non-Indian parents. *Id.* In construing section 1911(a) of the ICWA, the Supreme Court stated:

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[15] For example, non-Indian state child welfare workers often mischaracterize the dynamics of the Indian extended family:

> An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

H.R. Rep. No. 1386, at 22 (1978) reprinted in 1978 U.S.C.C.A.N. 7530, 7533. At trial, the Cherokee Nation presented expert testimony that the involvement of extended family members in child-rearing is culturally unique to Cherokee Indians.

> [n]or can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.

Id. at 49 (internal citations and footnote omitted).[16]

Therefore, exercising its power under the Indian Commerce Clause of the United States Constitution, U.S. Const. art. 1, § 8, Congress passed the ICWA making, *inter alia*, these specific findings:

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[16] While the present case does not involve section 1911(a), which grants tribes exclusive jurisdiction to determine placement of Indian children who are either domiciled on a reservation or a ward of the tribe, the ICWA "lays out a dual jurisdictional scheme." *Holyfield*, 490 U.S. at 36. Therefore, in cases of children not domiciled on the reservation, section 1911(b), as noted in the *Holyfield* decision,

> creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

Id. In cases of concurrent jurisdiction between states and tribes, the ICWA "set[s] procedural and substantive standards for those child custody proceedings that do take place in state court." *Id.* Thus, the clear message of *Holyfield*, even though construing section 1911(a), still rings true in this child custody proceeding: the ICWA safeguards the tribe's role in child custody proceedings affecting its children and protects a tribe's strong interest in retaining its children within the tribe. *Id.* at 37.

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

Additionally, Congress declared:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id. § 1902.[17]

[17] Given that its policy conflicts with the express purpose of the ICWA, we take this opportunity to reject the "Existing Indian Family" doctrine (the "EIF"). *See* Note, *The Indian Childs Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 Cath. U. L. Rev., 511, 534 (1989) ("In light of the legislative history of the ICWA, the existing Indian family theory is thus contrary to the intent of Congress." (footnotes omitted)). The EIF is a judicially created exception to the application of the ICWA. *See In the Matter of the Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In the Matter of A.J.S.*,

Because the ICWA establishes "minimum Federal standards for the removal of Indian children from their families" and applies to any child custody proceeding involving an Indian child, *see* 25 U.S.C. §§ 1902, 1903, 1911, it is through this lens that we are constrained to decide the present controversy.

II. Transfer of Baby Girl to South Carolina

In its rendering of the facts of the case, the final order of the family court stated that if it were not for the misinformation provided to the Cherokee Nation about the birth father during the process of securing the ICPC, "[Appellants] [would not have] received permission to remove the child from Oklahoma and transport the child to their home state of South Carolina just days after her birth." This statement was neither a finding of fact nor a conclusion of law, but rather was part of the factual background provided in the order. Nevertheless, on appeal Respondents argue that South Carolina courts lack jurisdiction to determine the custody issues. In response, Appellants argue that they properly transferred Baby Girl to South Carolina, and if not, the improper transfer was forgivable or understandable. More specifically, Appellants contend the ICPC form, which did not accurately represent Baby Girl's Indian heritage, should not be construed against them because the ICPC does not protect the rights of birth parents but is designed to ensure the child's safe transfer across state lines. Thus, Appellants maintain, they have satisfied the requirements of the ICPC by providing Baby Girl with a safe and loving home. Furthermore, while Appellants do not dispute that the Cherokee Nation was never informed of Baby Girl's status as an Indian child, Appellants argue that the misspelling of Father's name was an obvious mistake, which they subsequently corrected by amending their pleadings to allege Father is a Cherokee Indian.

Appellants correctly identify the purpose of the ICPC. *See Doe v. Baby Girl*, 376 S.C. 267, 284, 657 S.E.2d 455, 464 (2008) ("[W]e note the ICPC was designed to ensure that placements for children across state lines are safe; it was not designed

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204 P.3d 543 (Kan. 2009) (holding the purpose of the ICWA "was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother"). In so holding, we join the majority of our sister states who have rejected the EIF or have since abandoned the exception. *See In the Matter of A.J.S.*, 204 P.3d at 548–49 (listing the states that have rejected the EIF).

to protect the rights of the birth parents. Certainly, there was no evidence that Baby Girl's placement with appellants had become unsafe in any way." (internal citation omitted)). However, we think Appellants' argument mischaracterizes the family court's statement. The family court did not find that Appellants violated the ICPC by *unsafely* transferring Baby Girl across state lines. Rather, Appellants' mistake when researching Father's tribal membership coupled with the subsequent omission on the ICPC form, meant that the Cherokee Nation was not properly alerted to Baby Girl's status as an Indian child; and therefore, the tribe's right to participate in Baby Girl's placement was never triggered before Appellants removed Baby Girl from Oklahoma.

While the evidence establishes Baby Girl would not be in South Carolina had the Cherokee Nation been properly noticed of her status as an Indian child, we agree with Appellants that the propriety of Baby Girl's transfer to South Carolina was litigated in the Oklahoma action when the Oklahoma court issued an order dismissing the case on jurisdictional grounds. Appellants correctly point out that in Father's Response to Appellants' Motion to Dismiss, he argued that the ICPC request form "would not have been processed by Michael Nomura of Heritage Family Services without giving notice to the Cherokee Nation had Defendant not withheld the fact that the baby was part American Indian on the form." After considering this and other arguments, the Oklahoma court issued an order dismissing the action on jurisdictional grounds, and neither Father nor the Cherokee Nation appealed that order. Therefore, because no appeal was taken from the dismissal of the action, that decision remains the law of the case. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.").

Because the Oklahoma court declined to exercise jurisdiction in this case, it is now incumbent on this Court to resolve the myriad issues concerning Baby Girl's final placement.

III. Father's Status as a "Parent" under the ICWA

Appellants claim Father does not have standing to invoke the protection of the ICWA because Father does not meet the ICWA's statutory definition of "parent" found in section 1903(9).[18] We disagree.

[18] Appellants also urge this Court to conclude that the ICWA does not apply if we conclude Father is not a "parent" as defined by the ICWA. However, the ICWA's

The family court found the ICWA was applicable, in that the Cherokee Nation is an "Indian Tribe," Baby Girl is an "Indian Child," and Father is a "parent" as prescribed in the ICWA. *See* 25 U.S.C. § 1903(4), (8)–(9).

> The ICWA defines "parent" as
>
> any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established*.

Id. § 1903(9) (emphasis added).

Appellants argue that unwed fathers must show more than "mere biology" to invoke the protections of the ICWA. The ICWA does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity; thus, Appellants argue that the ICWA defers to state law on this point. Relying on section 63-9-310(A)(5) of the South Carolina Code,[19] Appellants contend that

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applicability stems from Baby Girl's status as an Indian child under section 1903(4). *See* Note, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, *supra* note 17, at 540 ("Congress clearly intends that the only prerequisite to the operation of the ICWA be the involvement of an Indian Child in a child custody proceeding."). Thus, the ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a "parent" has no bearing on the ICWA's applicability.

[19] That section provides that an unwed father must consent to an adoption taking place within six months of a child's birth only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the

because Father neither lived with Mother for a continuous period of six months before the child's birth, nor contributed to her pregnancy-related expenses, Father does not qualify as a "parent" under the ICWA.

In making the determination that Father was a "parent" under the ICWA, the family court focused on the distinction between the requirements for an unwed father to consent to an adoption under state law versus the requirements for an unwed father to establish paternity under the ICWA, and found the "ICWA extends *greater* rights to the unwed Indian father" than state law. (emphasis added). The family court's finding and Appellants' argument collapse the notions of paternity and consent. However, the family court ultimately concluded that Father met the ICWA's definition of "parent" by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing. We agree with the family court that, by its plain terms, this is all that is required under the ICWA. Therefore, Father is a "parent" as defined by the ICWA.

IV. Termination of Parental Rights

Because we find Father is a "parent"[20] for purposes of the application of the ICWA, we now turn to whether Father's parental rights should be terminated. While the ICWA incorporates state law termination grounds, it also clearly mandates state courts consider heightened federal requirements to terminate parental rights as to ICWA parents.[21]

> birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (2010). Under state law, Father's consent to the adoption would not have been required.

[20] We note that Father is not afforded protection under the ICWA merely because he is an *Indian* parent. The ICWA also provides protection to non-Indian parents, so long as they are a parent of an "Indian Child" as defined by section 1903(4).

[21] We agree with the dissent that the ICWA does not operate to "oust" the states' jurisdiction to make custody determinations affecting Indian children. *See Holyfield*, 490 U.S. at 58 (citation omitted). However, in cases where state courts are considering the placement of an Indian child, the ICWA sets forth important procedural and substantive provisions that state courts *must* follow. *Id.* at 36.

A. Voluntary Termination

While Father's consent would not have been required under South Carolina law, *see* S.C. Code Ann. § 63-9-310(A)(5), for a parent to voluntarily relinquish his or her parental rights under the ICWA, his or her

> consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

While state termination grounds play a part in custody proceedings under the ICWA, we believe, unlike the dissent, that state law cannot operate to frustrate the clear purposes of the ICWA, as "Congress perceived the States and their courts as partly responsible for the problem [the ICWA] intended to correct." *Id.* at 44–45. In fact, to achieve its desired goal of placing Baby Girl with Appellants, the dissent utilizes reasoning expressly rejected by the *Holyfield* court in finding that a state court could not employ state abandonment principles to sidestep the ICWA's clear mandates in order to sanction an Indian mother's attempt to avoid the ICWA's domiciliary provisions to facilitate an adoption by white parents. *See id.* at 52–53 (stating this insertion of state abandonment principles "conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, *and the preferred forum for nondomiciliary Indian children*. *[State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.*" (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969–970 (1986))).

25 U.S.C. § 1913(a). Moreover, a parent may withdraw his or her consent "for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." *Id.* § 1913(c).

It is undisputed that the only consent document Father ever signed was a one-page "Acceptance of Service" stating he was not contesting the adoption, which was purportedly presented for Father's signature as a prerequisite to the service of a summons and complaint. Thus, Appellants did not follow the clear procedural directives of section 1913(a) in obtaining Father's consent. Moreover, even if this "consent" was valid under the statute, then Father's subsequent legal campaign to obtain custody of Baby Girl has rendered any such consent withdrawn. Therefore, neither Father's signature on the "Acceptance of Service" document, nor his stated intentions to relinquish his rights, were effectual forms of voluntary consent under the ICWA.

B. Involuntary Termination

Thus, we may only grant Appellants' adoption decree with respect to Father in the absence of his voluntary consent if Appellants can establish grounds for involuntarily terminating Father's parental rights under state law ***and*** the ICWA.

Under the ICWA, in addition to any state law grounds for termination, Appellants must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). Moreover,

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. § 1912(f) (emphasis added).

1. Active Remedial Measures

To effect termination under the ICWA, the parties seeking termination "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

Appellants admit that the provision has not been satisfied; however, they seek to avoid the remedial measures requirement by claiming that any efforts to rehabilitate Father would be futile. We find Appellants' futility argument insufficient to override the clear mandate of section 1912(d) under these facts.

Even assuming the dissent is correct in finding that Father did not want custody of Baby Girl and did not desire to act as a parent to her, straightforward application of the language of section 1912(d) requires that remedial services be offered to address any parenting issues to prevent the breakup of the Indian family—for example, by attempting to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent.[22] In this case, far from offering such services, Appellants—perhaps understandably, given the emotionally wrenching circumstances—have actively sought to prevent Father from obtaining custody of Baby Girl since she was four months old. Father, despite some early indications of possible lack of interest in Baby Girl, not only reversed course at an early point but has maintained that course despite this active opposition. Therefore, a finding on these facts that the remedial measures mandated by the ICWA may be waived would be an unwarranted substitution of this Court's preferences for the clear dictates of statutory law.[23]

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[22] The dissent rightly points out that, in most termination cases, the *state* initiates remedial or rehabilitative efforts after *removing* a child from parental custody. However, the dissent acknowledges that "such services may also be offered to parents proactively to prevent a child's removal in the first instance." The ICWA does not distinguish removal situations from adoptive placements. Thus, had the tribe been properly noticed of the adoption from the outset, it would have been the tribe's prerogative to take remedial measures to reunify the Indian family.

[23] We note that even under South Carolina law, we do not terminate parental rights merely because a parent is not a perfect parent. *See Hooper v. Rockwell*, 334 S.C. 281, 296, 513 S.E.2d 358, 366 (1999). Thus, only where "reunification is not possible or appropriate" may a party move to terminate the parent's rights by

2. Likelihood of Serious Emotional or Physical Damage

Section 1912(f) requires a qualified expert to provide evidence satisfying this Court beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The family court applied a clear and convincing standard of review, pursuant to *Santosky v. Kramer*, 455 U.S. 745 (1982), even though the instant case deals with termination of parental rights under the ICWA. While the family court misinterpreted *Santosky*,[24] considering it found Appellants failed to

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proving a basis for termination by clear and convincing evidence. *Id.*; *see also Richland Cnty. Dep't of Soc. Servs. v. Earles*, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998) (citing *Greenville Cnty. Dep't of Soc. Servs. v. Bowes*, 313 S.C. 188, 437 S.E.2d 107 (1993)). Our cases demonstrate that when a parent consciously refuses to support, visit, or otherwise make a suitable environment for their child, termination is appropriate, but even in extreme cases, we seek to rehabilitate the parent either by ordering them to pay support, addressing any substance abuse issues, or instituting a treatment or placement plan. *See S.C. Dep't of Soc. Servs. v. M.R.C.L.*, 393 S.C. 387, 390–95, 712 S.E.2d 452, 454–57 (2011) (terminating parental rights as to parents who tested positive for crack cocaine, failed to complete drug and alcohol testing, and refused to comply with court ordered child support); *Hooper*, 334 S.C. at 296–301, 513 S.E.2d at 366–69 (terminating parental rights based on mother's severe abuse and neglect of her child, refusal to satisfy court ordered support obligations, and failure to comply with at least twelve treatment plans designed to remedy the conditions which led to her child's removal); *Earles*, 330 S.C. at 32–34, 496 S.E.2d at 868–70 (terminating parental rights after mother's home could not be made safe within twelve months due to mother's physical and sexual abuse of her two children over the course of four years); *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 48, 413 S.E.2d 835, 835 (1992) (terminating parental rights after mother failed to support child by making only three court ordered child support payments over a one-year period, attending only thirty-five of ninety-four visits scheduled with the child over a four-year period, and failing to visit the child at all for a period of five months); *Dep't of Soc. Servs. v. Phillips*, 365 S.C. 572, 580, 618 S.E.2d 922, 926 (Ct. App. 2005) (terminating parental rights after children were exposed to sexual behaviors between mother and father and mother failed to remedy her drug addiction problem during the year the children were removed from the home).

[24] In *Santosky*, the Supreme Court held that the *minimum* burden of proof allowable

meet even the lower burden, we agree that Appellants have not satisfied their burden of proving that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt.

The family court admitted the testimony of Dr. Bart Saylor as Appellants' expert witness to demonstrate the likelihood of damage to Baby Girl if removed from Appellants' custody. Dr. Saylor, a licensed clinical psychologist and designated forensic psychologist, conducted a bonding evaluation with Appellants and Baby Girl, but had no contact with Father. Dr. Saylor only considered the effect of severing Baby Girl's bond with Appellants and did not review any information about Father's capacity to form a loving relationship with Baby Girl. Although Dr. Saylor admitted he did not have specific training in Cherokee child rearing practices, he did not believe knowledge of Indian culture was necessary to evaluate the bonding between Baby Girl and Appellants. Dr. Saylor testified that Appellants and Baby Girl had a very strong bond, and therefore,

> I believe that at this point removal from the one and only parents, the secure, the bonded relationship, the one and only that she has with these parents at this age would be very traumatic, would be very disruptive. It could produce depression, anxiety, it could cause disruption in her capacity to form relationships at a later age. It would be extremely stressful to her. It would be taking away everything that she had come to know and count on for her comfort and security and replace it with something that would be completely unfamiliar and strange to her.

Dr. Saylor confirmed that he believed beyond a reasonable doubt that Baby Girl's removal from Appellants would cause serious emotional harm. However, Dr. Saylor agreed that even though a child may have bonded successfully one time, a child can bond again. Finally, he could not say what long-term harm would result from Baby Girl's removal.

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in a state-initiated termination of parental rights proceedings was "clear and convincing evidence." 455 U.S. at 769. Any lesser standard would deprive a parent of due process under the law. *Id.* While the *Santosky* court mentioned that states might find the "beyond a reasonable doubt" standard utilized in the ICWA an "unreasonable barrier to state efforts to free permanently neglected children for adoption," the thrust of the *Santosky* decision was to create a minimum, not a maximum, burden of proof in termination of parental rights proceedings.

Father's expert, Tiffany Dunaway, a Child Welfare Specialist with the Cherokee Nation who has worked with between ten and fifteen transitioned children the same age as Baby Girl, conducted a home study on Father's family while Father was stationed on active duty in Iraq. Dunaway reported that the family home was clean, safe, and appropriate and that there were many acres of land surrounding the home for outdoor play. Based on her interaction with Father's parents, Dunaway opined, "this child will thrive, I don't have any doubt. I know we can't predict the future, but I think that she will be safe . . . . She'll know who she is and where she came from. She'll be very loved." Under cross-examination, Dunaway admitted that some transitioned children have difficulties, especially older children, but testified that these children have thrived overall. Dunaway admitted that she had never met Baby Girl, nor had she witnessed Father interact with a child the same age as Baby Girl. Dunaway's opinion about the ability of the child to thrive was based on anecdotal experience, and she could not produce any studies to show that transitioned children thrive in the long-term.[25]

In its final order, the family court noted that Dr. Saylor could not render an opinion about the long-term effects of severing the bond between Appellants and Baby Girl, although he testified that in the short-term it would be very traumatic. The family court found persuasive the testimony that Father was a good father who enjoyed a close relationship with his other daughter and Dunaway's testimony that children around Baby Girl's age tended to thrive when reunited with their Indian parents. Therefore, the family court concluded that Appellants did not prove that "the child will suffer physical or emotional damage if returned to the custody of her biological father," and as a result, "the ICWA prohibits termination of his parental rights."

[25] The dissent finds Dunaway's opinion "lacks credibility" as to whether Baby Girl would suffer harm if removed from Appellants' custody, citing testimony in which Appellants' counsel challenged Dunaway to provide statistics that children placed in tribal homes have not suffered serious harm, rather than basing her assertions on her personal experience as a case worker. We disagree that this exchange reflects negatively on Dunaway's credibility, as she testified to her personal experience in transitioning children. In any event, it was Appellants' burden to establish a likelihood of serious emotional or physical harm beyond a reasonable doubt if Baby Girl were placed with Father.

Appellants argue that section 1912(f) does not require a child to suffer long-term harm. Appellants urge this Court to find severe emotional harm likely based solely on the expected harm of severing Baby Girl's bond from the only parents she knows.

Initially, we note that the plain language of section 1912(d) requires a showing that the transferee parent's prospective legal and physical custody is likely to result in serious damage to the Indian child, not that the Indian child's *removal* from the custody of the adoptive parents will likely result in emotional damage, which in this case Appellants' expert admits is likely to be temporary.[26]

Absent any evidence to the contrary, we hold that Appellants' reliance on bonding, without more, cannot satisfy their high burden of proving that Father's custody of Baby Girl would result in serious emotional or physical damage to her. While we are conscious that any separation will cause some degree of pain, we can only conclude from the evidence presented at trial that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her. Furthermore, Father instituted child custody proceedings when Baby Girl was four months old. *See Rick P. v. State, OCS*, 109 P.3d 950, 958 (Alaska 2005) (footnote omitted) ("Our cases indicate that a parent's willingness to resume parental duties does not 'remedy' abandonment if this change of heart comes too late for the parent to bond with the child during the critical early phase of the child's life."). Because Father intervened at this early point and most of the bonding occurred during the course of this litigation, it should not be a factor that weighs against Father. *See Holyfield*, 490 U.S. at 53–54 (1989) ("We are not unaware that over three years have passed since the twin babies were born and

[26] Even in cases of the *voluntary* relinquishment of parental rights, the parent has the ability under the ICWA to renege on his or her consent "*for any reason at any time*" before the entry of the final decree of termination or adoption. *See* 25 U.S.C. § 1913(c) (emphasis added). Thus, the ICWA gives conclusive preference to parental custody over custodial stability. Indeed, the dissent's dependence on Father's perceived lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for termination his rights as a parent is not a valid consideration under the ICWA for this same reason. Because the ICWA permits a parent to revoke voluntary consent up until the final adoption decree for any reason at all, whatever Father's deficit in expressing interest in Baby Girl, it clearly falls short of consent to termination, and even then, his rights would not be prejudiced until a final decree.

placed in the [adoptive] home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have [three years ago]. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain . . . . Had the mandate of the ICWA been followed [three years ago], of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" (citation omitted)). Thus, the bonding that occurred during litigation, without more, cannot form the basis for terminating Father's parental rights.

3. State Statutory Grounds for Termination

Because we have found that Appellants have not met their burden of proof to establish termination under the ICWA, we need not address the grounds for termination elucidated in section 63-7-2570 of the South Carolina Code. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (appellate court need not discuss remaining issues when determination of prior issue is dispositive).

4. Best Interests of the Child

South Carolina courts have a long history of determining custody disputes based on the "best interests of the child." *See Hooper v. Rockwell*, 334 S.C. 281, 295, 513 S.E.2d 358, 366 (1999) ("This Court long has tried to decide all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" (quoting *In Re Doran*, 129 S.C. 26, 31, 123 S.E. 501, 503 (1924))). This important history is not *replaced* by the ICWA's mandate. *See In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests.") Instead, "[w]ell-established principles for deciding custody matters should further [the ICWA's] goals." *Id.* (quoting *In re Mahaney*, 51 P.3d 776, 785 (Wash. 2002)).

Where an Indian child's best interests are at stake, our inquiry into that child's best interests must also account for his or her status as an Indian, and therefore, we must also inquire into whether the placement is in the best interests of the *Indian child*. *See* 25 U.S.C. § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of

minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."). In making this determination, the child's relationship with his or her tribe is an important consideration, as the ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, 490 U.S. at 50 n.24 (quoting *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. 1981)).[27] Thus, Baby Girl, as an Indian child, has a strong interest in retaining ties to her cultural heritage. *See id*. at 49–50 ("In addition, it is clear that Congress's concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture.").[28]

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[27] While the *tribe* ultimately decided to return the *Holyfield* children to the adoptive parents, the dissent fails to account for the marked difference between the facts of the *Holyfield* custody dispute and those of the present controversy, and the actual basis for the tribe's decision: the children had been in the care of the adoptive parents for four years; they did not understand the Choctaw language, which was the predominant language spoken in most Choctaw homes; and no adoptive tribal home was waiting for the children, so that interim placement in foster care would have been necessary. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 17–18 (2008). Moreover, the tribal court ordered that the children maintain contact with their Choctaw extended family and tribe, and the placement was within the same state. *Id.* at 18; *Holyfield*, 490 U.S. at 40. Thus, the children's and tribe's respective interests in maintaining cultural ties were still protected.

[28] The Record establishes that Father's family has a deeply embedded relationship with the Cherokee Nation. For example, not only does the Record indicate that Father and his family are proud of their heritage and membership in the Wolf Clan, the home study performed on Father's parents states the following:

> [Father's father] is Cherokee Indian. He grew up knowing he was Cherokee and being proud of who he was. [Father's parents] . . . prepare the following traditional foods in their home: grape dumplings, buckskin bread, Indian cornbread, Indian tacos, wild onions, fry bread, polk salad and deer meat. [Father's mother] state[d] she cooks these foods in her home on a regular basis and all of her

The family court order stated, "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case, I find no conflict between the two."[29] Likewise, we cannot say that Baby Girl's best interests are not served by the grant of custody to Father, as Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family. Moreover, in transferring custody to Father and his family, Baby Girl's familial and tribal ties may be established and maintained in

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> children have eaten these items.
>
> [Father's parents] attend the Cherokee Holiday in Tahlequah, Oklahoma[,] when they can and participate in eating traditional foods, viewing the arts and crafts and watching the traditional games. [Father's father] participates in voting in the Cherokee elections[,] . . . . took part in learning about the Cherokee culture when his children were in high school by learning to make Indian crafts and learning to play the drum[, and] . . . . is sometimes seen at the Nowata Indian Health Clinic but receives the majority of his health care from the Veterans hospital. He claims his family is from the Wolf Clan, and he has been to as well as participated in stomp dances.
>
> [H]is family had Indian land which was located in Pryor, Oklahoma and Cayuga, Oklahoma. He claims to have very traditional ties with his extended family and considers geneology [sic] a hobby by researching his Cherokee culture. [Father's parents] have many Native American items in their home. Decorative Native American pieces are scattered throughout their home in nearly every room.

Thus, the Record demonstrates that Father and his family are well-positioned to introduce Baby Girl to her Indian heritage.

[29] The dissent states: "It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests." We do not read the family court's order to be based on that erroneous assumption. Plainly, the family court determined that there was no conflict between Father's best interests and Baby Girl's best interests. *See* S.C. Code Ann. § 63-9-20 (stating that in adoption proceedings "when the interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child.").

furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe. *See Holyfield*, 490 U.S. at 37.

C. Preferential Placement

Furthermore, even if we were to terminate Father's rights, section 1915(a) of the ICWA establishes a hierarchy of preferences for the adoptive placement of an Indian child.[30] *See* 25 U.S.C. 1915(a). That section provides: "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (emphasis added). While not binding, the Bureau of Indian Affairs Guidelines concerning good cause state that courts may look to the "request of the biological parents or the child when the child is of sufficient age," the "extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness," and the "unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria" when deciding to deviate from the stated preferences. 44 Fed. Reg. 67584, 67954–95 (1979). The party seeking to deviate from the preferences bears the burden of demonstrating that good cause exists. *Id.*

From the outset, rather than seek to place Baby Girl within a statutorily preferred home, Mother sought placement in a non-Indian home.[31] In our view, the ensuing

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[30] *Holyfield* describes this provision as "[t]he most important substantive requirement imposed on state courts" under the ICWA towards creating a federal policy that an Indian child should remain with his or her tribe whenever possible. *Holyfield*, 490 U.S. at 36, 37 (citation omitted).

[31] The biological parents' placement preference is not the guiding consideration under the ICWA. Rather, the ICWA assigns great weight to tribal preference when placing Indian children. *See Holyfield*, 490 U.S. at 52–53 ("The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive

bond that has formed in the wake of this wrongful placement cannot be relied on by Appellants and the dissent to deviate from the ICWA's placement preferences.

While the best interests of the child standard is always a guiding consideration when placing a child, any attempt to utilize our state's best interests of the child standard to eclipse the ICWA's statutory preferences ignores the fact that the statutory placement preferences and the Indian child's best interests are not mutually exclusive considerations. Instead, the ICWA presumes that placement within its ambit is in the Indian child's best interests. *See In re C.H.*, 997 P.2d 776, 784 (Mont. 2000) ("[T]he best interests of the child . . . is an improper test to use in ICWA cases *because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences*. To allow emotional bonding—a normal and desirable outcome when, as here, a child lives with a foster family for several years—to constitute an 'extraordinary' emotional need [comprising good cause to deviate from the preferences] would essentially negate the ICWA presumption." (emphasis added)). Therefore, "the unfettered exercise of [state] discretion poses a real danger that the ICWA preferences will be overridden upon the slightest evidence favoring alternative placement." Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 645 (2002). Thus, the bonding that has occurred between Appellants and Baby Girl has not satisfied this Court that custody with Father is against Baby Girl's best interests. For this reason, under these facts, we cannot say that bonding, standing alone, should form the basis for deviation from the statutory placement preferences.

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forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969–970 (1986))); Roger A. Tellinghuisan, *The Indian Child Welfare Act of 1978: A Practical Guide With [Limited] Commentary*, 34 S.D. L. Rev. 660, 666 (1989) ("*Holyfield* also carries the clear message that [the ICWA] would be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents . . . .").

CONCLUSION

We do not take lightly the grave interests at stake in this case. However, we are constrained by the law and convinced by the facts that the transfer of custody to Father was required under the law. Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl. Thus, it is with a heavy heart that we affirm the family court order.

Because this case involves an Indian child, the ICWA applies and confers conclusive custodial preference to the Indian parent. All of the rest of our determinations flow from this reality. While we have the highest respect for the deeply felt opinions expressed by the dissent, we simply see this case as one in which the dictates of federal Indian law supersede state law where the adoption and custody of an Indian child is at issue. Father did not consent to Baby Girl's adoption, and we cannot say beyond a reasonable doubt that custody by him would result in serious emotional or physical harm to Baby Girl. Thus, under the federal standard we cannot terminate Father's parental rights. For these reasons, we affirm the family court's denial of the adoption decree and transfer of custody to Father.

AFFIRMED.

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

JUSTICE KITTREDGE: I dissent. I would reverse and remand for the entry of an order terminating the father's parental rights and approving the adoption. I would further order the immediate return of the minor child to the adoptive parents.

Today the Court decides the fate of a child without regard to *her* best interests and welfare. I disagree that Congress intended the Indian Child Welfare Act[32] (ICWA or Act) to be applied in derogation of the child's best interests and welfare. *See In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests"); *In re Mahaney*, 51 P.3d 776, 785 (Wash. 2002) (observing that ICWA's applicability "should not signal to state courts that state law is replaced by the act's mandate"). ICWA envisioned a symbiotic relationship between the additional protections of the Act and well-established state law principles for deciding custody matters in accordance with the best interests of the child. The simple fact that a child is an "Indian child" is not dispositive of the placement question. In my judgment, Congress intended ICWA-controlled cases to be decided based on a preference for placement with an Indian family, not an irrebuttable presumption mandating an Indian family placement. Even in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988), the only case in which the United States Supreme Court has addressed ICWA, the tribal court, on remand, ordered child placement with the non-Indian adoptive parent. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 17-18 (2008).

In my judgment, under our *de novo* review, the unique facts of this case manifestly overcome the statutory placement preference and compel placement of this child with the adoptive couple. The facts of a case cannot be ignored. With great respect for the majority, I believe it has recast the facts to portray Father in an undeserved favorable light, thus creating the illusion that Father's interests are in harmony with the best interests of the child. The reality is Father purposely abandoned this child and no amount of revisionist history can change that truth. As for the protracted procedural history, the Court blames the birth mother and the

[32] "ICWA establishes Federal minimum standards for the removal of Indian children from their homes and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." 25 U.S.C. § 1902.

adoptive couple—everyone except the Father, whose vanishing act triggered the adoption in the first instance. As I view the evidence, the interests of Father and Respondents are directly contrary to the best interests of this child. I believe the law, including ICWA, supports my view that the best interests of the child must prevail.

I.

STANDARD OF REVIEW

This Court's standard of review in an appeal from the family court is *de novo*. S.C. Const. art. V, § 5 ("The Court shall have appellate jurisdiction . . . in cases of equity, and in such appeals they shall review the findings of fact as well as the law . . . ."); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). As such, "the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Lewis*, 392 S.C. at 384, 709 S.E.2d at 651. Although we generally defer to findings of fact by the family court due to its ability to assess the demeanor and credibility of witnesses, our standard of review does not require any deference. Having carefully reviewed the voluminous record, with great respect for the able family court judge, I am firmly persuaded that the family court judge erred in her factual findings, especially in the application of the facts to the law. Determining the proper interpretation of a statute is a question of law for our plenary review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *see also E.D.M. v. T.A.M.*, 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992) (noting the appellate court has authority to correct errors of law in appeals from family court orders).

II.

FACTS

At the center of this controversy is a child ("Baby Girl") born to unwed parents on September 15, 2009. Before her birth, the biological parents ("Mother" and "Father") were engaged to be married but were not living together. In addition to Baby Girl, Father has a child from a previous relationship who was six years old at the time of the engagement. Father pays support for his other child through a deduction from his military pay; however, those payments began only after that

child's mother brought an action against him in family court because he accrued an estimated $11,000 child support arrearage.[33]

When Mother and Father were dating, Father was serving in the military and stationed in Fort Sill, Oklahoma, approximately four hours away from his hometown of Bartlesville, Oklahoma, where his parents and Mother lived with her two other children from a previous relationship. Father visited Mother in Bartlesville during his fourteen-day break in December 2008, and although he was permitted to leave the military base on weekends, he seldom made the four-hour drive from Fort Sill to Bartlesville.[34]

In January 2009, Mother told Father they were expecting a child.[35] Before her first prenatal doctor's appointment, Mother asked Father for financial assistance. Although he acknowledged paternity from the outset, Father refused to help financially unless he and Mother were married. At trial, Father was asked, "But she had to marry you before you felt you'd be responsible as a father?" He answered, "Correct." After her prenatal appointment, Mother told Father the baby's due date was in September 2009.

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[33] There are allegations that Father has another child; however he denies paternity and does not support that child.

[34] Father explained, "Being four hours away I was able to come home on the weekends, but I didn't make the right amount of money, you know, to be sufficient enough for me to come home, you know, whenever I wanted to." The record reveals Father's annual salary was $20,227 in 2009 and $23,697 in 2010. Because of Father's military service, he was not required to pay income taxes when in active service. Additionally, his housing and food expenses were covered by the military, and Father admitted virtually all of his salary was disposable income. The only recurring expenses Father mentioned were $20-25 per week for cigarettes and going to bars "drinking with [his military] buddies, joking and having a good time."

[35] There is conflicting evidence as to Father's reaction to this news. Father testified he was "very happy" to learn they were expecting a child. However, Mother testified Father "didn't really have a reaction" and "every time [she] would bring it up, he really didn't say a whole lot." I find Mother's testimony more credible, as Father's lack of interest in his child and refusal to provide Mother any support strongly corroborates her testimony as to Father's reaction to learning of the pregnancy.

In the months thereafter, despite the Court's attempt to recast the facts in a light more favorable to Father, he wanted nothing to do with the pregnancy and related responsibilities. The couple's relationship became "extremely distant" and by June 2009, they were no longer speaking to one another.[36]

Throughout Mother's pregnancy, Father never offered to pay any of her medical or living expenses or accompany her to any doctor's visits, even though he admitted he was capable of doing so. According to Father, he would have given Mother support, but he "never got[] anything from the state of Oklahoma for child support." Eventually, with Father abandoning parental responsibilities, Mother broke off the relationship. Shortly thereafter, Mother sent Father a text message inquiring whether he wanted to support her and their child or relinquish his parental rights. Father sent a return text message to Mother expressly indicating his desire to give up his parental rights.

Father later claimed he would not have "given up" his parental rights had he known Mother planned to place the baby for adoption. However, during Father's cross-examination the following exchange took place:

> Q. But you were prepared to sign all your rights and responsibilities away to this child just so as long as the mother was taking care of the child?
>
> A. That's correct.
>
> Q. And you would not be responsible in any way for the child support or anything else as far as the child's concerned?
>
> A. Correct.
>
> Q. That's correct? Is that conducive to being a father?

[36] According to the Guardian *ad Litem*'s report, "Phone records obtained by the Guardian confirm many texts coming into [Father's] telephone from the Birth Mother's telephone number through the end of May," despite Father's claim that Mother severed contact and would not respond to his repeated attempts to reach her.

A. I don't believe so.

Mother was already struggling financially as a single mother of two children, and she knew it would be even more difficult to provide for a third child without help from Father. Mother testified she "wanted [her] little girl to have a chance," and she believed an adoption plan would be in the best interests of Baby Girl. Due to Father's stated disinterest in supporting or rearing the child, coupled with Mother's belief that Father's verbal and written expressions effectively relinquished his parental rights, she did not inform Father that she planned for the child to be adopted.

In June 2009, Mother was introduced to Adoptive Couple ("Appellants") after she contacted an adoption agency in Oklahoma. Appellants reside in Charleston, South Carolina, and have been married for six years. The couple received infertility treatment for years and underwent seven unsuccessful in vitro fertilization attempts before deciding to adopt. Mother testified that she considered other families residing in Oklahoma, but she ultimately selected Appellants as an adoptive couple because they had values similar to her own and could provide Baby Girl a stable and loving home. In the weeks leading up to Baby Girl's birth, Appellants spoke to Mother weekly and traveled to Oklahoma to visit Mother in August 2009. Appellants helped support Mother during the last few months of her pregnancy and shortly after Baby Girl's birth.

Before she gave birth, Mother informed the adoption agency she had Cherokee heritage and that she believed Father was an enrolled member of Cherokee Nation. Mother provided her attorney with Father's correctly spelled name and location and what she believed to be his date of birth.[37] Mother's attorney forwarded this information to Cherokee Nation in a letter dated August 21, 2009. The letter also stated Father was believed to be an enrolled member and inquired whether the tribe would consider Baby Girl to be an "Indian Child" under ICWA. However, in the letter, Father's first name "Dusten" was misspelled "Dustin," and his date of birth was not accurate. Based on that incorrect information, Cherokee Nation replied in a letter dated September 3, 2009, that the unborn baby could not be traced to tribal records and therefore would not be considered an "Indian Child." However, Cherokee Nation's letter also stated, "This determination is based on the above listed information exactly as provided by you. Any incorrect or omitted family documentation could invalidate this determination." Mother testified she told her

[37] Mother testified she knew Father's birthday was in October and that he was older than she was, so Father's year of birth was sometime before 1982.

attorney the letter from Cherokee Nation was wrong and that Father was an enrolled member of the tribe; however, Mother admitted she did not know Father's correct birth date.[38]

Appellants were present for Baby Girl's birth on September 15, 2009. Appellants were in the delivery room when Mother gave birth to Baby Girl. Adoptive Father cut the umbilical cord.

Father, however, did not appear at the hospital or attempt to contact Mother while she was in the hospital.[39] The following day, Mother signed forms relinquishing her parental rights and consenting to the adoption of Baby Girl. Baby Girl was placed with Appellants shortly after her release from the hospital. Eight days after her birth, Appellants returned to South Carolina with Baby Girl.[40]

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[38] A trial, Cherokee Nation presented testimony of one of its employees as an expert in Cherokee Indian culture and Cherokee child-rearing. The expert testified that Cherokee names are often passed down and many members have the same name. According to the expert, the tribe uses "birth date, name, *something to get us somewhere close* to see if a person is [an] enrolled [member]."

At oral argument, counsel indicated Cherokee Nation has eight members with the first name "Dustin" or "Dusten" with the same last name as Father. It is unclear how many of those eight members have the same middle name as Father or live in Fort Sill, Oklahoma; however, when asked how many were born in the same month, counsel replied that she did not know, but that she "guessed" Father was the only one. Counsel further explained, "[Cherokee Nation] receive[s] possibly thousands of inquiries a year. Everyone in the country claims to be Cherokee. We can't track down every letter we get." Notwithstanding this assertion by counsel, the record includes correspondence from Cherokee Nation demonstrating that the tribe indeed responds to *some* inquiries with a follow-up request for additional information.

[39] Father admitted he knew the expected due date and that there was only one hospital available for the birth. However, there was no evidence Father attempted to be present.

[40] A prerequisite to Appellants removing the child from Oklahoma was receiving consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children (ICPC). Mother provided the documentation; however, the documentation reflected the child's race as "Hispanic" instead of "Native

Although he was aware of the anticipated due date, Father made no attempt to contact Mother during the months after she gave birth to ask about Baby Girl, to request visitation, or to offer any gifts or financial support. According to Father's mother, she called Mother several times shortly after Baby Girl's birth to let her know the family had some money and some gifts for the baby, but Mother did not return her phone calls. Mother denied receiving calls or visits from any of Father's family members.

Appellants initiated adoption proceedings in Charleston, South Carolina, on September 18, 2009.

Because Father had evaded all parental responsibilities, he did not learn that Baby Girl was placed for adoption until he was served with a copy of Appellants' adoption complaint on January 6, 2010, a fact that the majority somehow believes inures to Father's benefit.[41] Father signed an acceptance of service stating that he was the father of Baby Girl, that he was not contesting the adoption, and that he waived the thirty-day waiting period and notice of hearing.

On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings under the Servicemember's Civil Relief Act and three days later filed a summons and complaint in an Oklahoma district court to establish paternity, child custody, and support of the child. Father's complaint initially alleged that "[n]either parent nor the children [sic] have [sic] Native American blood. Therefore the Federal Indian Child Welfare Act . . . do[es] not apply." The complaint was amended on April 19, 2010, to allege "[b]oth the father and the child have Native American blood. Therefore the Federal Indian Child Welfare Act . . . do[es] apply." The Oklahoma complaint named Appellants and Mother as defendants. Father departed for Iraq on January 18, 2010, with his father acting as

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American." Notably, this document was completed on September 21, 2009, after receiving a letter dated Septemer 3, 2009, from Cherokee Nation indicating Baby Girl was not an Indian child and ICWA was not applicable. After the child was discharged from the hospital, Appellants stayed in Oklahoma for approximately eight days until they received ICPC approval.

[41] The complaint was served on Father just days before he was deployed to Iraq for approximately twelve months. Father returned from Iraq on December 26, 2010.

power of attorney while he was away. On June 28, 2010, the Oklahoma action was dismissed on jurisdictional grounds, as South Carolina was the child's home state.[42]

At some point during the pendency of the Oklahoma action, Cherokee Nation identified Father as a registered member and determined that the child was an Indian Child, as defined by ICWA.[43] On March 30, 2010, Appellants amended their South Carolina pleadings to acknowledge Father's membership in Cherokee Nation. On April 7, 2010, Cherokee Nation filed a Notice of Intervention in the South Carolina action.

The case was tried in September of 2011. The interest of Baby Girl was represented by a Guardian *ad Litem*, who recommended that Father's rights be terminated and the adoption be approved.[44] On November 25, 2011, a final order was issued, in which the family court found ICWA applied and further that Father's

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[42] Respondents challenge South Carolina's jurisdiction to hear this case, which is an improper effort to further litigate Father's unsuccessful Oklahoma action. Yet this Court accepts Respondents' invitation to weigh in on the Oklahoma action and castigate Appellants. No appeal was taken from the dismissal of the Oklahoma action, rendering the Oklahoma dismissal the law of the case. *See Ulmer v. Ulmer*, 369 S.C. 486, 632 S.E.2d 858 (2006) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal). Before acknowledging this issue is not before us, the majority's superfluous discussion attributes nefarious motives to Appellants and refers to Baby Girl's transfer to South Carolina as improper. Again, Father, who ran away from parental responsibilities, avoids any responsibility. I do not understand how an unwed birth father who willfully abandons his child escapes even the slightest blame.

[43] An Indian child means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

[44] I note the parties agreed that the family court would not consider the portions of the Guardian *ad Litem*'s report going to the ultimate issues to be decided—specifically, the aspects of the report concerning the child's best interests and custody recommendation. Likewise, I do not consider the Guardian *ad Litem*'s ultimate recommendations and emphasize that my findings of Baby Girl's best interests are reached separately and independently.

parental rights should not be terminated under South Carolina law. The family court denied Appellants' petition for adoption and transferred custody of Baby Girl to Father.

III.

LAW/ANALYSIS

Based upon my *de novo* review of the record, the family court's findings are affected by several reversible errors. Specifically, the family court erred in finding Appellants failed to meet their burden of proving grounds for termination of Father's parental rights. As discussed in detail below, it was error to conclude that Father's failures to support and visit were not willful under state law. Father knowingly abandoned his parental responsibilities in every respect, including his willful failure to contribute any support until token efforts were made well after this adoption proceeding was underway. Yet, state law is not the only relevant consideration; rather, state law must be considered along with the federal mandates superimposed by ICWA.

A.

Overview of ICWA

ICWA establishes "minimum Federal standards for the removal of Indian children from their families," and applies to any child custody proceeding involving an Indian child. *See* 25 U.S.C. §§ 1902, 1903, 1911. Congress enacted ICWA in response to the "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Holyfield*, 490 U.S. at 32. The legislative history of ICWA indicates Congress was concerned with "'the wholesale removal of Indian children from their homes, the most tragic aspect of Indian life today.'" *Id.* (quoting Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler)). As one Tribal Chief testified, "Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and

at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id*. at 34 (quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association)).

Thus, ICWA was intended to preserve tribal sovereignty and avoid the culturally inappropriate removal of Indian children based on the tendency of "many social workers, ignorant of Indian cultural values and social norms . . . [to] discover neglect or abandonment where none exists." H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533.[45] Accordingly, the express purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

However, almost forty years later, in struggling with the human reality of implementing ICWA, courts frequently face competing tensions concerning an individual child's personal and cultural identity. "The grand narrative underlying the Act, while born of a grim history of governmental destruction of Indian tribes, families, and culture, sometimes has little direct correlation with the actual circumstances of individual Indian children before state court judges." Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New*

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[45] The House Report describes a particular aspect of Indian culture that is frequently misunderstood:

> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533. At trial, Cherokee Nation presented expert testimony that the involvement of extended family members in child-rearing is an aspect that is culturally unique to Cherokee Indians.

Understanding of State Court Resistance, 51 Emory L.J. 587, 596 (2002). "In any child welfare case, it is essential that the decisionmaker be able to exercise discretion in arriving at a disposition that is most likely to protect the future welfare of the unique child." *Id.* I would adopt this well-reasoned approach and reject the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child.[46] I, unlike the majority, construe ICWA as allowing appropriate consideration of compelling circumstances in a particular case which bear on the individual child's physical, psychological, and social welfare.

B.

Applicability of ICWA

The family court found ICWA was applicable. Specifically, the family court found Cherokee Nation is an "Indian Tribe," Baby Girl is an "Indian Child," and Father is a "parent," as defined by ICWA. *See* 25 U.S.C. §§ 1903(4), (8)-(9).

Appellants do not challenge the family court's findings that Cherokee Nation is an "Indian Tribe" and Baby Girl is an "Indian Child." However, Appellants argue the family court erred in finding Father satisfies the ICWA definition of a "parent." ICWA defines a "parent" as:

> any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions

[46] Were the issue before this Court, I would reject the existing Indian family doctrine based on ICWA's clear statutory language in accordance with the modern trend. *See, e.g., In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982) ("It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."), *overruled by In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (abandoning existing Indian family doctrine based on a finding it was "at odds with the clear language of ICWA"). There is scant evidence that Father ever established significant social or cultural ties with Cherokee Nation. I give the absence of such evidence no weight. The majority gives great weight to paternal grandparents' ties with the Cherokee Nation.

> under tribal law or customs. *It does not include the unwed father where paternity has not been acknowledged or established.*

25 U.S.C. § 1903(9) (emphasis added).

Appellants argue the text, legislative history, and policy underlying ICWA demonstrate that unwed fathers must show more than "mere biology" to invoke the protections afforded to a parent under ICWA. ICWA does not expressly establish how an unwed father must acknowledge or establish paternity. According to Appellants, courts should look to the particular state's statutory prescription for when a father's paternity has been acknowledged.

Looking to South Carolina law, Father's consent to the adoption would not be required because he neither lived with Mother for a continuous period of six months before birth, nor contributed to her pregnancy-related expenses. As explained more fully below, I would reverse the family court in this regard.[47]

[47] The Court could affirm the family court without upholding what I believe to be an egregiously erroneous determination that Father's rights would not be terminated under state law. By sidestepping the clear error of the family court, that is precisely what the Court has done. The indisputable fact is that Father provided **no** support to Mother during the pregnancy. Parental rights have been terminated under South Carolina law where the biological parent did far more to grasp the opportunity of parenthood than Father. *See Roe v. Reeves*, 392 S.C. 143, 708 S.E.2d 778 (2011) (finding father did not undertake a sufficient effort to make the sacrifices fatherhood demands where he bought pregnant mother sweatpants and t-shirt and offered to give mother $100, even though he attempted to visit mother in the hospital and maintain contact with mother after birth); *Doe v. Roe*, 369 S.C. 351, 631 S.E.2d 317 (Ct. App. 2006) (finding father's contributions to pregnant mother failed to meet general minimum standards of timely grasping the opportunity to assume full responsibility for his child where father contributed approximately $50, cigarettes, a pillow, and a few trips to fast food restaurants); *cf. Abernathy v. Baby Boy*, 313 S.C. 27, 437 S.E.2d 25 (1993) (finding father demonstrated willingness to develop a full custodial relationship with his child where he attempted to provide monetary support to mother during pregnancy, endeavored to keep apprised of her progress during the pregnancy, and appeared at the hospital and offered to pay medical expenses incurred from the birth).

Specifically, in South Carolina, where a child is placed with the prospective adoptive parents within six months of birth, an unwed father's consent is required only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (Supp. 2011); *see also Reeves*, 392 S.C. at 153, 708 S.E.2d at 784 ("It is not enough that the father simply have a desire to raise the child; he must act on that interest and make the material contributions to the child and the mother during her pregnancy required of a father-to-be.").

Because Father abandoned his child and would not be recognized as a putative father under South Carolina law, Appellants claim Father cannot be considered a parent under ICWA and his consent to the adoption is not required. Although I agree with Appellants that Father abandoned Baby Girl and that his rights would be terminated under state law without further inquiry, I nonetheless reject Appellants' contention that such a finding under state law precludes the application of ICWA to this case.

Appellants conflate the issues of consent under state law and the definition of "parent" under ICWA. The issues of paternity and whether one's consent is required in an adoption proceeding are separate questions. It is beyond dispute that Father has acknowledged *biological paternity* from the time Mother first informed him that she was pregnant. The fact that Father, from the beginning, ran from parental responsibilities cannot be used to challenge the issue of paternity. Moreover, Father admitted paternity in his pleadings in both the South Carolina and Oklahoma actions, and DNA testing conclusively established that he is the child's biological father. *Cf. In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988) (finding putative father not an ICWA parent where father never attempted to enforce his paternal rights, never commenced a proceeding to

claim such rights, and failed to acknowledge or establish paternity prior to the entry of the final judgment of adoption). I concur with the family court's finding that Father meets the definition of parent under ICWA.

However, even if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child. The Act's protections do not stem only from a parent's status as such. Rather, ICWA's protections were specifically designed to safeguard the interests and welfare of Indian *children*—not just parental rights.

Because ICWA applies and Father does not consent to the adoption, Appellants are required to prove grounds for terminating Father's parental rights and adoptive placement in accordance with ICWA and state law.

C.

Termination of Parental Rights

The majority avoids the family court's findings with respect to termination of Father's parental rights under state law. The family court held Appellants failed to prove by clear and convincing evidence the existence of any grounds to terminate Father's parental rights. Specifically, as concerns the state law considerations, the family court found Father's failure to visit and failure to support Baby Girl were not willful. Additionally, as concerns ICWA considerations, the family court found Appellants failed to meet their burden of proving that continued custody by Father was likely to result in serious emotional or physical harm to Baby Girl.

Appellants argue they demonstrated that Father's failure to visit and failure to support was willful and that termination of Father's parental rights was in the best interests of Baby Girl. I agree.

Unlike the majority, my view is predicated upon the guiding principle that "[t]he welfare and best interests of the child are paramount in custody disputes." *Woodall v. Woodall*, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996); *see also S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) (stating that the best interests of the child are paramount to that of the parent in cases involving termination of parental rights). Nothing evinces any Congressional intent to disregard this cardinal rule in the context of ICWA; rather, Congress has expressly declared it is the policy of the United States to protect the best interests of Indian children. *See* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best

interests of Indian children . . . ."). Thus, "ICWA's applicability does not mean that ICWA *replaces* state law with regard to a child's best interests." *L.N.B.-L.*, 237 P.3d at 965 (emphasis added) (finding continuation of father's and mother's parental relationship would likely result in serious emotional damage to their children and thus, termination of parental rights was in children's best interests); *see also In re Dependency of A.A.*, 20 P.3d 492, 495-96 (Wash. Ct. App. 2001) ("Regardless of the culture from which the parents come, when a termination proceeding is initiated in a Washington court, the best interests of the children at issue are paramount. . . . [T]he dominant consideration in a termination of parental rights is the moral, intellectual and material welfare of the child."); *In re Interest of C.W.*, 479 N.W.2d 105, 114 (Neb. 1992) (stating "ICWA does not change the cardinal rule that the best interests of the child are paramount") (internal quotation omitted)).

Therefore, ICWA's applicability "should not signal to state courts that state law is replaced by the act's mandate." *Mahaney*, 51 P.3d at 785. Rather, ICWA envisioned a symbiotic relationship between the additional protections of the Act and well-established state law principles for deciding custody matters in accordance with the best interests of the child. *See Holyfield*, 490 U.S. at 58 (noting "Congress did not intend to 'oust the States of their traditional jurisdiction over Indian children falling within their geographic limits'" through enacting ICWA) (quoting H.R. Rep. No. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541)). It is with these principles in mind that we should determine whether Appellants met their burden of showing that Father's parental rights should be terminated under both state law and federal law.[48]

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[48] The majority accuses me of ignoring the "most salient feature of the *Holyfield* decision, which is that the Supreme Court deferred to the *tribe* to decide what was in the best interest of those Indian children." I fully appreciate that the Supreme Court ultimately deferred to the Choctaw Tribe in that instance; however, unlike the majority, I recognize that such deference was afforded because the Indian children in *Holyfield* were required to be considered as domiciled on the reservation, and thus, the tribal courts were vested with *exclusive* jurisdiction to enter a decree of adoption pursuant to section 1911(a) of ICWA. *See Holyfield*, 490 U.S. at 53. In my view, the majority construes this narrow holding in *Holyfield* to require unwavering deference to the tribe in *all* matters—not just those relating to the power of tribal courts to adjudicate child custody proceedings vis-à-vis state courts where the Indian child is domiciled on the reservation. Indeed, the majority conflates the issues of venue, tribal sovereign jurisdiction, and the controlling feature of substantive law regarding the protection of an Indian child's

1.

Grounds for Termination

The family court found Father's failure to visit and support Baby Girl did not show a settled purpose to forego his parental duties. These findings, especially as to Father's failure to support, are manifestly contrary to the evidence.

Regarding visitation, the family court found the child's removal from Oklahoma, Father's subsequent deployment to Iraq, and the contested nature of the custody lawsuit hindered Father's ability to visit Baby Girl. Regarding support, the family court found that Father was a full-time member of the military, was capable of providing support, but failed to offer any type of meaningful support to Mother or his child prior to being served with the adoption lawsuit. Nonetheless, the family court concluded Father's failure to contribute any support was not willful. In this regard, the family court found significant that Appellants never sought support from Father, he was not under any court order to pay support, and that he began

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best interests to justify its rigid view of ICWA's exclusive dominance in every realm. However, because the application of section 1911(a) is not presently before this Court, I find that *Holyfield*'s protection of tribal sovereignty, although properly zealous in that instance, does not mandate absolute deference to the Cherokee Nation's custody recommendations here.

Moreover, I fail to see how my position would disregard any of the interests ICWA affords to the Tribe. *See id.* at 49 ("The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e.g., §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."). None of the Tribe's rights established by ICWA and enumerated in *Holyfield* are implicated, much less disregarded, here. Accordingly, I cannot understand the majority's continued emphasis on the primacy of tribal sovereignty as determinative of the outcome of this action.

paying child support when Baby Girl was sixteen months old.[49] While section 63-7-2570 allows for consideration of "requests for support by the custodian and the ability of the parent to provide support[,]" I would not give Father a reprieve on his failure to pay support simply because Appellants did not seek support from someone who had repeatedly expressed disinterest in the child.[50] Father's parental rights under South Carolina would have been terminated before Baby Girl was placed with Appellants. Moreover, I would consider this factor alongside well-settled law (discussed below) that a parent most certainly cannot excuse abandonment of parental responsibilities by claiming no one asked or demanded he or she act like a parent. *See, e.g.*, *Reeves*, 392 S.C. at 152-53, 708 S.E.2d at 783 (noting that if the mother wants the father to stay away, he must respect her wishes but be sure that his support does not remain equally distant) (citing *In re Adoption of M.D.K.*, 58 P.3d 745, 750-51 (Kan. Ct. App. 2002) (Beier, J., concurring)).

The United States Supreme Court has issued a series of cases holding that the Constitution affords protection to an unwed father where the father has grasped the opportunity to be a parent; mere biology is not enough. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding failure to give putative father notice of adoption proceedings did not violate due process where he had never established a substantial relationship with his child).[51] Essentially, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260 (quoting *Caban v. Mohamed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). Thus, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' his interest in personal contact

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[49] Beginning in February 2011, Father has intermittently sent checks to Appellants' attorney for the benefit of Baby Girl. According to the record, Father remitted seven checks totaling $1,500. The most recent payment was dated July 7, 2011.

[50] This is particularly so in light of the evidence at trial indicating Father refused to provide Mother with pre-birth financial assistance.

[51] *Lehr* was preceded by *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding due process was violated by the automatic rejection of an unwed father's custodial relationship without granting the father opportunity to present evidence regarding his fitness as a parent), and *Quilloin v. Walcott*, 434 U.S. 246 (1978) (denying constitutional protection to unwed father who had manifested only limited interest in his children).

with his child acquires substantial protection under the due process clause." *Id.* at 261 (quoting *Caban*, 441 U.S. at 392). "[M]ere existence of a biological link does not merit equivalent constitutional protection." *Id.* "If [a natural father] grasps the opportunity" to develop a relationship with his child and "accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Id.* at 262. "If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.*

In recognition of these principles, South Carolina similarly requires an unwed father's parental rights to be predicated upon some involvement in the child's life. Thus, if an unwed father fails to undertake parental responsibility, as in this case, his parental rights are jeopardized. A family court may terminate parental rights upon clear and convincing evidence of at least one enumerated statutory ground and a finding that termination is in the best interests of the child. *S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 608, 582 S.E.2d 419, 423 (2003) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

A parent's rights may be terminated if:

> (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *willfully* failed to visit the child. . . . The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.
>
> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *willfully* failed to support the child. . . . The court may consider all relevant circumstances in determining whether or not the parent has willfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570 (Supp. 2011) (emphasis added). Willful conduct is that which "evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992).[52]

[52] Although compliance with the literal requirements of section 63-7-2570 is

Based on my *de novo* review of the evidence, Father's failure to visit Baby Girl was willful. Father made no meaningful effort to establish a relationship with Baby Girl when there was ample opportunity for him to do so. To the contrary, he avoided any rights and responsibilities to the child. As noted, on repeated occasions, Father expressed his willingness to sign away his parental rights.[53] Moreover, while Father was in Iraq until December 2010, Father failed to request visitation until he was deposed in this case. At the time of his request, Baby Girl was twenty-two months old, and Father had returned from active duty seven months earlier.[54]

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usually required, there are instances in which a father's inability to undertake specific acts to preserve his parental relationship with his child may be excused, such as where an unwed father timely demonstrates a willingness to develop a relationship with his child but is thwarted from doing so by the refusal of the child's mother to accept his expressions of interest and commitment. *See Abernathy*, 313 S.C. at 32, 437 S.E.2d at 29 (finding an "unwed father is entitled to constitutional protection not only when he meets the literal requirements of section [63-7-2570], but also when he undertakes sufficient prompt and good faith efforts to assume a parental responsibility and to comply with the statute"). Here, the family court properly found Father was not entitled to the protection of the "thwarted father" exception because there is no evidence indicating he attempted to contribute to the support of his child during Mother's pregnancy or after the child's birth.

[53] The majority correctly notes that Father's various written and verbal expressions wishing to give up his parental rights were not legally binding. I do not understand why the majority undertakes such a substantial discussion of this issue, for no one has ever contended those expressions were legally binding. I do not equate them with valid legal consent to this adoption. Yet, at least to me, Father's clear expressions speak volumes about the element of willfulness in his abandonment of Baby Girl. Moreover, the relevance of this evidence to the issue of Baby Girl's best interests is self-evident. In my view, the revocability of a parent's consent under section 1913 of ICWA, to which the majority refers, does not render irrelevant a parent's repeated expressions of unwillingness and disinterest in parenting.

[54] According to Father, he never sent any cards or letters seeking progress reports on Baby Girl because he was unsure of whether he might be "going against any legal rights or anything like that. I didn't want to break the law."

I would also find that Father's failure to support Baby Girl was willful. I find the credible evidence shows Mother immediately informed Father of her pregnancy and requested financial assistance, but Father neither offered nor assisted Mother with either the pregnancy or with the medical costs associated with pregnancy and birth. According to Father, he would have paid child support if he had received a court order directing him to do so or if Mother had requested support and agreed to marry him.

However, unlike the family court, I find Father's purported willingness to provide support changes nothing. The suggestion that an unwed father's duty to support his child is conditioned on marriage, a formal plea from the mother or official state action is transparently frivolous. Further, Father's claimed willingness to provide support is of no moment for he did not *actually* provide any support and cannot demonstrate any legitimate excuse for failing to do so. As this Court recently stated:

> [An unwed father] must provide support regardless of whether his relationship with the mother-to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or submit to his emotional or physical control in any way.
> . . . .
>
> He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant.

Reeves, 392 S.C. at 152-53, 708 S.E.2d at 783 (quoting *In re Adoption of M.D.K.*, 58 P.3d at 750-51).

Further, we are not constrained to consider only Father's recent conduct towards Baby Girl. Rather, the "court is able to look beyond the months immediately preceding the [termination of parental rights] action at the [parent's] *overall* conduct." *Headden*, 354 S.C. at 612-13, 582 S.E.2d at 425. "While a parent's curative conduct after initiation of an action for termination of parental rights may be considered by the court on the issue of intent, it must be considered in light of

the timeliness by which it occurred." *Abercrombie v. LaBoon*, 290 S.C. 35, 38, 348 S.E.2d 170, 171-72 (1986). "Rarely would this judicially motivated repentance, standing alone, warrant a finding that an abandonment had been cured." *Id.* at 38, 348 S.E.2d at 172.

Father failed to pay any child support until Baby Girl reached sixteen months of age and did so inconsistently and in an insubstantial amount.[55] As I have previously stated, the eventual payments of child support and isolated request for visitation are untimely, and I find them to be judicially motivated repentance falling short of curative conduct. *See Reeves*, 392 S.C. at 153, 708 S.E.2d at 784 ("[A] father's attempts to assert his parental rights are insufficient to protect his relationship with the minor child 'unless accompanied by a prompt, good-faith effort to assume responsibility for either a financial contribution to the child's welfare or assistance in paying for the birth mother's pregnancy or childbirth expenses.'"); *Doe v. Roe*, 386 S.C. 624, 633, 690 S.E.2d 573, 578 (2010) (acknowledging Father's attempts to provide support and seek visitation when child was nine months old but finding such effort "came too late for it to have any significant import"); *Ex parte Black*, 330 S.C. 431, 435 n.1, 499 S.E.2d 229, 232 n.1 (Ct. App. 1998) (finding initial attempts to evade parental responsibilities were not cured by later efforts to assume a parental relationship, where efforts arose at the urging of father's family and only after he realized mother had relinquished her parental rights).

I conclude Father has failed to "grasp his opportunity" to develop a relationship with Baby Girl and the record reflects clear and convincing evidence to support the termination of Father's parental rights under subsections (3) and (4) of section 63-7-2570. The family court's findings in this regard are error. I would terminate Father's parental rights under state law, specifically section 63-7-2570 (3) and (4).

2.

Best Interests of the Child

It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's

[55] According to his own testimony, the amount Father has set aside for child support since Baby Girl's birth is roughly equal to the amount he spends on cigarettes in a single year.

obligation to determine what would be in the child's best interests. In light of this error of law and based upon my review of the record, I would hold that it is in Baby Girl's best interests for Father's parental rights to be terminated.

"[T]he welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration of the court in all child custody controversies." *Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003). The Court acknowledges this settled principle but ignores it in application.[56] "The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157. "In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should be considered." *Id.* As I have previously noted, "ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests." *In re Welfare of L.N.B.-L*, 237 P.3d at 965. Moreover ICWA's applicability "should not signal to state courts that state law is replaced by the act's mandate," *In re Mahaney*, 51 P.3d at 785. Therefore, I consider the best interests of Baby Girl in light of the symbiotic relationship between the ICWA and well-established state law principles.

The Guardian *ad Litem* appointed to represent the interests of Baby Girl reported that Adoptive Mother has made her career as a specialist in child development and works from home, which allows interaction with Baby Girl throughout the day. Moreover, the Guardian found Appellants are child-focused and family-oriented, and Baby Girl has thrived in their care. The Guardian conducted a home visit in Oklahoma with Father and paternal grandparents. The Guardian found Father's family "appears to genuinely care for each other" and that it was the family's desire to receive the child into their home. However, the Guardian expressed concerns regarding Father were he to assume a role as primary caregiver. The Guardian testified about her concerns that Father chose to leave active military service without first arranging full-time civilian employment. Further, the Guardian noted

[56] The Court notes "that even under South Carolina law, we do not terminate parental rights merely because a parent is not a perfect parent." I agree, as this is simply another example of the majority attributing to me a position I do not take. It is clear to me from the totality of the majority's analysis that its application of ICWA has eviscerated any meaningful consideration of Baby Girl's best interests, despite its lip service to this settled principle.

Father has not developed a parenting plan that would enable him to provide for his children beyond that which is afforded by his parents.[57]

Additionally, consideration of Father's behavior as it relates to the statutory grounds for termination is appropriate for purposes of the best interests determination because his conduct "evinces a settled purpose to forego parental duties." *Headden*, 354 S.C. at 610, 582 S.E.2d at 423 (citation omitted). Although I recognize Father began intermittently paying child support when Baby Girl was sixteen months old, and sought visitation when she was twenty-two months old, consistent with our existing jurisprudence, I find that these actions "came too late." *Id.* at 611, 582 S.E.2d at 423. By the time Father began these efforts to undertake his parental responsibilities, Baby Girl had already developed a substantial bond with Appellants in the first critical months in her life. Baby Girl's overriding interest in stability and continuity of care must remain in the forefront of this analysis.

In addition to the evidence which supports the statutory grounds for willful failure to visit and support, I also note Father's parental history with his other minor daughter, which reflects a disregard to fulfill parental obligations. The mother of his first child was forced to take court action after Father had amassed a child support arrearage of approximately $11,000. Given the totality of the evidence, placement with Father is not in Baby Girl's best interests. Father's established abandonment of parental responsibilities signifies "that he is consciously indifferent to the rights—and emotional needs—of his infant daughter . . . ." *Doe v. Roe*, 386 S.C.624, 633, 690 S.E.2d 573, 578 (2010).

In contrast, Appellants have provided Baby Girl a loving, nurturing, and stable home. The evidence of their parental fitness is overwhelming. State law is clear that it is the child's interests which shall prevail. *See* S.C. Code Ann. § 63-7-2570. Accordingly, I conclude placement with Appellants would serve the best interests of Baby Girl.

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[57] The portions of the report upon which I rely relate only to the Guardian *ad Litem*'s factual observations of Father's conduct and concerns about his parenting abilities. Those portions are unrelated to any disparity in education and wealth between Father's family and Appellants.

3.

Heightened Protections of ICWA

Were the termination of Father's parental rights determined solely under state law, there would be no further inquiry. However, through ICWA, Congress has specifically afforded heightened protections in a termination of parental rights action. I discuss each of these protections in turn.

a.

Emotional Harm to Child

ICWA prohibits the termination of parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). The beyond-a-reasonable-doubt standard is different than the clear-and-convincing burden of proof required under state law. Thus, in an Indian child custody proceeding to which ICWA applies, a dual burden of proof must be met before a parent's rights may be terminated: the court must find beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, and the court must also find that clear and convincing evidence supports termination under the applicable state statutory ground. *Accord In re Elliot*, 554 N.W.2d 32 (Mich. Ct. App. 1996) (finding in a child custody proceeding involving an Indian child, a dual burden of proof must be met); *In re Bluebird*, 411 S.E.2d 820, 823 (N.C. Ct. App. 1992) (finding "a dual burden of proof is created in which the state provisions and federal provisions must be satisfied separately"); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992) (finding the goals of ICWA and goals of state law are properly harmonized through requiring a dual burden of proof).

The family court found Appellants failed to prove that Father's custody of Baby Girl was likely to result in serious emotional or physical harm to the child. Noting Appellants' expert did not interview Father and had never before conducted a bonding evaluation on an Indian child, the family court gave little weight to his expert testimony. The family court further reasoned that the testimony was entitled to little weight because Appellants' expert considered only the damage resulting from Baby Girl's removal from Appellants' care—not the harm caused by

placement with Father. The family court relied heavily on the testimony of an employee of Cherokee Nation, who testified as to Cherokee Nation's position regarding termination of Father's parental rights.

Additionally, the court found Father has a "demonstrated" ability to parent effectively[58] and, therefore, is a fit and proper person to have custody of Baby Girl. Despite acknowledging that Appellants would surely be excellent parents were Baby Girl to remain in their custody, the family court concluded Appellants failed to meet their burden of proving Father's continued custody of Baby Girl would result in severe emotional harm to the child. The family court's conclusion that Appellants failed to satisfy section 1912(f) was error.

At trial, Appellants presented the testimony of Dr. Bart Saylor, a qualified expert in familial bonding who conducted a bonding evaluation of Appellants and Baby Girl, testified that both adoptive parents seemed very well-adjusted, Baby Girl was a healthy little girl, and there was a strong emotional and psychological bond between them. He testified that severing the bond Baby Girl has formed with Appellants would, beyond a reasonable doubt, be "very traumatic" and "very disruptive" for the child. He further opined that severing that bond could produce "depression, anxiety, [and] it could cause disruption in [Baby Girl's] capacity to form relationships at a later age." Dr. Saylor concluded that her removal would "be taking away everything that she had come to know and count on for her comfort and security and replace it with something that would be completely unfamiliar and strange to her." Dr. Saylor further articulated that "it's not a matter of an alternative being favorable or unfavorable, you know, better or worse. It's just taking away what has been the very source and foundation of her security in her life . . . ."

When asked during cross examination his opinion about Baby Girl's ability to bond with her biological family, Dr. Saylor testified that the fact that Baby Girl is healthy and happy bodes well for her resilience; however, he quickly cautioned that a substantial source of such health was her healthy and stable relationship with Appellants. In fact, Dr. Saylor stated the bond is "a good resource in this child's psychological armament, but all the more sense of loss and disruption of losing that" will occur if the bond is severed.[59]

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[58] This finding contains no support in the record.

[59] Dr. Saylor further explained:

Dr. Saylor admitted he was unfamiliar with any specific studies suggesting a pattern of harm suffered by Native American adolescents who were raised by non-Indian adoptive families; he nevertheless testified that he would find such broad-based presumptions of "minimal utility in making that sort of a risk-assessment prediction." Although not discounting the significance of cultural heritage, Dr. Saylor noted that in terms of a child's bond with her caregiver, "it wouldn't have any relevance one way or the other to this bonding assessment, whether it was Native American, African American, European [heritage], that—that would not be the issue." Essentially, the relevant consideration in a bonding assessment is the family unit—the bond among the unique individuals, which is not necessarily defined by their cultural identity. Rather, according to Dr. Saylor, "the real variable that determines [children's] happiness and their success and their identity is that loving interaction with [their] family." Dr. Saylor ultimately opined that he believed beyond a reasonable doubt that the removal of Baby Girl from Appellants care would cause serious emotional harm. I find Dr. Saylor's testimony is credible and persuasive.

On behalf of Cherokee Nation, Tiffany Dunaway, an employee and case worker with the tribe, testified the tribe's recommendation was for Baby Girl to be placed with her natural father.[60] Dunaway was qualified as an expert in Cherokee Indian culture and Cherokee Indian practices. Dunaway received a bachelor's degree in family life education, but she has no formal training on bonding and attachment. In preparation for trial, she never met or evaluated Baby Girl or Appellants and she

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> Could it be that if she'd had multiple caregivers and the bond was less well established, it might be easier for her to make another transition, I mean, possibly so. She might not be as healthy and happy a child on the surface, but making the transition might be easier. But I just don't think you can say that because she's happy and has been a well-cared for child that that would make it easier. *I think it could actually make it harder.*

(emphasis added).

[60] The bulk of Ms. Dunaway's testimony concerns the preference of Cherokee Nation regarding Baby Girl's adoptive placement. However, section 1912(f) does not contemplate the consideration of tribal preference in determining harm suffered by the child.

met Father only once briefly. Additionally, Dunaway admitted that she had never seen Father interact with *any* child of *any* age. Nevertheless, Dunaway was certain that Baby Girl would do well in Father's custody and would not be permanently harmed by severance of the bond Baby Girl has established with Appellants. Dunaway admitted she had no information about Father's ability to parent; nonetheless, she testified, "I have no doubt that this father [can] raise his child." Dunaway's opinion was based on a home visit she conducted with Father and paternal grandparents and a separate home study of the paternal grandparents, conducted while Father was not residing there.[61] Further, Dunaway acknowledged her opinion that Baby Girl would thrive if placed in that home was based on anecdotal experience alone. Dunaway admitted she was unaware of any studies that show the percentage of transitioned children who thrive long-term following reunification with their Indian families. On cross-examination, the following exchange took place:

> Q. When you said yesterday that Baby Girl would just do wonderful at [Father's], you really don't know that for sure, do you?
>
> A. And—and I think I said that. I think I said, you know, we don't know what the future is going to be. I've transitioned children her age and that are older than her and they thrive. They've done well. So I can only go off of my experience on that.
>
> Q. Your personal experience?
>
> A Yes, through work.
>
> Q And—and you've not had any children who didn't thrive?

[61] Dunaway distinguished a "home assessment," which she conducted in this case, from a "full-blown home study," which she acknowledged she is not qualified to perform without additional training and certification. It appears the home study of paternal grandparents was conducted by another employee of Cherokee Nation for the purpose of approving paternal grandparents as an alternative placement during Father's military service. Dunaway explained that a home study of Father was not conducted because "[the tribe] didn't need one on him," notwithstanding her admission that the tribe had no information regarding Father's ability to parent.

A. You know, I've had children who've had difficult times.

Q. How many? Because yesterday you said they all were successful.

A. I – you know, well they—they are successful. I think the children are thriving. I think there are a couple of girls who were—they're—I think they're 12 and 8 now. At first they were needing counseling. They, you know, they were older.

Q. Right. I don't want to get into anecdotal. Give me statistics.

A. I don't have those.

Q. Give me some hard statistics and don't tell me personal stories. Tell me how many children are not thriving?

A. I don't have those.

Q. Why wouldn't you?

A. I don't keep those.

Q. You don't really know, do you?

A. I don't keep those things.

Q. You don't know. So yesterday when you said they were all successful you don't really know how many of those are successful today, do you?

A. No, I don't.

. . . .

Q. But as you sit here today to testify you don't really have any studies completed or in your file in terms of a two-year old being taken out of a primary caregiver's home, a two-year old who only knows this couple as [] their only psychological parent, her only psychological parent, you don't have any

studies in your file as to how the children you've monitored have done when they've been ripped out of an adoptive family's home and placed into someone's she doesn't even know?

A. I can only testify as to my experience.

[witness instructed by court to answer the question]

A. No, we do not have statistics. And the Tribe may have statistics; I don't have them. I can just—So, no, I do not have them.

. . . .

Q. So you're prepared to say that this child who has never been with the biological father should be removed from the home that this child was—the only home that this child has known and put into an entirely strange environment with a father where there's no information about his ability to parent?

A. Yes.

Yet the family court was persuaded, as is the majority, by Dunaway's testimony. While I believe Dunaway's testimony reflects insight into Cherokee Nation's traditions and an understanding of the importance of cultural heritage in an Indian child's development, with respect, I find Dunaway's views, expressed as a representative of Cherokee Nation regarding the tribe's placement recommendation, are not persuasive in this case as they relate to the determination of whether Baby Girl would suffer harm if removed from Appellants' custody. Further, in light of her lack of expertise in the area of bonding, her lack of interaction with Baby Girl and Father, and her reliance on purely anecdotal evidence, I find Dunaway's opinion regarding Baby Girl's emotional well-being lacks credibility. *See In re Robert T. v. Devon T.*, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988) (approving the family court's failure to give weight to an expert witness's testimony regarding lack of harm to child when witness had never met child or adoptive family). Thus, on the whole, I find Dunaway's testimony unpersuasive.

Respondents argue Dr. Saylor's expert testimony should have been excluded because he was not a qualified expert under ICWA due to his lack of knowledge specifically related to Indian culture. I reject Respondents' contention that Dr. Saylor was not properly qualified as an expert. While I acknowledge testimony of

an expert witness who possesses knowledge of Indian culture may be helpful, it is not required by section 1912(f). Moreover, where the basis for termination of parental rights is unrelated to Indian culture, the need for expert testimony possessing a familiarity with such culture becomes less crucial. *See Marcia V. v. State*, 302 P.3d 494, 504 (Alaska 2009) (stating "when the basis for termination is unrelated to Native culture and society and when any lack of familiarity with culture mores will not influence the termination decision or implicate cultural bias in the termination proceeding, the qualifications of an expert testifying under § 1912(f) need not include familiarity with Native culture"); *see also* Bureau of Indian Affairs ("BIA") Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67594 (1979) (indicating expert testimony by someone that has knowledge of tribal cultural and childrearing practices may be valuable to a court, but is not required). Furthermore, I see no basis for finding that severing the bond between a two-year old Indian child and the only caregivers she has ever known would be less traumatic and disruptive than if the child were a non-Indian.[62]

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[62] The majority finds it would be inappropriate to consider the bonding that occurred between Baby Girl and Appellants during litigation, and cites *Holyfield* in support of this finding. However, I view this as another instance in which the majority misapprehends that opinion.

In *Holyfield*, the adoptive parents argued the bonding which took place during the pendency of the litigation defeated the tribe's exclusive jurisdiction. The United States Supreme Court found the express language of section 1911(a) could not be ignored in spite of the potential finding of the tribal court upon remand that the Indian children should be removed from their non-Indian adoptive home. In that vein, the Supreme Court stated:

> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of [section 1911(a) of] the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." It is not ours to say whether the trauma that might result from removing these children from their

I also find the family court improperly interpreted section 1912(f)'s "damage" as encompassing only long-term harm. Section 1912(f) contains no such limitation on the damage requirement. By its terms, section 1912(f) requires only proof of serious emotional or physical harm to the child. I believe this particular provision of ICWA is designed specifically to protect the best interests of the child, which necessarily includes the child's short-term well-being. This does not mean, however, long-term considerations are irrelevant. Dr. Saylor opined that severing the bond between Baby Girl and Appellants had the potential to negatively affect

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> adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community. Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."

Holyfield, 490 U.S. at 53-54 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 971-72 (1986) ("While stability in child placement should be a parmount value, it cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged. . . . In any event, here we have no choice in the matter: [section 1911(a)] prohibits the Utah courts from exercising jurisdiction. Instead, we must defer to the experience, wisdom, and compassion of the Navajo tribal courts to fashion an appropriate remedy. We hope the tribal courts will consider the tribe's slow response to the notice of the Utah adoption proceedings as well as the value of stability in child placement and will recognize the strong bonds [child] has developed with his adoptive parents. . . . [W]e are confident that the courts of the Navajo Nation will give the petition for adoption the careful attention it deserves *and will act with the utmost concern for [child's] well-being*.") (emphasis added)).

Further, I note that, following remand to the tribal court in *Holyfield*, the Choctaw tribal court judge balanced the tribe's interests in preserving tribal communities against the children's interests in continuity and stability, and concluded it was in the children's best interests to remain with the non-Indian adoptive parent. *See* Maldonado, *supra*, at 17-18. This lends further support for the proposition that the best interests inquiry is not ousted by ICWA and that bonding is a highly relevant consideration.

Baby Girl as an adult. However, Dr. Saylor candidly acknowledged that long-term effects of such traumas are subject to a host of varying factors and are therefore unpredictable.[63]

Finally, I find the family court erred in discounting Dr. Saylor's testimony because he attributed Baby Girl's emotional harm to only her removal from Appellants' care and not her return to Father's care. Initially, although Father never assumed or sought physical custody of Baby Girl, I recognize, as have other courts, that "continued custody" under section 1912(f) refers not only to physical custody, but legal custody as well.[64] *See D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001) (noting section 1912 termination provisions are applicable even where parent never had physical custody but whose custodial rights had not been terminated); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 938 (N.J. 1988) ("[T]he reference to 'custody' in section 1914 refers to a parent's legal, rather than physical, relationship with a child."). Nonetheless, it is apparent from the circumstances before us that section 1912 must be applied in the context of the facts of the particular case. The critical feature here is that Father deliberately avoided developing a parent-child relationship with Baby Girl. Thus, no father-daughter relationship exists upon which to base an evaluation.

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[63] Respondents additionally suggested through cross-examination of Dr. Saylor that his testimony should be discounted because he refused to "conclusively" testify that Baby Girl would suffer "irreparable harm" if Father were awarded custody. I reject this effort to discount Dr. Saylor's testimony. The statute imposes a beyond a reasonable doubt standard and speaks in terms of "serious harm," not irreparable harm. In addition, I find Dr. Saylor's measured responses and caution against making broad generalizations reflective of an objective and credible expert witness. Dr. Saylor's measured responses and candor are refreshing when contrasted with the "all in" expert, like Dunaway.

[64] The majority asserts that the "plain language" of section 1912(f) "requires a showing that the *transferee* parent's *prospective* legal and physical custody is likely to result in serious damage to the Indian child." (emphasis added). Section 1912(f) says no such thing. The majority's attempt to engraft into the statute the terms "transferee" and "prospective" must be rejected. The text of section 1912(f) requires a showing that "the *continued* custody of the child by the parent or Indian custodian" would result in emotional harm to the child. (emphasis added).

Here, Father chose not to be a parent for an extended period of time. In addition, there is compelling evidence that Baby Girl would suffer serious emotional damage if removed from the physical custody of Appellants. In this case, although the record raises substantial questions as to Father's fitness as a parent, ICWA does not require the presentation of additional evidence showing that a biological parent could not provide a good home for the child. *See In re Adoption of Baade*, 462 N.W.2d 485, 490-91 (1990) (reasoning that if parent retained legal custody of the child, the adoptive couple would be unable to adopt him and would have no basis for maintaining physical custody; as a result, the father's continued legal custody would result in the child having to leave the adoptive couple, which would produce serious emotional damage). Thus, "[w]hen the child is not in the custody of the parents for a protracted period of time, as in this case, it would be irrelevant to receive testimony as to whether or not the continued custody of the child by the parents will harm the child." *In re the Interest of D.S.P.*, 480 N.W.2d 234, 240-41 (Wis. 1992). I would adopt this well-reasoned approach. Since Father has never made meaningful attempts to establish a relationship with Baby Girl, the distinction drawn by the family court is incongruous with the facts before us. I therefore find the appropriate analysis of section 1912(f) requires only an examination of the likelihood of serious emotional harm if the child were removed from Appellants, the sole caregivers Baby Girl has ever known.

In light of Dr. Saylor's testimony regarding the deep and nurturing bond formed between Appellants and Baby Girl, if Father were to retain continued legal custody, thereby preventing Appellants from retaining physical custody of the child, I am persuaded beyond a reasonable doubt that Baby Girl would suffer severe emotional harm. Thus, I conclude Appellants have satisfied the requirements of section 1912(f).

b.

Active Remedial Efforts

In addition to other protections afforded by ICWA, section 1912(d) requires that, before a parent's rights may be terminated, a court must determine if active efforts to provide remedial services have been made. Specifically, that section states:

> Any party seeking to effect a . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative

> programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d). The remedial efforts should be directed at remedying the reason that led to removal. *Adoption of Hannah S.*, 48 Cal. Rptr.3d 605, 612 (Cal. Ct. App. 2006); *see also Matter of Baby Boy Doe*, 902 P.2d 477 (Idaho 1995) (holding that the types of remedial and rehabilitative services to be required under ICWA depend on the facts of the case).

The legislative history of subsection (d) suggests that Congress intended for the Federal standard regarding active efforts to mirror state law standards after which it was patterned:

> The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.

H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7545. *See also Adoption of Hannah S.*, 48 Cal. Rptr.3d 605 (finding active efforts are essentially equivalent to reasonable efforts to provide reunification services under state law); *In re Baby Boy Doe*, 902 P.2d 477 (accord). Like most states, South Carolina requires reasonable efforts to be made to reunify a family following the removal of a child from a parent's custody. *See* S.C. Code Ann. § 63-7-1640 (South Carolina's family preservation statute setting forth requirement that "reasonable efforts to preserve or reunify a family" have been made by Department of Social Services).

Initially, it is clear Congress envisioned section 1912(d) to apply in the removal context. *See Holyfield*, 490 U.S. at 32 (noting the legislative history of ICWA demonstrates Congress was concerned with "the wholesale *removal of Indian children from their homes*, the most tragic aspect of Indian life today" (emphasis added) (internal quotations omitted)). Likewise, in terms of the state standards referenced in the House Report, South Carolina's reasonable efforts requirement is applicable when a child has been removed from the parent's custody. *See* S.C. Code Ann. §§ 63-7-1640 (noting child's health and safety are the paramount concern with regard to state's reasonable efforts to preserve or reunify a family); 63-7-2570(2) (establishing that parent must comply with terms of state plan and

remedy the conditions which caused removal).[65] To be clear, I do not find the absence of a removal action in the traditional sense dispositive of the active efforts requirement of section 1912(d); however, I merely acknowledge the reality that because the circumstances before us do not involve removal, the application of section 1912(d) is not straightforward. *See In re J.S.*, 177 P.3d 590 (Okla. Civ. App. 2008) (finding the active efforts provision of section 1912(d) eludes definition and therefore should be determined by courts on a case-by-case basis). As an additional difficulty, the parties seeking the termination of parental rights are Appellants, not the state. I acknowledge that the absence of the state social services agency as a party to this proceeding does not render section 1912(d) inapplicable; however, as a practical hurdle, its resources cannot be utilized to comply with the active efforts requirement. Overwhelmingly, most cases applying section 1912(d) encompass issues relating to vocational rehabilitation, alcohol or substance abuse, mental health issues, lack of parenting skills, or domestic violence allegations, all of which may be treated through counseling and education provided through child protection agencies. *See, e.g.*, *In re K.B.*, 93 Cal. Rptr. 3d 751 (Cal. Ct. App. 2009) (noting that county department of public social services satisfied the active efforts requirement where department provided mother with referrals to inpatient substance abuse program, parent class, homemaking assistance, and a class designed to educate parents on issues of sexual abuse); *In re Interest of Walter W.*, 744 N.W.2d 55 (2008) (affirming finding that state department's case manager assisted mother in locating and applying for inpatient chemical dependence programs, provided list of job skill development programs, referred her for a mental health evaluation, assisted her in finding housing, and provided bus tickets for transportation to Alcoholics Anonymous, Narcotics Anonymous, and visitations with her child).

In the case before us, termination of parental rights is sought on the basis of Father's willful abandonment of parental rights and responsibilities. Yet, Father claims active efforts were not offered because he was not advised of his parental rights, Mother concealed her plan for adoption, no one ever demanded child support from him, and a child support proceeding was not initiated. I find disingenuous Father's claimed lack of awareness of his parental rights—by his own

[65] Further connecting the provision of rehabilitative services to the removal context, such services may also be offered to parents proactively to prevent a child's removal in the first instance. *See* S.C. Code Ann. § 63-7-1650 (permitting state to provide services to abused and neglected children without the removal from custody).

admission he knew of Mother's pregnancy and was informed of Baby Girl's expected due date. In fact, Father relies on his early acknowledgement of paternity in support of his claim as an ICWA parent pursuant to section 1903(9).

I further find Father's expectation to be notified of Mother's adoption plan is unreasonable in light of his expressed desire (verbally and in writing) to "give up" his parental rights and his prolonged failure to inquire about the child after her birth. Moreover, Father undoubtedly knew of the adoption when he was served with pleadings in this lawsuit in January 2010. Yet, other than his intervention in the adoption proceeding, his conduct towards Baby Girl remained unchanged until February 2011 when he first attempted to support the child.[66]

For purposes of invoking constitutional and statutory protections afforded an unwed father, a father's support for an expected child is an obligation that arises at the instant the father learns of the pregnancy and continues after the child's birth. It is of no moment that a father is under no family court order requiring support payments. *See S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 547 S.E.2d 506 (Ct. App. 2001) (finding formal notice of a parental duty to support is not required before failure to discharge such duty may serve as grounds for termination of parental rights); *S.C. Dep't of Soc. Servs. v. Parker*, 336 S.C. 248, 258, 519 S.E.2d. 351, 356 (Ct. App. 1999) ("[N]othing in [63-7-2570] requires a parent be 'notified' of his duty to support or visit [child] before failure to discharge those duties may serve as grounds for termination of parental rights."). This settled law stands in contrast to the family court's finding that Father's parental rights would not be terminated under state law for failure to support because, in part, Appellants never requested support from Father.

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[66] This Court has previously stated:

> Even in the most acrimonious of situations, a[n unwed] father-to-be can fund a bank account in the mother-to-be's name. He can have property or money delivered to the mother-to-be by a neutral third party. He can—and must—be as creative as necessary in providing *material assistance* to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born.

Reeves, 392 S.C. at 153, 708 S.E.2d at 783.

Further affecting the active efforts requirement is the basis for termination of Father's parental rights—his abandonment of Baby Girl. Father claims his abandonment was conditioned on his belief that Mother would raise the child—not place her for adoption. Now Father contests Baby Girl's adoption and argues termination of his parental rights is improper because active remedial efforts have not been made to prevent the breakup of his family. I do not follow Father's logic. The breakup of the Indian family does not turn on whether Baby Girl is raised by her mother or by Appellants—rather, the breakup of Father's Indian family was occasioned by Father's unwillingness to become involved in the child's life, a decision he made long before he learned of the adoption proceedings. *See In re N.B.*, 199 P.3d 16, 25 (2007) ("The active efforts inquiry [of section 1912(d)] focuses on *reunifying* the broken Indian family." (emphasis added)).

A finding of abandonment necessarily encompasses "conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Hamby v. Hamby*, 264 S.C. 614, 617, 216 S.E.2d 536, 538 (1975). As the family court found in this case:

> During [Mother's] pregnancy and after the child's birth, [Father] was a full time member of our military, earning income. Though he had the ability to do so, he never attempted to offer any type of meaningful support to [Mother] or his child. In essence, prior to being served with the adoption lawsuit when the child was four months old, [Father] made no "meaningful attempts" to assume his responsibility of parenthood . . . .[67]

Under the facts presented, I ask: what active efforts are envisioned under section 1912(d) where, as here, the parent has consistently avoided parental rights and responsibilities? In my judgment, it would defy common sense and ignore the reality of the facts of this case to construe Congressional intent to mandate a futile act. Because active efforts are aimed at remedying the conditions which threaten the parent-child relationship, in my opinion, Father's unilateral abandonment cannot be corrected by remedial services or rehabilitative programs. *See Adoption of Hannah S.*, 48 Cal. Rptr.3d at 612 (finding party seeking termination of parental rights was not required to make active efforts based on father's abandonment and

[67] Despite this finding, the family court concluded Father did not willfully fail to support the child under state law.

felony convictions resulting in a prison term). Appellants cannot reasonably be expected to provide such services to someone who has expressed, in both actions and words, an unwillingness to form a parent-child relationship. *See In re Welfare D.K.*, No. A10-550, 2010 WL 4181454, at *2 (Minn. Ct. App. Oct. 26, 2010) (affirming family court's ruling that active efforts were made in part because father had not visited child in over a year despite living near the child, missed a scheduled visit without explanation, and father's failure to visit was attributable to his subjective feelings that visiting was inconvenient rather than to county's failure to provide assistance); *In re Children of J.W.L.*, No. A05-20, 2005 WL 1804833, at *6 (Minn. Ct. App. Aug. 2, 2005) (holding social workers' efforts would have been futile in part because father never had a relationship with children, initially denied paternity as to both, and had previously shown no interest in being a parent).[68]

Any "rehabilitation" or attempt at curing Father's refusal to undertake the responsibilities that come with being a parent was squarely and completely within

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[68] In rejecting futility as an option under section 1912(d), the majority states that Father must receive rehabilitative services even if one assumes "Father did not want custody of Baby Girl and did not desire to act as a parent to her." What the majority expresses as an assumption is in fact the reality of this case. Lost in the academic discussion and rigid application of legal principles is a child whose birth father abandoned her from the moment he learned of the pregnancy. The majority construes ICWA to require active remedial efforts to an Indian parent regardless of the facts. I could not disagree more strongly, as I believe Congress intended section 1912(d) to be construed through the lens of the facts of the particular case and the best interests of the Indian child. The majority's rigid approach to section 1912(d) cannot be reconciled with an approach that seeks a result consistent with the best interests of the Indian child. I am simply not persuaded that application of section 1912(d) is meant to relieve a parent of a purposeful decision not to be a parent, which is a decision that is entirely unconnected to any need for rehabilitative services. Given Father's purposeful decision to abandon parental rights and responsibilities, I find absurd the Court's suggestion that Appellants should have "attempt[ed] to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." I view this as requiring not merely efforts to rehabilitate a nonexistent parent-child relationship, but rather to perform a miracle. The Court's suggestion illustrates the futility of providing rehabilitative services in this case. It is a tragic end that Appellants, whose conduct is implicitly characterized as unlawful, are now blamed for not "stimulating" Father to become a real parent.

his own control. *See Reeves*, 392 S.C. at 150, 708 S.E.2d at 728 ("[I]t is only if [a father] grasps that opportunity and accepts some measure of responsibility for the child's future may he enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."); *Abercrombie v. LaBoon*, 290 S.C. 35, 348 S.E.2d 170 (1986) (finding curative conduct after initiation of an action for termination of parental rights may be considered by the court, but only rarely would such judicially motivated repentance standing alone warrant a finding that an abandonment was cured). Accordingly, in line with other courts that have reached the same conclusion, I believe it is unnecessary to require a showing of reunification efforts because such efforts would be futile under these circumstances. *See, e.g.*, *In re N.B.*, 199 P.3d at 25 ("The facts showing abandonment will vary widely from case to case, and determining futility in any given case would be a factual matter necessarily left to the trial court.") (citing *In re Baby Boy Doe*, 902 P.2d at 484).

Although I have previously examined Father's abandonment at length, I mention it again only to point out that, at the time Baby Girl was placed with Appellants, there was no indication Father had any interest in grasping his opportunity as a parent. To the contrary, every indication from Father was that he was totally uninterested regarding Baby Girl's future and well-being and that he wished to "give up" his parental rights. Further, in the Oklahoma action, Father's initial complaint indicated that neither he nor Baby Girl were Native American, and stated ICWA was inapplicable.[69]

While I recognize ICWA's laudable policy of preserving and reunifying American Indian families where possible, I cannot accept that Congress intended to force superfluous attempts aimed at mending nonexistent parent-child relationships. Certainly, the Act "does not do so at the expense of a child's right to security and stability." *In re C.A.V.*, 787 N.W.2d 96, 104 (Iowa Ct. App. 2010). Application of section 1912(d) is not meant to relieve a parent of a purposeful decision not to be a parent, which is a decision that is entirely unconnected to any need for rehabilitative services and unrelated to the unique familial and child-rearing culture of the Cherokee Nation. Accordingly, I conclude no efforts could have prevented the breakup of this Indian family.

[69] I fully appreciate that Father's complaint was later amended to allege ICWA's applicability.

Based on the foregoing, I would terminate Father's parental rights with respect to Baby Girl in accordance with section 63-7-2570 of the South Carolina Code and section 1912 of ICWA.

D.

Adoptive Placement

A termination of Father's parental rights does not end this matter. It must be determined if adoption of Baby Girl by Appellants is appropriate in light of ICWA's adoption placement preferences. ICWA mandates that

> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

25 U.S.C. § 1915(a) (emphasis added). Congressional history indicates that "[Subsections 1915(a) and (b)] establish a Federal policy that, where possible, an Indian child should remain in the Indian community, *but is not to be read as precluding the placement of an Indian child with a non-Indian family*." H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546 (emphasis added). The emphasized language is, in my judgment, tied to the underlying Congressional intent to serve the best interests of the child.

Cherokee Nation contends Appellants' motion to finalize the adoption of Baby Girl should be denied because they failed to establish good cause to deviate from the placement preferences set forth in section 1915. According to the tribe, Appellants failed to demonstrate any of the factors set forth in BIA Guidelines warranting deviation from the preferences set forth in section 1915.[70] At oral argument before

[70] The BIA Guidelines offer examples of the kinds of factors that can provide good cause to deviate:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

this Court, counsel for Cherokee Nation stated "The [Appellants] would be the last people available to adopt this child even if [Father] was out of the picture." That statement is chilling, for it demonstrates the tribe's lack of concern for the best interests of this unique child. I note that paternal grandparents are not parties to this action, and although Cherokee Nation has intervened and expressed its recommendation regarding adoptive placement of Baby Girl, that recommendation is not dispositive. *See In re J.R.S.*, 690 P.2d 10, 17 (Alaska 1984) ("ICWA entitles the tribe to influence over adoptive placements, not to adoptive rights themselves.").

I believe that the Indian child's best interests are of primary consideration in adoption proceedings, notwithstanding the tribe's preference to the contrary. *See* S.C. Code Ann. § 63-9-20 (stating that in adoption proceedings "when the interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child."); *In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Az. Ct. App. 1983) (finding ICWA's declared policy emphasizes that the first interest Congress seeks to protect is that of Indian children); *see also* 25 U.S.C. § 1902. "[I]t is patently clear that Congress envisioned situations in which the child's best interest may override a tribal or family interest . . . ." *Maricopa Cnty.*, 667 P.2d 228, 234 (Az. Ct. App. 1983) (quoting 25 U.S.C. § 1915(a), (b)).

Further, the BIA Guidelines may assist the Court, but they are not binding, nor are they an exhaustive list. *See* BIA Guidelines, 44 Fed. Reg. 67584, 67594 (1979) ("[T]hese guidelines . . . are not published as regulations because they are not intended to have binding legislative effect."). Although ICWA and the BIA Guidelines draw attention to relevant considerations, the best interests of the child remain paramount.[71] *See Adoption of N.P.S.*, 868 P.2d 934 (Alaska 1994);

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

BIA Guidelines, 44 Fed. Reg. 67584, 67594 (1979).

[71] The majority finds that Appellants' showing of good cause must be ignored because Baby Girl was unlawfully removed from Oklahoma shortly after her birth and wrongfully placed with Appellants in South Carolina, such that any subsequent bonding cannot be relied upon to establish good cause. Further, the Court faults Appellants for failing to notify the tribe that Baby Girl was to be removed from Oklahoma and cites to the Cherokee Nation's sovereign authority in determining

Maricopa Cnty., 667 P.2d 228 (Az. App. 1983); *In re Interest of Bird Head*, 331 N.W.2d 785 (Neb. 1981).

I would hold that good cause exists to deviate from the adoptive placement preferences of section 1915(a). Baby Girl has resided with Appellants for two years. A close parent-child relationship with each of the adoptive parents has been established, and her removal would cause severe emotional damage. *See Maricopa Cnty.*, 667 P.2d at 234 (affirming family court's finding of good cause where the child had resided with the adoptive mother for three years, that a close mother-child relationship had been established, and that the baby's removal would cause psychological damage). Additionally, Mother has consistently expressed her desire that Baby Girl be placed with Appellants. ICWA expressly provides that courts should consider the preference of a parent.[72] *See* 25 U.S.C. § 1915(c)

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the fate of its children.

While I have previously expressed my frustration with the Court's misreading of *Holyfield* and resurrection of unappealed rulings, I am compelled to note that Baby Girl was removed from Oklahoma only after receiving a letter from Cherokee Nation indicating that she would not be considered an Indian Child and that ICWA was not applicable. Although Cherokee Nation cannot be penalized for receiving incomplete information in the intitial inquiry, it likewise cannot be rewarded for engaging in the most cursory of investigations into this child's heritage, notwithstanding Mother's unequivocal assertions that Father was an enrolled member of the Cherokee Nation. I construe the events following that initial response from Cherokee Nation as Appellants' good-faith reliance on the tribe's representations that Baby Girl was not Cherokee and ICWA was not applicable. Ignoring the bonding that occurred here is simply ignoring the reality of this case.

[72] By way of supplemental citation, Father contends Mother's preference that Baby Girl be placed with Appellants is, standing alone, insufficient to constitute good cause warranting deviation from section 1915(a). *See In re T.S.W.*, 276 P.3d 133 (Kan. 2012) (holding placement preference of birth mother alone does not constitute good cause to deviate from placement preferences under ICWA). I do not disagree. Although I recognize that the placement preference of a birth mother standing alone may be insufficient, here, Mother's preference, although certainly relevant, is only one of several factors in my analysis. The totality of the circumstances, in my judgment, compels a finding of good cause to deviate from the section 1915 placement preferences.

("Where appropriate, the preference of the Indian child or parent shall be considered . . ."); *see also In the Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993) (holding mother's preference for placement with non-Indian, adoptive parents was appropriate factor in finding good cause). Moreover, Appellants have expressed and demonstrated a desire and willingness to introduce Baby Girl to her Indian culture.[73] Section 1917 permits an adopted Indian child to receive information on his or her "tribal affiliation . . . and . . . such other information as may be necessary to protect any rights flowing from the individual's tribal relationship" upon reaching the age of eighteen. 25 U.S.C. § 1917. Thus, I am persuaded that Baby Girl will have a knowledge of and appreciation for her cultural heritage. *See In re Robert T.*, 246 Cal. Rptr. at 176 (holding that the Native American child's best interests were to remain with his adoptive parents since they have bonded well and have encouraged him to learn about and visit his cultural roots).

In light of the totality of the evidence, including the strong emotional parent-child bond formed between the Appellants and Baby Girl, the harm that would be caused if Baby Girl were removed from the only parents she has ever known, Mother's expressed preference, and Appellants' dedication to exposing the child to her Indian heritage, I would hold good cause exists to deviate from the placement preferences of ICWA.

IV.

CONCLUSION

I dissent and would reverse the judgment of the family court. I would terminate Father's parental rights pursuant to section 63-7-2570 of the South Carolina Code of Laws and in accordance with ICWA. Additionally, I would hold there is good cause to deviate from ICWA's adoptive placement preferences and remand for an immediate entry of judgment approving and finalizing the adoption of Baby Girl by Appellants. And finally, I would require the immediate return of Baby Girl to Appellants.

HEARN, J., concurs.

[73] I reject Cherokee Nation's contention that the interests of an Indian child are always better served by placement with an Indian family.

JUSTICE HEARN: Without hesitation, I join Justice Kittredge's thoughtful, well-reasoned, and excellent dissent. Like Justice Kittredge, I view both the pertinent facts of this case—facts which emanate solely from Father's conduct—and the legal principles underlying termination of parental rights and adoption as requiring judgment in favor of Adoptive Couple. My review of the record convinces me that Father turned his back on the joys and responsibilities of fatherhood at every turn. I would not minimize, as the majority does, the telling fact that Father told Mother in writing after Baby Girl's birth that he would relinquish his parental rights rather than support her and Baby Girl, and I do not join the majority in accepting his laughable explanation that he did this as a way to convince Mother to marry him. In stark contrast to Father's behavior in completely shirking his parental responsibilities, every action taken by Adoptive Couple since they learned she was going to be their child has demonstrated their deep and unconditional love and commitment to Baby Girl. Nevertheless, today, the majority goes out of its way to re-cast the facts in a light unfavorable to Adoptive Couple and overlooks Father's clear course of conduct, affording him a second chance at fatherhood, all at great emotional cost to Baby Girl and Adoptive Couple.

Apart from the human tragedy that Father's reluctance to act like a father until the eleventh hour has wrought on Baby Girl, Adoptive Couple, and their extended family, I profoundly disagree with the majority's elevation of the Indian Child Welfare Act (ICWA) to a position of total dominance over state law and settled principles of the best interests of the child, a position which I find totally unsupported by ICWA jurisprudence. As Justice Kittredge demonstrated, Father's last-ditch efforts to embrace a relationship with his daughter under the cloud of litigation are far too little and much too late. I cannot fathom that Congress intended ICWA to require the return of a child to a parent who consistently, by his words and actions, evinced a desire to forego his responsibilities as a father. I therefore wholeheartedly join Justice Kittredge's dissent and would order Baby Girl's return to Adoptive Couple.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George Thomas Samaha, III, Respondent.

Appellate Case No. 2012-206426

Opinion No. 27149
Heard June 19, 2012 – Filed August 1, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William Curtis Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harry Leslie Devoe, Jr., of New Zion, for Respondent.

PER CURIAM: In this attorney disciplinary action, the Commission on Lawyer Conduct ("the Commission") considered Formal Charges filed against attorney George Thomas Samaha, III ("Respondent") that arose from his representation of a widow in matters involving her late husband's estate. A Hearing Panel of the Commission found Respondent had committed misconduct in the course of this representation by (1) charging excessive fees, (2) failing to cooperate during probate court proceedings and making a false statement under oath, and (3) engaging in a conflict of interest. We find Respondent has committed misconduct warranting the imposition of a one-year definite suspension and order Respondent to pay the costs of these proceedings.

I. BACKGROUND

Respondent was admitted to the practice of law in South Carolina on January 3, 1995. The Office of Disciplinary Counsel ("ODC") filed Formal

Charges against Respondent on August 14, 2009 alleging he committed misconduct in his representation of Lillian J. McLure ("Lillian"). Respondent filed a Response to Formal Charges on September 17, 2009 denying the pertinent allegations. The Hearing Panel conducted a two-day hearing on the charges on June 30 and July 1, 2010.

II. PANEL REPORT

A. Findings of Fact

The Hearing Panel issued a Panel Report that was filed with the Commission on December 15, 2011. The Hearing Panel made the following Findings of Fact, which we find are fully supported by the record. In August 2000, Respondent prepared two wills for Lillian and her husband, Francis G. McLure ("Frank"), in which each left everything to the other. Frank had always handled the couple's financial matters and took care of Lillian during their marriage. Lillian, who was then in her late 70s, was described as being a very trusting person who had a limited formal education and needed help with her financial affairs.

A few months later, in October 2000, Respondent prepared what he termed a "sham" will for Frank at Frank's request.[1] In the new will, Frank devised $100,000 to his sister-in-law, Ann McLure ("Ann"), and made smaller bequests to others. Frank told Respondent that he made this new will "[t]o get [Ann] off his back" about an inheritance. Frank informed Respondent that all of his assets, with the exception of a vehicle, were titled in the names of himself and Lillian as joint tenants with a right of survivorship. Consequently, Ann would be unable to find sufficient assets in the estate to fund the bequests. Frank intended that all of his assets would go to Lillian. At some point, Respondent also prepared one or more documents giving Ann a power of attorney for both Frank and Lillian.

Frank died on January 3, 2001. Thereafter, Ann, using a power of attorney, removed $130,000 from a joint checking account held by Lillian and her husband. The money was taken without Lillian's knowledge or permission and was discovered when she reviewed her banking statements. Ann also took a vehicle, Frank's ashes, and Frank's financial notebooks.

Lillian retained Respondent to protect her late husband's estate and to recover the funds taken by Ann. In May 2001, Respondent wrote to Lillian's

[1] Frank's October 2000 will was ultimately admitted to probate by the probate court judge, who found it was the later will and was properly executed, witnessed, and notarized.

family members in New York and recommended the appointment of a conservator to protect her interests because "[a] conservator must file accountings with the Court, whereas someone who has her Power of Attorney can transfer and acquire any or all of her assets without being accountable to anyone." Respondent never obtained a conservator, although he acknowledged that he did not need the family's assistance to have one appointed. Thereafter, on June 26, 2001, Respondent had Lillian execute a written Contract for Legal Services, which called for Respondent (1) to "marshal" the assets of Frank's estate for a 25% contingency fee, and (2) to file a conversion action against Ann.[2]

Respondent also prepared the following documents signed by Lillian: (1) an Irrevocable Living Trust dated July 16, 2001, which named Respondent as the sole trustee; (2) a Last Will and Testament, executed on July 24, 2001, designating himself the personal representative for Lillian's estate; and (3) a General Durable Power of Attorney, executed on October 19, 2001, which appointed Respondent as Lillian's attorney-in-fact. Respondent did not advise Lillian to seek outside counsel to review these documents.

Thereafter, Respondent refused to turn over documents to George McDowell, the attorney appointed to handle Frank's estate. McDowell had requested the records in order to perform his duty to file an accounting of Frank's estate. The probate court requested that Respondent bring Lillian to a scheduled probate court hearing. Around October 2001, however, Lillian moved to an assisted living facility in Catskill, New York, and Respondent failed to reveal her location despite repeated requests from McDowell.

In subsequent probate court hearings concerning Frank's estate, Respondent admittedly failed to cooperate in turning over documents needed for the accounting. In addition, he falsely told the probate court judge that he did not know where Lillian resided and repeatedly refused to reveal Lillian's whereabouts. Respondent maintained in his testimony to the Hearing Panel that he was protecting Lillian from Ann, the probate court judge, and others, but he acknowledged there were other methods, besides making false statements under oath, to protect his client. Although Respondent still insisted that he did not know where Lillian was *the day of* the hearing, because she was traveling, he conceded that he did know where Lillian resided because he was paying for her bills at the assisted living facility.

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[2] Respondent maintained he believed Lillian to be competent at that time. Medical evidence in the record, prepared in 2002, subsequently called into question Lillian's abilities.

Respondent ultimately settled a malpractice action brought against him by McDowell on behalf of Lillian. Respondent did not admit liability, but he contributed $35,000 towards the settlement amount of $245,000, with the remainder being paid for by his insurance carrier. McDowell also recovered the funds taken by Ann.

B. Misconduct

Based on the foregoing, the Hearing Panel found Respondent committed misconduct in three areas. First, Respondent charged excessive legal fees. The Hearing Panel questioned the need for Respondent's charges when he could have accomplished faster results by immediately revoking Ann's power of attorney and sending the revocation to the appropriate account holders. Ultimately, Respondent marshaled only nine assets, all of which Lillian had held in joint tenancy with her late husband with a right of survivorship. However, pursuant to his 25% contingency fee arrangement, Respondent charged a fee of $115,000 to marshal the assets for an estate valued at less than $500,000. Respondent also sold Lillian's marital home to a buyer who was presented to him by one of Lillian's neighbors, yet he charged a 25% marshaling fee on the home sale pursuant to his contact for services. He also distributed a total of $75,000 of the proceeds from the sale of the home to two of Lillian's neighbors. One neighbor described this as an "extraordinarily generous" gift while simultaneously acknowledging that Lillian did not have a good understanding of what things cost. Respondent did not change his form of compensation to an hourly rate when he saw the true nature of the work involved, and the Hearing Panel noted "Respondent did nothing more than what a personal representative of the estate would have done for a much lesser fee."[3]

Second, Respondent failed to cooperate and made a false statement under oath during the probate court proceedings. Respondent failed to turn over documents to the attorney appointed to handle the estate of Lillian's late husband and he untruthfully stated he did not know Lillian's whereabouts when he was aware Lillian was staying at an assisted living facility in New York because he was paying her bills there.

Third, Respondent engaged in a conflict of interest. Respondent failed to advise Lillian to seek outside counsel to review the documents Respondent created

[3] The fee for a personal representative is statutorily limited to five percent "of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate," except where "otherwise approved by the court for extraordinary services." S.C. Code Ann. § 62-3-719(a) (2009).

giving himself Lillian's power of attorney, making himself the sole trustee of her Irrevocable Living Trust, and naming himself as Lillian's personal representative.

C. Violation of Disciplinary Rules

The Hearing Panel found Respondent had violated the following provisions of the Rules of Professional Conduct ("RPC") contained in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.5(a) (reasonableness of fee); Rule 1.7(b)[4] (conflict of interest); Rule 1.8(a) (pecuniary interest); Rule 3.2 (expediting litigation); Rule 3.3(a)(1) (false statement of fact or law to a tribunal); Rule 3.4(a) (unlawfully obstructing another party's access to evidence); Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); Rule 8.4(a) (violating or attempting to violate the RPC); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

In addition, it concluded Respondent had violated the following provisions of the Rules for Lawyer Disciplinary Enforcement ("RLDE") contained in Rule 413, SCACR: Rule 7(a)(1) (violating or attempting to violate the RPC); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the Oath of Office taken upon the admission to practice law in South Carolina).

[4] Rule 1.7(b) of the RPC provided at the time of Respondent's misconduct that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's own interests or responsibilities to another client, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. Rule 1.7 was amended in 2005. Respondent's representation of Frank in preparing a second will adverse to Lillian's interests was also arguably a conflict of interest and this conduct is, in essence, the source of all of the subsequent problems in this matter. However, as the Hearing Panel noted, although Respondent's witness (and former counsel) suggested Respondent's preparation of the second will was a conflict of interest since Respondent had prepared joint wills for the couple only a few months before, ODC did not pursue an allegation in this regard.

D. Aggravating & Mitigating Factors; Recommended Sanction

The Hearing Panel found the following three aggravating factors: (1) a dishonest or selfish motive (Respondent's lack of cooperation during the probate court proceedings was for the purpose of concealing his excessive fee and the mishandling of Lillian's funds); (2) Respondent's disciplinary history (on October 19, 2001, Respondent received a Letter of Caution with a finding of minor misconduct citing Rules 1.1, 1.2, 1.3, 1.4, and 8.1 of the RPC, Rule 407, SCACR); and (3) the vulnerability of the victim (the Hearing Panel found Respondent's actions "most troubling" since Respondent himself had initially recommended the appointment of a conservator to protect Lillian's interests, and Lillian was a very trusting and naïve person who clearly relied on Respondent to adequately handle her financial matters, yet Respondent had her execute an unreasonable fee agreement and failed to properly manage her assets and funds).

The Hearing Panel found two mitigating factors: (1) the delay in the disciplinary proceedings, which were pending over a period of many years; and (2) the imposition of other sanctions or penalties, i.e., the fact that Respondent had settled a malpractice action arising out of this matter, in which he contributed $35,000 towards the settlement amount of $245,000.

The Hearing Panel recommended that Respondent be suspended from the practice of law for one year and that he be ordered to pay the costs of these proceedings. The costs reported by the Commission are $3,086.64.

IV. LAW

Neither Respondent nor ODC has filed a brief with this Court taking exception to the Panel Report and the recommended sanction of a definite suspension of one year. *See* Rule 27(a), RLDE, Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

The authority to discipline attorneys rests entirely with this Court. *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011); *see also* S.C. Const. art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."). The Court "has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and

conclusions of law." *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008); *see also* Rule 27(e)(2), RLDE, Rule 413, SCACR ("The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.").

"A disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

Pursuant to Rule 27(a), RLDE, Rule 413, SCACR, the factual findings made by the Commission are deemed admitted by Respondent's failure to file a brief, and we find they are fully supported by the record. Further, we agree with the Hearing Panel that the factual findings support a finding of misconduct. Having found ODC has established Respondent's misconduct by clear and convincing evidence, this Court need only determine the appropriate sanction. *In re Hursey*, 395 S.C. 527, 719 S.E.2d 670 (2011).

After carefully considering the entire record in this matter, including the transcripts and exhibits submitted to this Court, we conclude the recommendation of the Hearing Panel for a one-year definite suspension is an appropriate sanction for Respondent's misconduct. *See In re Prendergast*, 390 S.C. 395, 402, 702 S.E.2d 364, 367 (2010) ("Although Rule 1.8 does not prohibit attorney-client business relationships, it clearly delineates three mandatory requirements an attorney must satisfy to comply with the standards of ethical conduct."); *In re Crummey*, 388 S.C. 286, 289-91, 696 S.E.2d 589, 591 (2010) (noting the attorney admitted that she drafted documents naming herself as personal representative and trustee for a trust without having the client seek the advice of other counsel, and she failed to make an accounting to the new personal representative and to the probate court; among other rules, this Court found Respondent had violated the following provisions of the RPC: Rule 3.2 (reasonable efforts to expedite litigation); Rule 3.3 (false statement of fact to tribunal); Rule 4.1 (false statement of fact to third person when representing a client); Rule 8.4(a) (violating the RPC); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation); and Rule 8.4(e) (conduct prejudicial to the administration of justice)); *In re Jones*, 359 S.C. 156, 597 S.E.2d 800 (2004) (imposing a one-year suspension for the attorney's misconduct in misrepresenting to disciplinary counsel, while under oath, that he was not licensed to practice law in another state, thus violating Rule 3.3, along with his misconduct in failing to perfect a criminal

defendant's direct appeal, to file a divorce on behalf of a client, and to cooperate in disciplinary proceedings); *cf. In re Wilmeth*, 373 S.C. 631, 632-33, 647 S.E.2d 185, 186 (2007) (sanctioning attorney with disbarment, pursuant to an agreement for discipline, for misconduct in seven matters; the Court noted the attorney had "drafted [] wills for two individuals and named herself as an alternate and/or substitute personal representative in each of the wills without complying with the provisions of Rule 1.8, RPC, Rule 407, SCACR," charged excessive attorney's fees and statutory personal representative's fees, and had "misappropriated $861,367.52 from either one or both of the estates").

We also agree with the Hearing Panel's recommendation regarding the payment of costs. The imposition of costs and the determination of their amount are within this Court's discretion. *See In re Thompson*, 343 S.C. at 13, 539 S.E.2d at 402 ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct. Unless otherwise ordered by the Court, costs shall be paid within 30 days of the filing of the opinion or order assessing costs."); Rule 7(b)(6), RLDE, Rule 413, SCACR[5] (stating sanctions for misconduct may include ordering payment of the costs of the proceedings). The payment of costs is a crucial component of any disciplinary action, and it is within the scope of allowable sanctions frequently implemented by this Court. *In re Prendergast*, 390 S.C. at 403-04, 702 S.E.2d at 368.

V. CONCLUSION

We hereby suspend Respondent from the practice of law in this state for one year. Respondent is also ordered to reimburse the Commission for the costs incurred in these proceedings, which total $3,086.64. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR (duties of attorney following disbarment or suspension).

DEFINITE SUSPENSION.

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

[5] This provision was formerly Rule 7(b)(8), RLDE, Rule 413, SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George E. Lafaye, III, Respondent.

Appellate Case No. 2012-212196

Opinion No. 27150
Submitted June 25, 2012 – Filed August 1, 2012

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara Marie Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

George E. Lafaye, III, of Columbia, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. He requests that disbarment be imposed retroactively to the date of his interim suspension, April 21, 2011. *In the Matter of Lafaye,* 392 S.C. 312, 709 S.E.2d 625 (2011). In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of his disbarment. Further, respondent agrees to pay restitution of $365,747.58, plus interest, and legal fees of $4,310.90 to Commonwealth Land Title Insurance Company and to pay restitution to the Lawyers' Fund for Client Protection (Lawyers' Fund), reimbursing it for all claims paid on his behalf. Respondent agrees to pay restitution within one (1) year of his disbarment.

The Agreement provides that respondent shall file proof of payment of restitution with the Commission no later than one (1) year from the date of the Court's order of disbarment and, if funds currently held in trust or operating accounts by the attorney appointed to protect the interests of respondent's clients are used to pay any of the above obligations, respondent's obligations shall be reduced by the amount paid. The Agreement further provides that respondent and Commonwealth Land Title Insurance Company may negotiate repayment of a lesser amount and that, should the title company confirm payment of a lesser amount in full satisfaction of respondent's debt, respondent's restitution obligation shall be deemed paid in full.

We accept the Agreement and disbar respondent from the practice of law in this State retroactive to the date of his interim suspension. In addition, we impose the conditions as stated in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent operated a solo practice from 1994 until his interim suspension on April 21, 2011. In 2009, the Commission received a report of an overdraft on respondent's trust account. During the course of the ensuing investigation by ODC, respondent admitted he failed to ensure deposits were credited to his trust account prior to disbursement in violation of Rule 1.15, RPC, Rule 407, SCACR. He also admitted he was delinquent in reconciling his trust account as required by Rule 417, SCACR.

During the course of the 2009 investigation, respondent retained an attorney and an accountant. Based on information and documents supplied by respondent, respondent's counsel and accountant represented to ODC that they had assisted respondent in becoming compliant with Rule 417, SCACR, and that respondent's trust account reconciliations had been brought up to date. In reliance on the representations made by respondent's counsel and accountant, and respondent's agreement to comply with Rule 1.15, RPC, and Rule 417, SCACR, in the future, ODC agreed to the Commission concluding the matter with a confidential admonition. The admonition was issued on July 31, 2009. At the time of the resolution of that investigation, respondent did not disclose the existence of a second trust account to ODC.

On December 23, 2010, respondent conducted a closing for Mr. and Mrs. A who refinanced their home mortgage. Respondent received the funds in his second trust account by wire from Mr. and Mrs. A's new lender. Respondent was to pay off Mr. and Mrs. A's prior mortgage in the amount of $196,291.13 on January 3, 2011. Respondent did not pay off the loan as agreed because he did not have sufficient funds in the second trust account.

On February 28, 2011, respondent signed a false affidavit stating that he made the payoff and that he was in possession of a canceled check payable to the lender. Respondent submitted the false affidavit to the title company.

Respondent made two small payments on the prior loan between January and April 2011. In April, Mr. and Mrs. A discovered that their prior mortgage was not paid off when they received a statement showing that someone had been making periodic payments. Mr. and Mrs. A contacted the representative of the new lender who, in turn, contacted the title company.

Counsel for the title company confronted respondent on April 6, 2011, to determine the status of the mortgage. Respondent wired the funds to pay off the prior mortgage the same day. In order to pay off Mr. and Mrs. A's prior mortgage, respondent used funds received in connection with an unrelated closing for his clients, Mr. and Mrs. B.

On March 31, 2011, respondent had closed a loan for Mr. and Mrs. B to be disbursed on April 5. On April 5, 2011, respondent received $407,001.00 by wire to his second trust account to fund Mr. and Mrs. B's closing. Respondent did not pay off Mr. and Mrs. B's prior mortgage as agreed. Instead, respondent used a portion of Mr. and Mrs. B's loan proceeds to pay off Mr. and Mrs. A's prior mortgage. On April 14, 2011, respondent used approximately $40,000 of Mr. and Mrs. B's loan proceeds to make a payment to their prior mortgage holder.

On April 21, 2011, the date of respondent's interim suspension, he had approximately $65,000 in the second trust account and more than $23,000 in outstanding checks. On April 27, 2011, the title insurance company paid $365,747.58 to satisfy Mr. and Mrs. B's prior mortgage.

From 1994 until his interim suspension in April 2011, respondent misappropriated funds from his client trust accounts. Respondent used the funds to pay tax bills,

personal attorneys' fees, settle a malpractice claim, and for various other personal and business purposes. For many years, respondent paid his personal mortgage through monthly automatic debits from the second trust account in the amount of $1,184.00 per month. In 2009, respondent paid his personal tax debt in the amount of $11,224.50 from the second trust account.

Over time, respondent made attempts to restore misappropriated funds by making deposits into the second trust account from a personal investment account created with a family inheritance and personal loans. He also attempted to cover the shortages that resulted from his misappropriation by leaving earned fees in the trust account. As a result of his ongoing misuse of trust funds, respondent's efforts to restore the account were unsuccessful.

Respondent now admits that the representations he made to ODC in 2009 were false. He also admits he did not prepare proper monthly reconciliations as required by Rule 417, SCACR. Finally, respondent admits he was able to keep ODC from discovering the misappropriation in 2009 by failing to disclose the existence of the second trust account.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.15 (lawyer shall hold property of clients in lawyer’s possession in connection with representation separate from lawyer’s own property; lawyer may deposit lawyer’s own funds in client trust account for the sole purpose of paying service charges on that account; lawyer shall promptly deliver to client or third person any funds client or third person is entitled to receive; lawyer shall not disburse funds from an account containing funds of more than one client or third person unless funds to be disbursed have been deposited in the account and are collected funds); Rule 4.1 (in course of representing client, lawyer shall not knowingly make false statement of material fact to third person); Rule 8.1 (lawyer in connection with disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known to have arisen in the matter); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is

professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits he violated Rule 417, SCACR. Further, respondent admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Within one (1) year of the date of this opinion, respondent shall pay restitution in the amount of $365,747.58, plus interest, and legal fees of $4,310.90 to Commonwealth Land Title Insurance Company. In addition, within one (1) year of the date of this opinion, respondent shall pay restitution to the Lawyers' Fund, reimbursing it for all claims paid on his behalf.

Respondent shall file proof of payment of restitution to the Commission no later than one (1) year from the date of this opinion. If funds currently held in respondent's trust or operating accounts by the attorney appointed to protect the interests of respondent's clients are used to pay any of the above-stated restitution obligations, respondent's obligations shall be reduced by the amount paid. Respondent and Commonwealth Land Title Insurance Company may negotiate repayment of a lesser amount. Should the title company confirm payment of a lesser amount in full satisfaction of respondent's debt, respondent's restitution obligation shall be deemed paid in full.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles Thomas Brooks, III,
Respondent.

Appellate Case No. 2012-212138

Opinion No. 27151
Submitted July 2, 2012 – Filed August 1, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III, of Ballard Watson Weissenstein, of West Columbia, for Charles Thomas Brooks, III.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. Respondent agrees to make restitution to the South Carolina Commission on Indigent Defense (SCCID) for the excess compensation he received by asking it to reduce the fees it currently owes to him by $61,826.40. Respondent agrees that, within thirty (30) days of imposition of a sanction, he will provide the Commission on Lawyer Conduct (the Commission) with documentation from SCCID that the request has been made and will satisfy

his debt to SCCID. If the amount respondent is owed by SCCID is insufficient to satisfy his debt, respondent agrees to submit a repayment plan for the balance owed to the Commission within thirty (30) days of the imposition of discipline. Respondent further agrees to complete the Legal Ethics and Practice Program Ethics School within one (1) year of imposition of discipline and he agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of imposition of discipline. We accept the Agreement and issue a public reprimand with conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

A substantial portion of respondent's practice has been devoted to representing indigents in post-conviction relief, Department of Social Services, and sexually violent predator actions. Respondent also represents indigents in criminal cases and probation revocations.

The executive director of the SCCID filed a complaint against respondent alleging he overbilled SCCID for his representation of indigents. For most of his appointed work, respondent would submit vouchers at the conclusion of his representation on each case. Respondent's vouchers served as itemized billing records for each individual case indicating time and dates for the work performed.

During a time period covering approximately two (2) years and eight (8) months, respondent's vouchers to the SCCID contained numerous errors. In fact, when respondent's billing records for that period were later totaled by date rather than viewed as separate vouchers, the calculations revealed that respondent billed SCCID in excess of 24 hours per day for fourteen separate days.

Respondent admits he substantially overbilled for his representation of indigent clients and acknowledges systemic problems with his billing practices. Chief among these problems was respondent's failure to maintain contemporaneous time records in his indigent cases. When it was time to submit a voucher, respondent and his staff often relied on his client's file to determine the amount of time he had devoted to that particular client. Respondent submits this approach resulted in him sometimes incorrectly attributing work to the wrong dates and overestimating the time devoted to a particular task. It also caused him to sometimes bill for the same travel time more than once because the underlying cases were concluded at

different times and he did not keep track of whether he had already billed travel time for a particular day. Additionally, respondent billed for items SCCID does not consider compensable, namely work performed by paralegal staff and particular travel time. Respondent further explains that some work was reported under his name when it was actually performed by his wife, another attorney in his firm. Despite these admitted problems, respondent contends he did not intentionally overbill SCCID and ODC does not have any evidence to the contrary.

Due to the lack of contemporaneous time records, an exact figure for excess billing and excess payments received cannot be established. However, after reviewing the records in detail with the assistance of his counsel and a forensic accountant, respondent calculates he received $61,826.40 in excess compensation from SCCID.

Respondent has continued to represent indigent clients and submit vouchers for his work but, pursuant to his requests, SCCID has not paid him for his services since ODC began its investigation. Because of the additional vouchers submitted during the investigation, respondent represents that SCCID owes him more on approved, unpaid vouchers than he received in excess compensation.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5(a) (lawyer shall not charge or collect an unreasonable fee or an unreasonable amount for expenses) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

Respondent shall make restitution to SCCID for the excess compensation he received by asking it to reduce the fees it currently owes to him by $61,826.40 and entering into a repayment plan if the amount owed to him is insufficient to satisfy his debt to SCCID. Within thirty (30) days of the date of this opinion, respondent shall provide the Commission with documentation from SCCID that his request has been made and that it will satisfy his debt to SCCID. If the amount respondent is owed by SCCID is insufficient to satisfy his debt, respondent shall submit a repayment plan for the balance owed to SCCID to the Commission within thirty (30) days of the date of this opinion.

Respondent shall complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of this opinion and provide the Commission with proof of completion no later than ten (10) days after the conclusion of the program. Finally, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert E. Hemingway, Sr., Respondent

Appellate Case No. 2012-212194

Opinion No. 27152
Submitted June 25, 2012 – Filed August 1, 2012

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert E. Hemingway, Sr., of Columbia, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction in Rule 7(b), RLDE. Respondent requests that any suspension or disbarment be imposed retroactively to January 10, 2006, the date of his interim suspension. *In the Matter of Hemingway*, 367 S.C. 278, 625 S.E.2d 641 (2006). Respondent further agrees to enter into a restitution agreement with the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline to reimburse those harmed as a result of his misconduct. We accept the Agreement and disbar respondent from the practice of law and order that he enter into a restitution agreement as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Around January 2002, respondent was retained to represent clients who had been injured in an automobile accident. The clients received medical care from Complainant A, a chiropractic clinic. Respondent had notice of and agreed to protect Complainant A's lien.

Complainant A began contacting respondent around January 2004 to obtain payments for services rendered. Complainant A and respondent exchanged several messages over the next several months during which respondent promised to send payment to Complainant A. Respondent did not pay the full amount of the invoice until on or about November 15, 2004.

During the investigation of this matter respondent admitted he had not been performing monthly reconciliations of his trust accounts as required by Rule 417, SCACR.

Matter II

Respondent represented a client who had been injured in an automobile accident. Respondent's client was paid insurance benefits by National Union Fire Insurance Companies of Pittsburgh. Complainant B acted as a third party administrator of the company's claims. Respondent was aware Complainant B was entitled to reimbursement for any benefits paid to his client if a third party was held liable for the accident.

On two separate occasions, Complainant B notified respondent in writing that it expected to be reimbursed $2,648.60 for benefits paid to respondent's client. Respondent disbursed all settlement monies to his client without protecting the financial interests of Complainant B.

Matter III

Respondent's mother passed away in June 2001. Respondent was appointed Personal Representative of the Estate on July 20, 2001. Respondent admits he did

not properly disburse the Estate funds and did not ensure the Estate was closed in a timely manner.

Complainant C, a probate court judge, was assigned to hear the matter dealing with the Estate of Respondent's Mother. On June 21, 2005, on a Rule to Show Cause for dereliction of duties, Complainant C ordered respondent to file the Estate's closing documents within thirty (30) days. On October 10, 2005, on a Summons to Show Cause for dereliction of duties, Complainant C held respondent in contempt of court, imposed a fine of $250.00, and ordered respondent to fulfill all of his duties as Personal Representative of the Estate and to file any and all documents necessary to close the Estate within thirty (30) days. On February 13, 2006, on a demand for a hearing on the closing of the Estate, Complainant C ordered respondent to provide the Court and the heirs with written verification of the date of death balances of the decedent's accounts, to provide the Court with written verification by cancelled check or release/satisfaction of the payment and amount of payment of the creditor claims, to recover from appropriate third parties certain expenses paid by the Estate on behalf of the third parties, and to file an amended Inventory and Appraisement and amended Final Accounting of the Estate.

On June 30, 2006, respondent had not complied with the Court's June 21, 2005, October 10, 2005, and February 13, 2006, orders and, therefore, Complainant C issued a Summons to Show Cause for respondent's dereliction of duties. At the hearing on July 31, 2006, respondent's attorney offered respondent's resignation as fiduciary based upon medical reasons and requested an additional thirty (30) days in which to obtain and provide the Court and the heirs with the items ordered during the February 13, 2006, hearing.

On August 2, 2006, Complainant C found respondent to be in contempt of court for failing to timely conclude the Estate and failure to comply with the Court's previous orders. The Court gave respondent ten (10) days to file the previously ordered documents. In addition, Complainant C removed respondent as Personal Representative of the Estate for cause. The Court appointed two of respondent's siblings as Co-Personal Representatives.

On September 25, 2006, Complainant C issued a Bench Warrant for Incarceration for respondent for his failure to provide the court-ordered documents dealing with the Estate. The warrant required that respondent be imprisoned for thirty (30) days

or until he provided the requested Estate documents. Respondent provided the Court with all requested documents and the Estate was closed.

Matter IV

Complainant D retained respondent to represent her in relation to injuries she suffered in two automobile accidents. Respondent received $71,337.59 to settle Complainant D's cases.

Respondent admits he never disbursed the monies to Complainant D and cannot account for the monies owed to Complainant D. Respondent acknowledges that he failed to notify Complainant D after he was placed on interim suspension. In addition, he misplaced Complainant D's file and was unable to provide the file to the attorney appointed to protect his clients' interests.

Complainant D filed a claim with the Lawyers' Fund for Client Protection (the Lawyers' Fund). On December 19, 2008, the Lawyers' Fund paid Complainant D $40,000.00, the maximum amount allowed. *See* Rule 411, SCACR.

Matter V

On January 10, 2006, the Court placed respondent on interim suspension. *In the Matter of Hemingway*, *id.* On or about June 22, 2006, respondent accepted $1,500.00 from Complainant E as a retainer fee for a case he wished respondent to handle. Complainant E filed a claim with the Lawyers' Fund and was awarded $1,500.00.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.15 (lawyer shall promptly deliver to client or third person any funds or other property client or third person is entitled to receive); Rule 5.5 (lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional

misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent further admits he violated Rule 417, SCACR. Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate a valid court order issued by a court of this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall enter into a restitution agreement with the Commission agreeing to reimburse those harmed by his conduct as follows: 1) $2,648.60 to Complainant B; 2) $31,337.59 to Complainant D; and 3) $55,400.00 to the Lawyers' Fund. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cathy C. Bone, Respondent,

v.

U.S. Food Service and
Indemnity Insurance Company
of North America, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27153
Heard January 26, 2012 – Filed August 1, 2012

AFFIRMED

Michael E. Chase and Carmelo B. Sammataro, both of Turner, Padget, Graham & Laney, of Columbia, for Petitioners.

Blake A. Hewitt and John S. Nichols, both of Bluestein, Nichols, Thompson & Delgado, of Columbia, for Respondent.

JUSTICE BEATTY: In this workers' compensation case, the employer and its carrier appealed from the circuit court's order that determined the employee's claim was compensable and remanded the matter to the South Carolina Workers' Compensation Commission for further proceedings. The Court of Appeals dismissed the appeal as interlocutory in *Bone v. U.S. Food Service*, S.C. Ct. App. Order dated June 30, 2010. This Court has granted the petition of the employer and its carrier for a writ of certiorari to review the decision of the Court of Appeals. We affirm.

I. FACTS

Cathy C. Bone filed a workers' compensation claim form (Form 50) dated August 7, 2007 alleging that she injured her back on Tuesday, June 26, 2007 while employed with U.S. Food Service. Her job consisted of power washing and cleaning the insides of truck trailers that transported food. Bone alleged that she hurt her back when she lifted two pallets inside a trailer to clean under them.

According to Bone she did not report the incident immediately because she needed to continue working and thought she would be okay, but thereafter she developed increasing pain. On Tuesday, July 3, 2007, Bone reported the injury to one of her supervisors, Richard Thompson, shortly after she arrived at work. The same morning she reported her injury, Bone had a flat tire on her way to work, and she called in to advise her office of this fact.

The employer, U.S. Food Service, and its carrier, Indemnity Insurance Co. of North America (collectively, "Employer"), denied Bone's claim, disputing that she had injured her back on June 26 and asserting the injury occurred when her tire was changed on July 3.

At the hearing in this matter, Bone testified that she did not physically change the tire herself. Rather, a gentleman who was in the parking lot of a nearby business where she had pulled off the road had changed the tire for her. However, Bone's supervisor, Thompson, noted Bone was crying when she reported her injury. In addition, he recalled that she had told him that "she had to change her tire on her truck," which he interpreted to mean that she had personally changed the tire. Bone disagreed with this interpretation as well as with the exact wording of her statement. The supervisor did not dispute the fact that Bone had told him that her back injury occurred on June 26 when she lifted the pallets at work.

The hearing commissioner found Bone had failed to meet her burden of showing that she had sustained an injury by accident arising out of and in the course of her employment. An Appellate Panel of the Commission upheld the hearing commissioner's findings and conclusions in full.

Bone appealed to the circuit court, which concluded Bone had sustained a compensable injury, and it reversed and remanded the matter to the Commission for further proceedings consistent with this determination. In its order, the circuit court observed the Commission had denied the claim after "ostensibly finding [Bone] injured her back while changing her tire on July 3." However, the circuit court found Bone gave consistent statements to Employer and her physicians that her injury occurred on June 26, and further found there was "no evidence in the record, let alone substantial evidence, that [Bone] injured her back while changing a tire on the way to work on July 3, 2007." The circuit court rejected Employer's contention that the supervisor's testimony and the hearing commissioner's finding regarding credibility supported the decision below, stating credibility "goes only to the weight afforded [Bone's] testimony and in no way establishes [that her] injury occurred on July 3."

The Court of Appeals dismissed Employer's appeal of the circuit court's order on the basis it was interlocutory and did not dispose of the entirety of the case with finality. It held a general appealability statute allowing appeals

from interlocutory orders was not applicable in matters before the Commission. *Bone v. U.S. Food Service*, S.C. Ct. App. Order dated June 30, 2010. In making this determination, the Court of Appeals relied primarily upon the following precedent: *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010) (holding the Administrative Procedures Act is controlling in agency matters and S.C. Code Ann. § 14-3-330, a general appealability statute, is not applicable to agency appeals)*; Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (stating a circuit court order remanding a case for additional proceedings before an administrative agency is not immediately appealable); and *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (noting an order that determines issues of law while leaving open questions of fact is not a final order).

II. LAW/ANALYSIS

Employer contends the decision of the Court of Appeals should be reversed and the appeal reinstated because the circuit court's order was immediately appealable. Employer asserts the decision of the Court of Appeals is based upon a misapplication of precedent. Because of lingering confusion in this area that has arisen after the passage of the Administrative Procedures Act (APA), we shall review this precedent to provide clarification and a unified approach to appeals involving administrative agencies.

As an initial point of reference, we note our long-standing rule that the APA governs the review of administrative agency matters and is controlling over any provisions that conflict with its terms. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981) (holding the APA's standard of review was controlling over conflicting provisions in the workers' compensation act because the APA "purports to provide uniform procedures before State Boards and Commissions and for judicial review after the exhaustion of administrative remedies"). With this fundamental principle in mind, we turn now to an examination of the decisions cited by the Court of Appeals.

A. *Montjoy* and the Final Judgment Rule of Section 1-23-390

Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) involved an appeal from an order of the circuit court remanding the case to the Commission. We granted the respondent's motion to dismiss the appeal on the basis the circuit court's order was interlocutory and not directly appealable. *Id.* at 52, 446 S.E.2d at 618.

In doing so, we relied upon the final judgment rule articulated in section 1-23-390 of the APA and observed that "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable."[1] *Id.* Although *Montjoy* involved a Commission case, its holding applies to all administrative agencies subject to the APA.

Section 1-23-390 was thereafter amended,[2] but it still requires an appeal from a "final judgment" of the circuit court and currently provides: "An aggrieved party may obtain a review of a *final judgment* of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C. Code Ann. § 1-23-390 (Supp. 2011) (emphasis added). The phrase, "in the manner provided by the South Carolina Appellate Court

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[1] Section 1-23-390 then provided: "An aggrieved party may obtain a review of any *final judgment* of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases." *Id.* (quoting S.C. Code Ann. § 1-23-390 (1986)) (emphasis added).

[2] The 2006 amendment was necessitated by legislative changes that now direct agency appeals to the Court of Appeals rather than to the circuit court. The change specifically to Commission cases was effective on July 1, 2007. *Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 61-62, 650 S.E.2d 464, 465 (2007) (stating section 42-17-60 previously directed appeals from the Commission to the circuit court, but they now are to the Court of Appeals for injuries occurring on or after July 1, 2007).

Rules as in other civil cases" simply refers to following the same procedures for briefing schedules, preparation of records, etc., as in other civil cases and these rules do not supersede the APA provisions.

B. *Charlotte-Mecklenburg*: APA Controls Over the General Appealability Statute of Section 14-3-330

Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010) concerned the dismissal of an appeal from an order of the Administrative Law Court (ALC) on the basis it was not immediately appealable under the APA. We observed that "[t]he right of appeal arises from and is controlled by statutory law." *Id.* at 266, 692 S.E.2d at 894. We noted that S.C. Code Ann. § 14-3-330(1) (1976)[3] is a general appealability statute that permits immediate appeal from an interlocutory order "involving the merits"; however, where a specialized statute regarding appeals is applicable, section 14-3-330 does not govern the right to review. *Id.*

We observed that S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2009) of the APA allows judicial review only from "final decisions" of the ALC. *Id.* "Therefore, although § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC." *Id.* We overruled two cases "[t]o the extent . . . [that they] rely on § 14-3-330 to permit the appeal of interlocutory orders of the ALC *or an administrative agency* . . . ." *Id.* (emphasis added).[4]

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[3] Section 14-3-330(1) permits review of "*[a]ny intermediate judgment*, order or decree in a law case *involving the merits* in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions[.]" (Emphasis added.)

[4] The following cases were overruled: *Canteen v. McLeod Regional Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) (a workers' compensation

We considered the meaning of a "final decision" and stated, "If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory." *Id.* at 267, 692 S.E.2d at 894. "A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment." *Id.* Rather, "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.* at 267, 692 S.E.2d at 895 (citing *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)).

We concluded that, although the ALC decided questions of law in this matter, it also remanded some issues, so a final determination had yet to be made. *Id.* Consequently, we held the order of the ALC was interlocutory and not a final decision that was immediately appealable. *Id.*

C. Application of Precedent to Employer's Appeal

Employer attempts to distinguish *Montjoy* and *Charlotte-Mecklenburg* and argues the Court of Appeals applied an "overly broad" interpretation of the latter. Although *Montjoy* holds that a circuit court order remanding a case to an agency for further proceedings is not a final order under section 1-23-390, Employer argues the nature of the remand was not revealed in the *Montjoy* opinion, so *Montjoy* should not preclude an immediate appeal here.

Employer acknowledges that section 1-23-390 of the APA limits appellate review to final orders. However, Employer contends a final order under section 1-23-390 is one that "affects the merits," citing, among other cases, *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984) and

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case) and *Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009) (an ALC matter). Thus, it is clear from the example of the overruled cases and the reference to "interlocutory orders of the ALC or an administrative agency" that the analysis in *Charlotte-Mecklenburg* applies broadly to administrative agency matters and it is not limited just to orders of the ALC.

Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983). Employer maintains the current order is appealable because the circuit court decided a portion of the case, compensability, with finality, citing *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005) ("An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." (citation omitted)), *implied overruling recognized by Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011).

In *Long v. Sealed Air Corp.*, the Court of Appeals, noting this Court's recent holding in *Charlotte-Mecklenburg* that section 14-3-330 does not apply where a specific statute of the APA controls, concluded *Brown* had been implicitly overruled to the extent that it defined a final order in terms of whether it "involved the merits" because, even though *Brown* did not cite to or specifically rely upon section 14-3-330, it applied an "involving the merits" analysis, which is relevant only under section 14-3-330. *Long*, 391 S.C. at 487 & n.4, 706 S.E.2d at 36 & n.4. Employer argues *Long* was "wrongly decided" under existing precedent and should be overturned.

Today we reiterate that appeals in administrative agency matters are handled differently than appeals in other cases. The South Carolina General Assembly enacted the APA's mechanisms for review to provide uniform procedures after the exhaustion of administrative remedies; the APA's provisions are controlling in these agency matters and supersede any conflicting provisions. *Lark*, 276 S.C. at 132, 276 S.E.2d at 305. Thus, while appeals from the circuit court in other cases are subject to the general appealability statute of section 14-3-330, which allows appeals from interlocutory orders in certain instances (such as where the interlocutory order involves the merits), this provision and its concepts are inapplicable in matters subject to the APA. *Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 266, 692 S.E.2d at 894.

In this case, the APA contains a specific statute, section 1-23-390, which governs appeals from the circuit court, and this statute limits appeals to those from "final judgments." Final judgments are not defined by the

terminology in section 14-3-330 to include interlocutory orders that "involve the merits." The concept of "involving the merits" is part of the analysis in determining whether an interlocutory order may be appealed under section 14-3-330, so it has no bearing here.

As noted by Bone, there are many cases arising after the enactment of the APA that have applied this standard of "involving the merits," even though they do not specifically reference section 14-3-330. In many instances, these cases reached the correct result, but the "involves the merits" analysis did not survive the enactment of the APA.[5] This has left some lingering confusion in our case law. To clarify, post-APA decisions applying this analysis are overruled to the extent that they either rely upon section 14-3-330 explicitly or rely upon any of its concepts in defining what constitutes a "final judgment."

A "final judgment" is defined in this context as was stated in *Charlotte-Mecklenburg*, i.e., the order must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what has already been determined. *Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 267, 692 S.E.2d at 895. Although Employer argues one issue (compensability) has been decided here and, thus, the order is immediately appealable, this essentially applies an "involves the merits" analysis that we have already rejected in *Charlotte-Mecklenburg*. *See id.* at 267, 692 S.E.2d at 894 (stating a judgment deciding issues of law, but leaving open questions of fact is not a final judgment). As Bone asserts, the order does not dispose of the entire action, because a ruling as to compensability, with nothing more (such as the claimant's specific benefits and medical status), is not enforceable as it stands. Further, a circuit court order remanding a matter to an agency is not a final judgment and it is not immediately appealable. *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618. The ruling in *Montjoy* did not

[5] Some of these cases are based on reasoning from opinions decided before the enactment of the APA. *See, e.g., Chastain v. Spartan Mills*, 228 S.C. 61, 65, 88 S.E.2d 836, 837 (1955) (holding the Commission's order reversing an award and remanding the case to the single hearing commissioner to take further testimony was not final because it did not "affect the merits").

elaborate on the purpose of the remand to the Commission because the holding was not dependent on the nature of the remand.

The procedure urged by Employer, which would postpone a remand to the agency for a final decision and instead allow an appeal from an interlocutory order and then a second appeal after the final agency decision, would result in piecemeal appeals in agency cases that would adversely affect judicial economy and compromise informed appellate review. The APA's requirement of review of a final decision, and its statutory mandate for the exhaustion of administrative remedies serves (1) to protect the administrative agency's authority and (2) to promote efficiency, and we agree with the Court of Appeals that the order of remand in the current matter is not immediately appealable. *Cf. Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (stating the exhaustion of administrative remedies serves to protect administrative agencies and promote efficiency and "may produce a useful record for subsequent judicial consideration" (citation omitted)); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004) (noting, in another context, the need for "further[ing] the goals of avoiding piecemeal appeals and fostering informed appellate review"); *Good*, 201 S.C. at 42, 21 S.E.2d at 213 ("The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases . . . which can be decided upon an appeal from [] final judgment . . . .").

To the extent Employer argues this result is untenable because the law of the case doctrine would preclude later review of the matter of compensability, this assertion is without merit. The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal.[6]

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[6] *See generally Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011) ("Under the law of the case doctrine, 'a party is precluded from relitigating, after an appeal, matters that were either

III. CONCLUSION

In agency appeals, the APA is controlling over general provisions that conflict with its terms. In this case, there is a specific statute in the APA that governs appeals from the circuit court in Commission cases, section 1-23-390, and it limits appeals to those from final judgments. Therefore, section 14-3-330, a general appealability statute allowing interlocutory appeals in certain instances, and its concepts are not applicable here. The definition of a "final judgment" used in *Charlotte-Mecklenburg* should be the point of reference in any analysis of that term when applying section 1-23-390. Consequently, we affirm the decision of the Court of Appeals, which found the current order remanding the matter to the Commission for further proceedings, does not constitute a final judgment as required by section 1-23-390 and is not immediately appealable.

AFFIRMED.

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

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not raised on appeal, but should have been or raised on appeal, but expressly rejected by the appellate court.'" (citation omitted)).

JUSTICE HEARN: Respectfully, I dissent. In my opinion, this case involves nothing more than a straight-forward application of Section 1-23-390 of the South Carolina Code (Supp. 2011), which permits an appeal from a final decision involving the merits of a substantial issue in a case. Under this rubric, the court of appeals erred in dismissing U.S. Food Service's appeal. In reaching the opposite result and broadening *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), beyond its original context, the majority overrules years of settled case law. Because *Charlotte-Mecklenburg* is inapposite and does not alter the analysis under section 1-23-390, I would reverse.

To begin, I agree with the majority that the Administrative Procedures Act (APA) governs the standards of appealability in administrative cases, which means our general rules do not apply. As explained more thoroughly below, the APA provides appealablilty standards for two different stages of these proceedings: appeal from the administrative body to the judiciary,[7] and further appellate review within the courts. This case involves only the latter, which is controlled by section 1-23-390. This statute provides: "An aggrieved party may obtain a review of a final judgment of the circuit court or court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." At the heart of this case is what the words "final judgment" in section 1-23-390 mean.

The first time we expressly interpreted this statute was in *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). At the time that case was decided, section 1-23-390 read: "An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases." S.C. Code Ann. § 1-23-390 (1986). Under this standard, which is

[7] Appeals from agency decisions used to be to the circuit court. S.C. Code Ann. § 1-23-380(1) (2005). Thus, the circuit court would sit in an appellate capacity. The statute has since been amended, and now appeals are brought directly to the court of appeals. S.C. Code Ann. § 1-23-380(1) (Supp. 2011).

similar to the present version of section 1-23-290, "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618 (1994). However, there is more to this than meets the eye. Because we provided no information regarding the scope of the remand in question, it is necessary to turn to the two workers' compensation cases relied upon to flesh out what we actually held: *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983), and *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984).[8]

In *Hunt*, the circuit court remanded a decision of the full commission so it could take additional testimony from the employee. 279 S.C. at 343, 306 S.E.2d at 622. We held: "Because the interlocutory order of the circuit court *does not involve the merits of the action*, it is not reviewable by this Court for lack of finality." *Id.* (emphasis added). Similarly, in *Owens*, the circuit court remanded for the taking of additional testimony, so the order did "*not involve the merits of the action.* It [was] therefore interlocutory and not reviewable by this Court for lack of finality." 281 S.C. at 491-92, 316 S.E.2d at 385 (emphasis added). Thus, in interpreting the scope of the final judgment rule under section 1-23-390, *Montjoy* implicitly reaffirmed the principle that a final order involving the merits of an action is immediately appealable.

In the years since *Montjoy*, the court of appeals has had many opportunities to evaluate appealability under section 1-23-390. In particular, the court of appeals examined this issue at length in *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). There, Brown, a worker in a cotton mill, developed breathing problems after years of service. *Id.* at 383, 622 S.E.2d at 549. Although he also smoked cigarettes for forty-five years, he claimed the respiratory troubles he developed were from his work in the mill. *Id.* at 382, 622 S.E.2d at 548. Despite the evidence to the contrary, the single commissioner concluded Brown's "respiratory disease arose out of and in the course of his employment; said disease was due to

[8] Section 1-23-390 was passed into law in 1977. *See* 1977 Act No. 176, Art. II, § 9. Accordingly, even though they do not cite this statute, *Hunt* and *Owens* were governed by it.

hazards of the employment which are excess of hazards normally incident to normal employees." *Id.* at 384, 622 S.E.2d at 550. The full commission affirmed. *Id.* at 385, 622 S.E.2d at 550. The circuit court, however, held Brown's smoking was a contributing cause of his illness, and therefore the mill was entitled to a reduction in the compensation it owed. *Id.* at 386, 622 S.E.2d at 550. Accordingly, the circuit court remanded for a determination of the extent of this reduction. *Id.*

Brown appealed, and the mill argued the order remanding to the commission was not immediately appealable. *Id.* at 386, 622 S.E.2d at 550-51. The court of appeals, citing section 1-23-390, *Montjoy*, *Owens*, and *Hunt*, held that "in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits." *Id.* at 387, 622 S.E.2d at 551. As the court went on to note, "'An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.'" *Id.* (quoting *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993)). Because the circuit court finally determined that Brown's smoking contributed to his injuries, it was a final judgment under section 1-23-390 and therefore was appealable. *Id.* at 388, 622 S.E.2d at 551. The fact the circuit court had also remanded the proceedings was of no moment because "the panel would have no choice but to allocate some part of Brown's disability to the non-compensable cause." *Id.*

The court of appeals reached the same result in *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009). In that case, the claimant, Mungo, alleged a change in condition that would entitle her to more benefits than she originally was awarded for her injuries. *See id.* at 276, 678 S.E.2d at 828. The single commissioner denied her request because the report which she used to show a change in condition was completed prior to the original hearing. *Id.* The full commission affirmed, and Mungo appealed to the circuit court. *Id.* The court reversed, holding the report could be considered and Mungo had demonstrated a change in condition. *Id.* at 276-77, 678 S.E.2d at 828. Accordingly, the court remanded for the commission "to determine the precise benefits owed to

[Mungo] for her change in condition and for her psychological condition." *Id.* at 277, 678 S.E.2d at 828-29.

The employer sought review before the court of appeals, and the threshold question was whether the circuit court's order was appealable. *Id.* at 277, 678 S.E.2d at 829. Relying in part on *Brown*, the court found that it was:

> The circuit court's order mandates an award for change of condition . . . . This ruling is a decision on the merits because it decides with finality whether [Mungo] proved these changes in her condition. Although the circuit court remanded the issue of the precise damages to be awarded to [Mungo], the single commissioner would have no choice but to award some damages to [her]. Accordingly, the circuit court's order constitutes a final decision and is appealable.

Id. at 278, 678 S.E.2d at 829.

The court of appeals also has used this same framework to determine when an order of the circuit court is *not* appealable. For example, in *Foggie v. General Electric Corp.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), the circuit court held the full commission's finding of permanent total disability rested, at least in part, on evidence which should have been excluded. *Id.* at 387, 656 S.E.2d at 397. The court also found the commission did not make any findings regarding a potential credit to the employer for previous psychological injuries the employee sustained. *Id.* at 387-88, 656 S.E.2d at 397. Consequently, the court remanded with instructions for the commission to review the record without the excluded evidence and determine whether the employee was still permanently and totally disabled, and to make findings regarding the employer's entitlement to the credit. *Id.*

The employee appealed, and the court of appeals held the circuit court had not made a final determination of whether the employee was totally and permanently disabled or whether the employer could receive any credit. *Id.* at

389, 656 S.E.2d at 398. Accordingly, the circuit court's order was not immediately appealable. *Id.*; *see also McCrea v. City of Georgetown*, 384 S.C. 328, 333, 681 S.E.2d 918, 921 (Ct. App. 2009) ("The circuit court's order was not a final judgment and did not involve the merits of the case. The circuit court remanded the case to the Commission so that additional evidence could be entered into the record without determining whether Claimant was disabled or whether Employer was entitled to stop payments. As such, this appeal is interlocutory.").

Thus, the test heretofore consistently applied in this State to determine whether an appellate decision is eligible for further review under section 1-23-390 is whether the order finally determines an issue affecting a substantial right on the merits. It does not appear the majority believes these cases were wrongly decided based on the law as it existed at the time. Instead, the majority holds that *Charlotte-Mecklenburg* rejected the concept of an "involving the merits" analysis under the APA and therefore implicitly overruled this line of cases. In my opinion, however, *Charlotte-Mecklenburg* did no such thing and has no impact on this case.

In *Charlotte-Mecklenburg*, the Administrative Law Court (ALC) partially granted summary judgment and remanded for the Department of Health and Environmental Control to decide whether any party was entitled to a certificate of need.[9] 387 S.C. at 266, 692 S.E.2d at 894. One of the parties appealed the ALC's order, and we dismissed the appeal as interlocutory. *Id.* The controlling statute in *Charlotte-Mecklenburg* was not section 1-23-390. Instead, it was Section 1-23-610 of the South Carolina Code (Supp. 2011), which provides "for judicial review of a final decision of *an administrative law judge*."[10] (emphasis added). We defined a final decision in this context as follows:

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[9] In order to obtain permission to construct certain healthcare facilities, the facility may need to demonstrate the need for it. *See* S.C. Code Ann. § 44-7-110, *et seq.* (2002 & Supp. 2011).

[10] The statute governing appeals from the Workers' Compensation Commission is Section 1-23-380 of the South Carolina Code (Supp. 2011), a

> If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.

Charlotte-Mecklenburg, 387 S.C. at 267, 692 S.E.2d at 894-95 (internal citations omitted). Because the ALC's order did not finally determine whether any party was entitled to a certificate of need, the order under review was not a final decision and thus not immediately appealable.[11] *Id.* at 267, 692 S.E.2d at 895.

The majority therefore is correct that *Charlotte-Mecklenburg* rejected an "involving the merits" analysis *with respect to administrative and agency decisions*. *See id.* at 266, 692 S.E.2d at 894 ("[A]lthough § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC

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sister statute of section 1-23-610, which similarly provides that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." I agree with the majority that *Charlotte-Mecklenburg*'s interpretation of section 1-23-610 applies equally to section 1-23-380.

[11] In reaching this result, we overruled two cases "to the extent [they] rely on [Section 14-3-330 of the South Carolina Code (1976)] to permit the appeal of interlocutory orders of the ALC or an administrative agency." *Charlotte-Mecklenburg*, 387 S.C. at 266, 692 S.E.2d at 894. The cases were *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and *Oakwood Landfill, Inc. v. South Carolina Department of Health & Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). Both of these cases concerned the initial appeal of an administrative order, not further appellate review of an order of the circuit court. *See Canteen*, 384 S.C. at 624, 682 S.E.2d at 507; *Oakwood*, 381 S.C. at 132, 671 S.E.2d at 653.

because the more specific statute, § 1-23-610, limits review to final decisions of the ALC."). *Charlotte-Mecklenburg* therefore examined a different statute and a different stage in the appellate process for administrative cases. Rather than determining whether an order of the circuit court sitting in an appellate capacity or the court of appeals is ripe for further review under the applicable statute—section 1-23-390—*Charlotte-Mecklenburg* only concerned whether the *administrative* order itself is final and therefore appealable to the judicial branch in the first instance. Put in the context of this case, *Charlotte-Mecklenburg* governs the appealability of the full commission's decision, not the circuit court's order reviewing it in an appellate capacity. Because the full commission found Bone's claim was not compensable, it rendered a final judgment and the circuit court could entertain the appeal under *Charlotte-Mecklenburg*. At this point, appealability ceased to be governed by *Charlotte-Mecklenburg* and is now controlled by section 1-23-390, and nothing in our opinion suggests we intended to abrogate the existing framework under it.

Once this distinction is acknowledged, the majority's concerns that an "involving the merits" analysis "would result in piecemeal appeals in agency cases that would adversely affect judicial economy and compromise informed judicial review" disappear. In fact, the interests of judicial economy actually demand a rejection of the majority's view. If accepted, the majority's position could leave cases trapped in a cycle of remands for years so long as some other non-ministerial determination needs to be made. This case is a prime example. The full commission made a final decision that Bone's claim was not compensable, a decision from which Bone was entitled to appeal.[12] The circuit court—acting as an appellate court—disagreed. Rather than permit an appeal to the court of appeals to review that decision, which potentially could find her injuries are not compensable and end the matter, the majority would require the case go back to the commission. At this point, there will be new

[12] Accordingly, the majority incorrectly states an "involving the merits analysis" would postpone a final decision from the agency. In fact, the requirement that the agency finally decide the case before a party can seek judicial review was firmly established by *Charlotte-Mecklenburg*.

hearings conducted at great expense to both parties. Moreover, because compensability has been established without the opportunity for further appellate review by the court of appeals, U.S. Food Service will be required to pay benefits to Bone as the case works its way back up the appellate chain.

Once the full commission renders a decision on what benefits are owed to Bone, the parties will return again to the court of appeals.[13] In doing so, U.S. Food Service runs the risk that the court of appeals will again remand the case, at which point it will have to start the process all over again. Only after that court issues its "final" order—assuming it finds nothing else warranting a remand—can U.S. Food Service finally argue to this Court that the full commission correctly held Bone's claim was not compensable back in June 2008. I fail to see how the possibility of such a result is tenable under the guise of judicial economy. Tellingly, the majority is unable to account for how appeals in non-agency cases which do not impose the heightened finality requirement have the same grim results it fears my view would lead to.

Additionally, the definition of final judgment under section 1-23-390 has no impact on "informed appellate review." Here again, the majority misapprehends the stage of proceedings in which we find ourselves. It cannot be forgotten that in these cases the circuit court sits in an appellate capacity, and *Charlotte-Mecklenburg* demands that the appealed order be a final one. Thus, by the time an administrative case arrives in the circuit court or the court of appeals, all the fact finding to support that final decision has taken place and there is not an opportunity to introduce more evidence. The record therefore is closed, and our platform for review is set. Requiring that the circuit court issue a final decision as defined in *Charlotte-Mecklenburg* as a prerequisite to filing an appeal in the court of appeals (or the court of appeals do so before a party can petition for a writ of certiorari from this Court) does nothing to inform appellate review.

[13] Due to the changes to section 1-23-380, the case would now proceed directly to the court of appeals.

The majority also believes the "involving the merits" rule is contrary to the requirement that one must exhaust his administrative remedies, but this too ignores the procedural posture of these cases. Exhausting one's administrative remedies is a threshold requirement to obtaining review in the courts. Thus, prior to appealing to the circuit court or the court of appeals, the appellant must have already exhausted his administrative remedies and obtained a final decision from the agency. This is the effect of sections 1-23-380 and 1-23-610 and *Charlotte-Mecklenburg*. Section 1-23-390, on the other hand, governs only when an aggrieved party can proceed to the next level of appellate review within the judiciary; it simply has no bearing on the finality of the agency's decision or exhaustion of remedies.

For these reasons, I believe the recent court of appeals' decision in *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011)—on which the majority relies to hold cases such as *Brown* are no longer good law due to *Charlotte-Mecklenburg*—is incorrect. The facts of *Long* are strikingly similar to the ones presented here. *Long* was another workers' compensation case, and the single commissioner found Long, the employee, failed to report his injury within the required time frame. *Id.* at 484, 706 S.E.2d at 34. The full commission affirmed. *Id.* Thus, the full commission made a final decision that Long's claim was barred. The circuit court, however, held Long had complied with the notice requirement and remanded for further proceedings. *Id.* at 484, 706 S.E.2d at 35.

The court of appeals first held that under section 1-23-390 and *Montjoy* the circuit court's order was not appealable because "the commission must conduct additional proceedings before a final judgment is reached." *Id.* at 485, 706 S.E.2d at 35. Next, the court addressed the impact of *Charlotte-Mecklenburg* on the analysis and found that it was "at least an implicit rejection of *Brown*."[14] *Id.* at 487, 706 S.E.2d at 36. As the court explained,

[14] The court's logic was that because *Charlotte-Mecklenburg* expressly overruled *Canteen*, and *Canteen* relied on *Brown*, *Charlotte-Mecklenburg* implicitly overruled *Brown* as well. *Long*, 391 S.C. at 487, 706 S.E.2d at 36. As explained above in footnote 11, however, *Canteen* dealt with the appealability of the full commission's order, not the circuit court's. Thus, the

"In light of *Charlotte-Mecklenburg*, we can find no basis on which to distinguish any decisions, including *Brown*, which rely on section 14-3-330[15] in finding a decision of the commission appealable. Accordingly, we believe the supreme court has effectively overruled *Brown*, and we will no longer apply it." Thus, because the circuit court ordered a remand, there was no final decision and the order was not immediately appealable. *Id.*

Judge Geathers authored a dissenting opinion in *Long*, in which he thoroughly and cogently examined the precedents from both this Court and the court of appeals and concluded,

> [T]he circuit court's decision that [Long] gave timely notice of her accidental injury to [Sealed Air] is the type of judgment that is an ultimate decision on the merits because it finally determines some substantial matter forming a defense available to Sealed Air. This is a final decision on the merits, and the remand language in the order has no effect on the finality of that decision.

Id. at 492-93, 706 S.E.2d at 39 (Geathers, J., dissenting). As Judge Geathers also notes in his dissent, we denied certiorari in both *Brown* and *Mungo*. *Long*, 391 S.C. at 491, 706 S.E.2d at 38. He even was quick to point out that

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fact it was overruled by *Charlotte-Mecklenburg* has no bearing on whether *Brown* was wrongly decided. The *Canteen* court even acknowledged *Brown* was not on point because of this distinction. 384 S.C. at 621 n.3, 682 S.E.2d at 506 n.3.

[15] *Brown* did not actually rely on section 14-3-330, a point which the court of appeals conceded in a footnote. *Long*, 391 S.C. at 487 n.4, 706 S.E.2d at 36 n.4. However, the court clarified that, in its view, "the *Brown* court's holding that the appealed order is a 'final judgment' under section 1-23-390 is based on a finding that the order 'involves the merits,' a concept that is relevant only under section 14-3-330." *Id.* This is not correct. *Brown*'s holding rested on *Montjoy*, *Hunt*, and *Owens*, all workers' compensation cases arising after the enactment of the APA and therefore controlled by section 1-23-390. Thus, "involving the merits" does not belong exclusively to section 14-3-330.

we denied certiorari in *Mungo*—which relied on *Brown*—on the same day we decided *Charlotte-Mecklenburg*. *Id.*

In my opinion, the majority in *Long* committed the same error the majority commits today by over-reading *Charlotte-Mecklenburg*. As explained above, *Charlotte-Mecklenburg* interprets another statute invoked at a different stage in the proceedings, and it evinces no intent to overrule any of the cases implicating section 1-23-390. I therefore believe *Brown* remains good law. Moreover, I believe the other cases from the court of appeals discussed above all correctly hold that appeals from final judgments involving the merits are countenanced under section 1-23-390. This rule does not result from a misguided application of section 14-4-330 to administrative appeals, but instead from a faithful adherence to our prior precedents in *Montjoy*, *Hunt*, and *Owens*. The court of appeals in *Long* consequently also erred in holding *Montjoy* itself would not permit the employer's appeal.

In sum, by finding *Charlotte-Mecklenburg* applies here, the majority has conflated the requirements to initially appeal an administrative order with the requirements for further appellate review beyond the circuit court or the court of appeals. Turning to the proper application of section 1-23-390 to this case, the circuit court's order undoubtedly was a final decision involving the merits of a substantial issue in the case—the compensability of the claim. Although the single commissioner and the full commission found Bone's claim to not be compensable, the circuit court disagreed. It therefore remanded for a determination of the benefits owed to Bone. Thus, the question of compensability—one of U.S. Food Service's main defenses—was decided with finality as there was nothing more the commission could do regarding that issue. Accordingly, the order is appealable under section 1-23-390. *See Mungo*, 383 S.C. at 278, 678 S.E.2d at 829 ("Although the circuit court remanded the issue of the precise damages to be awarded to Claimant, the single commissioner would have no choice but to award some damages to Claimant. Accordingly, the circuit court's order constitutes a final decision and is appealable."); *Brown*, 366 S.C. at 387-88, 622 S.E.2d at 551 (holding circuit court's order that apportionment was required was final and appealable

even though the court remanded for a determination of the amount of apportionment due). I would therefore reverse the order of the court of appeals and remand for it to consider the merits of U.S. Food Service's argument.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Milliken & Company, Respondent,

v.

Brian Morin, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27154
Heard March 20, 2012 – Filed August 1, 2012

AFFIRMED AS MODIFIED

John S. Nichols and Blake Hewitt, Bluestein, Nichols, Thompson, & Delgado, both of Columbia, for Petitioner.

Charles E. Carpenter, Jr, Carpenter Appeals & Trial Support, LLC, of Columbia, Henry L. Parr, Jr., David H. Koysza, and Martin M. Tomlinson, Wyche Burgess Freeman, & Parham, and John C. Glancy, Ogletree, Deakins, Nash, Smoak, & Stewart, all of Greenville, for Respondent.

JUSTICE HEARN: Milliken & Company sued Brian Morin after he resigned from the company and started a new venture using Milliken's proprietary information. The crux of its suit was that Morin breached the confidentiality and invention assignment agreements he signed when he started working for Milliken. A jury found for Milliken, and the court of appeals affirmed. *Milliken & Co. v. Morin*, 386 S.C. 1, 11-12, 685 S.E.2d 828, 834-35 (Ct. App. 2009). We granted certiorari to review the narrow issue of whether these agreements are overbroad as a matter of law. We hold they are not and affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Morin began working for Milliken as a research physicist in 1995 in its Spartanburg, South Carolina facility. As a condition of his employment, Morin had to sign an "Associate Agreement" which contained provisions regarding confidentiality and the assignment of certain inventions. The confidentiality agreement reads as follows:

> CONFIDENTIAL INFORMATION means all competitively sensitive information of importance to and kept in confidence by Milliken, which becomes known to me through my employment with Milliken and which does not fall within the definition of Trade Secret above.[1] Such Confidential Information may be

[1] In his brief, Morin also challenges the breadth of the trade secret definition. However, he did not contend it was overbroad before the court of appeals, much less even cite that provision to it. Therefore, he cannot now maintain his overbreadth challenge encompasses the definition of trade secret. *See*

valuable to Milliken because of what it costs to obtain, because of the advantages Milliken enjoys from its exclusive use, or because its dissemination may harm Milliken's competitive position.

. . . .

B. EXCEPT as required in my duties to Milliken, I will never, either during my employment by Milliken or thereafter, use or disclose, modify or adapt any . . . Confidential Information as defined in paragraph 3 hereinabove until three (3) years after the termination of my employment except as authorized in the performance of my duties for Milliken.

Morin's duty to assign his inventions to Milliken is somewhat longer:

4. INVENTIONS means discoveries, improvements and ideas (whether or not shown or described in writing or reduced to practice), mask works (topography or semiconductor chips) and works of authorship, whether or not patentable, copyrightable or registerable, (1) which relate directly to the business of Milliken, or (2) which relate to Milliken's actual or demonstrably anticipated research or development, or (3) which result from any work performed by me for Milliken, or (4) for which any equipment, supplies, facility or Trade Secret or Confidential Information of Milliken is used, or (5) which is developed on any Milliken time.

. . . .

A. With respect to Inventions made, authored and conceived by me, either solely or jointly with others, (1) during my employment, whether or not during normal working hours or whether or not at

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Camp v. Springs Mortg. Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals).

Milliken's premises; or (2) within one year after termination of my employment,[2] I will:

a. Keep accurate, complete and timely records of such Inventions, which records shall be Milliken property and retained on Milliken's premises.
b. Promptly and fully disclose and describe such Inventions in writing to Milliken.
c. Assign (and I do hereby assign) to Milliken all of my rights to such Inventions, and to applications for letters patent, copyright registrations and/or mask work registrations in all countries and to letters patent, copyright registrations and/or mask work registrations granted upon such Inventions in all countries.
d. Acknowledge and deliver promptly to Milliken (without charge to Milliken but at the expense of Milliken) such written instruments and to do such other acts as may be necessary in the opinion of Milliken to preserve property rights against forfeiture, abandonment or loss and to obtain, defend and maintain letters patent, copyright registrations and/or mask work registrations and to vest the entire right and title thereto in Milliken.

NOTICE: This is to notify you that paragraph A of this Milliken "Associate Agreement" you are being asked to sign as a condition of your employment does not apply to an Invention for which no equipment, supplies, facility or proprietary information of Milliken was used and which was developed entirely on your own time, and (1) which does not relate (a) directly to the business of Milliken or (b) to Milliken's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by you for Milliken.

[2] Invention assignment agreements which extend beyond the term of employment are called "trailer" and "holdover" clauses.

Over the next nine years with Milliken, Morin was promoted twice, first to Senior Research Physicist and then to Team Leader for the Advanced Yarns Team. During the time Morin was in charge of the Advanced Yarns Team, one of Milliken's goals was to investigate the use of additives and equipment modifications to create a new type of fiber. To seek out potential uses for such a product, Milliken sent Morin to a trade show in Anaheim, California, in the Fall of 2003. Shortly thereafter, he began drafting a business plan for his own company, Innegrity, which would manufacture this new fiber. He then resigned from Milliken on May 19, 2004, and filed a patent for the fiber, which he labeled Innegra, the following November.

Milliken first caught wind of Morin's plans after he invited his former colleagues to attend a presentation he was giving at a gathering of venture capitalists in Greenville, South Carolina. After noting the similarities between Innegrity's business plan and certain projects being conducted at Milliken, Milliken raised concerns that Morin had violated the Associate Agreement. This suit soon followed.

Milliken brought several claims against Morin, but only its claims for breach of the confidentiality agreement, breach of invention assignment provisions, breach of the duty of loyalty, and violation of the South Carolina Trade Secrets Act were submitted to the jury. The jury found for Milliken on its breach of the confidentiality and invention assignment agreement claims, but it found for Morin on the remaining causes of action. In the end, the jury awarded Milliken $25,324 in damages.[3] Morin appealed, arguing that these agreements are overbroad and therefore unenforceable, but the court of appeals disagreed and affirmed. *Milliken*, 386 S.C. at 11-12, 685 S.E.2d at 834-35. We granted certiorari.

[3] Pursuant to the invention assignment clause, Milliken requested that the circuit court assign the Innegra patent to it from Innegrity. Because Innegrity was no longer a party to the proceedings when the case was tried, the court denied Milliken's request. The court of appeals affirmed, *Milliken*, 386 S.C. at 8-9, 685 S.E.2d at 832-33, and Milliken did not seek certiorari on this issue.

STANDARD OF REVIEW

An action for breach of contract is an action at law. *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992). On appeal from an action at law tried by a jury, we sit merely to correct errors of law. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." 17B C.J.S. *Contracts* § 1030. We review questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

I. APPLICABLE STANDARD

We must first resolve a question left unanswered by the court of appeals, which is under what rubric we are to evaluate the enforceability of these agreements. Morin argues that we should analyze them as non-compete agreements and thus strictly construe them in favor of the employee. We disagree.

"According to the early common law of England, an agreement in restraint of a man's right to exercise his trade or calling was void as against public policy." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 59, 119 S.E.2d 533, 536 (1961). The rationale behind this categorical rule was that at the time a man had to be apprenticed in his trade and was bound by law to exercise it. *Id.* at 59-60, 119 S.E.2d at 536. "Hence, to enforce such an agreement was to deny such person the right to earn his living and to require him to violate an express provision of the law." *Id.* at 60, 119 S.E.2d at 536. As the law and realities of employment have progressed, however, there has been "'some amelioration of the ancient disfavor.'" *Id.* (quoting *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693, 698 (4th Cir. 1955)).

> "Modern courts have usually, in passing on these contracts, employed three criteria: (1) Is the restraint, from the standpoint of

> the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest? (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood? (3) Is the restraint reasonable from the standpoint of a sound public policy?"

Id. (quoting *Welcome Wagon,* 224 F.2d at 698). We reaffirmed and expounded upon these principles in *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983). In doing so, we reiterated that "[r]estrictive covenants not to compete are generally disfavored and will be strictly construed against the employer" and added that they must also be reasonably limited "with respect to time and place." *Id.* at 675, 301 S.E.2d at 143. This is the framework Morin would have us apply here.

The agreements under review, however, are not in restraint of trade. *See* Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* § 14:6 (4th ed. 2009) ("An employee's express commitment not to disclose his employer's confidential information, whether or not it comprises trade secrets, 'unlike the covenant not to compete cannot be challenged as an unreasonable restraint of trade.'" (quoting *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 289 (5th Cir. 1978))); *id.* § 14:17 ("If the employee agrees that all inventions and improvements in the employer's field, patentable and unpatentable, which are developed by the employee during his employment shall be the employer's property, such a contract is not invalid or unenforceable as an unreasonable restraint. The contract may even expressly impose such a duty for a period of time after termination of the employment . . . .").

Holdover clauses do not fit this mold because they do "not limit the employee's post-employment activities except with respect to the affected inventions and improvements." *NovelAire Techs., L.L.C. v. Harrison*, 50 So. 3d 913, 919 (La. Ct. App. 2010) (quotations omitted). Furthermore, they "are simply a recognition of the fact of business life that employees sometimes

carry with them to new employers inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer." *Dorr-Oliver, Inc. v. United States*, 432 F.2d 447, 452 (Cl. Ct. 1970). Thus, they do not operate in restraint of the employee's trade but merely vest ownership of an invention with the entity which ought to have it. Similarly, "noncompete agreements are viewed as restraints of trade which limit an employee's freedom of movement among employment opportunities, while nondisclosure agreements seek to restrict disclosure of information, not employment opportunities." *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999); *see also Hayes-Albion v. Kuberski*, 364 N.W.2d 609, 614 (Mich. 1984) (holding Michigan's non-compete statute "has no application where the plaintiff is not seeking to prevent the former employee from engaging in a similar business, but to prevent him from using the secret knowledge of his former employer").

Because these agreements are not in restraint of trade, we hold there is no "ancient disfavor" and thus they are not to be strictly construed in favor of the employee. *See Carolina Chemical Equip. Co. v. Muckenfuss*, 322 S.C. 289, 302, 471 S.E.2d 721, 728 (Ct. App. 1996) (Cureton, J., dissenting) ("'In this area, courts impose no presumptions against employers and do not subject the employee's promise or covenant not to disclose to a rigid test or analysis.'" (quoting Timothy D. Scranton & Cherie Lynne Wilson, *Postemployment Covenants Not to Compete in South Carolina: Wizards and Dragons in the Kingdom*, 42 S.C. L. Rev. 657, 682 (1991))). Accordingly, the scope of the restriction is determined using ordinary principles of contract law.[4] *See Revere Transducers*, 595 N.W.2d at 761 ("Nondisclosure-

[4] If upon review they are so broad as to effectively become non-compete agreements, then they are subject to the higher burden. *See Almers v. S.C. Nat'l Bank of Charleston*, 265 S.C. 48, 59, 217 S.E.2d 135, 140 (1975) (holding a pension forfeiture clause invoked when an employee went to work for a competitor had the same effect as a non-compete agreement because "[w]hen pruned to their quintessence, they tend to accomplish the same results and should be treated accordingly"); *Carolina Chemical Equip. Co.*, 322 S.C. at 293-94, 471 S.E.2d at 723 (majority opinion) ("Despite its

confidentiality agreements enjoy more favorable treatment in the law than do noncompete agreements."); *NovelAire*, 50 So. 3d at 918 ("NovelAire contends that the Agreement is a standard contract to provide for the ownership, as between an employer and an employee, of discoveries the employee made while working for the employer, and to keep those discoveries as confidential. NovelAire contends that neither of these contractual requirements constitute non-compete contracts. We agree.").

Nevertheless, these agreements are still restrictive covenants and public policy demands their scope be subject to judicial review for reasonableness. When evaluating these provisions, courts should look to the more general standard enunciated in *Standard Register*, namely whether the restriction is reasonable in that it is no greater than necessary to protect the employer's legitimate interests, and it is not unduly harsh in that it curtails the employee's ability to earn a living.[5] 238 S.C. at 60, 119 S.E.2d at 536; *see also Revere*

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designation as a 'Covenant Not to Divulge Trade Secrets,' this section would substantially restrict Muckenfuss's competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete."). The clauses in question here are not this broad and therefore do not implicate these cases. *See* discussion, *infra*, Part II.

[5] Geographic scope has no relevance for invention assignment or confidentiality provisions. *Revere Transducers*, 595 N.W.2d at 761; Peter Caldwell, *Employment Agreements for the Inventing Worker: A Proposal for Reforming Trailer Clause Enforceability Guidelines*, 13 J. Intell. Prop. L. 279, 296 (2006). However, a holdover clause must be reasonably limited in time. Altman & Pollack, *supra*, § 14:17. On the other hand, the absence of a time limitation in a confidentiality clause will not automatically render it invalid. *Revere Transducers*, 595 N.W.2d at 761; *see also Carolina Chemical Equip. Co.*, 322 S.C. at 301, 471 S.E.2d at 727 (Cureton, J., dissenting) ("Agreements not to divulge confidential information, unlike noncompetition agreements, may be valid and enforceable under certain circumstances even though they are unlimited as to time and place."). In any event, employers are afforded greater leeway with the temporal scope of these clauses than

Transducers, 595 N.W.2d at 761-62 (noting that reasonableness elements of non-compete clause analysis still remain for confidentiality agreements and "[t]he determining factor of whether assignment-of-rights-agreements are enforceable seems to be one of reasonableness"); *Ingersoll-Rand Co. v. Ciavatta*, 524 A.2d 866, 869 (N.J. 1987) (holding an invention assignment clause must "be reviewed as to its reasonableness, with an awareness of the practical realities of the business and employment world"); Caldwell, *supra*, at 292, 299 (stating the "subject matter is the only truly relevant factor" for holdover clauses, and it must be balanced by "'weigh[ing] the competing interest of employer and employee and [] giv[ing] full consideration to the public interest.'" (quoting *Universal Winding Co. v. Clarke*, 108 F. Supp. 329, 332 (D. Conn. 1952))).

II. ENFORCEABILITY OF AGREEMENTS

With this framework in mind, we turn next to the enforceability of the holdover and confidentiality agreements Morin signed. In our opinion, both of them are facially valid.

A. Holdover Clause

As has been eloquently stated, "A naked assignment or agreement to assign, in gross, a man's future labors as an author or inventor[—]in other words, a mortgage on a man's brain, to bind all its future products[—]does not address itself favorably to our consideration." *Aspinwall Mfg. Co. v. Gill*, 32 F. 697, 700 (C.C.D.N.J. 1887). However, where the agreement does not "implicate all of a researcher's future inventions 'in gross'" but rather applies to inventions derived from his work for the employer, it is enforceable. *St. John's Univ., N.Y. v. Bolton*, 757 F. Supp. 2d 144, 162 (E.D.N.Y. 2010). Morin himself even agrees that Milliken has no right to his "inventive ideas unless those ideas relate directly to his work for Milliken."

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with non-compete agreements. *Reverse Transducers*, 595 N.W.2d at 761; Caldwell, *supra*, at 297.

An employer therefore has a legitimate interest in protecting inventions that are the fruits of its employees' efforts while working for the company. Indeed, such provisions "are simply a recognition of the fact of business life that employees sometimes carry with them to new employers inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer." *Dorr-Oliver*, 432 F.2d at 452. Thus, we must first examine the scope of the invention assignment clause and determine whether it falls within these parameters.

The invention assignment agreement Morin signed is embodied in a complex set of paragraphs which by no means are an exercise in clarity. After sorting through the morass, however, the impact of the agreement is much narrower than it may appear initially. The agreement first applies to all inventions, a term which is defined quite broadly. It covers:

> discoveries, improvements and ideas (whether or not shown or described in writing or reduced to practice), mask works (topography or semiconductor chips) and works of authorship, whether or not patentable, copyrightable or registerable,
>
> (1) which relate directly to the business of Milliken, or
> (2) which relate to Milliken's actual or demonstrably anticipated research or development, or
> (3) which result from any work performed by me for Milliken, or
> (4) for which any equipment, supplies, facility or Trade Secret or Confidential Information of Milliken is used, or
> (5) which is developed on any Milliken time.

Accordingly, any discovery, etc, which meets *any* of the five criteria contained in the agreement is an invention and is to be assigned.

However, the agreement also contains a rather broad exception to this inclusive definition. It excepts an invention, as defined above,

for which no equipment, supplies, facility or proprietary information of Milliken was used *and*
which was developed entirely on your own time, *and*
(1) which does not relate
(a) directly to the business of Milliken or
(b) to Milliken's actual or demonstrably anticipated research or development, *or*
(2) which does not result from any work performed by you for Milliken.

(emphasis added).

Morin's contention is that the invention assignment clause is overbroad because it grants Milliken rights to one of Morin's inventions "irrespective of whether his invention is legitimately an extension of research he did for Milliken."[6] This argument is based on a misreading of the agreement. Under general principles of contract law, we find first as a matter of law that this agreement is unambiguous. *See Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) ("[W]hether a contract is ambiguous is a question of law."). We must therefore apply the contract's plain language. *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010). Under the terms of the agreement, if the invention *either*[7] does not relate to Milliken's work or was not the result of work performed by the employee for Milliken, then it is not covered. Conversely, for the exception to *not* apply—and thus require assignment of the invention—it must *both* relate to Milliken's business/research and result from the employee's work at Milliken.

[6] Morin directs his arguments towards the interplay between subparts (1) and (2) of the exception, not the rest of it. Because we do not believe requiring the assignment of inventions that were developed using the employer's equipment, supplies, and proprietary information, or which were developed on the employer's time, renders the agreement overbroad as a matter of law, we similarly confine our discussion.

[7] We reject Morin's argument that Milliken really meant to use the word "and" instead of "or" in the exception.

Thus, so long as the invention does not relate to work performed by the employee, it is not to be assigned.

Accordingly, the agreement is not broader than necessary to protect Milliken's legitimate business interests. Moreover, the one-year holdover provision is eminently reasonable. *See Rental Uniform Serv.*, 278 S.C. at 676, 301 S.E.2d at 143 (finding a three-year restraint is not "obnoxious" even in the context of a non-compete agreement). It also is not unduly harsh or oppressive because Morin still is entitled to any invention that does not result from his work at Milliken; thus, he is still of great value to future employees. We therefore hold that Milliken's invention assignment and holdover clause is not so broad as to be unenforceable as a matter of law.

B. Confidentiality Clause

It is widely recognized that an employer may "restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship." *GTI Corp. v. Calhoon*, 309 F. Supp. 762, 768 (S.D. Ohio 1969); *see also Roberson v. C.P. Allen Const. Co.*, 50 So. 3d 471, 475 (Ala. Civ. App. 2010) ("[A]n employer has a protectable interest sufficient to justify enforcement of a noncompete agreement if an employee was in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients. A protectable interest can also arise from the employer's investment in its employee, in terms of time, resources and responsibility." (quotations and alterations omitted)); *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 923 A.2d 1076, 1084-85 (N.H. 2007) ("Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of employment; confidential information other than trade secrets communicated by the employer to the employee, such as information regarding a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image."); *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1244 (Pa.

2011) ("The kinds of business interests that are considered legitimate and protectable under a restrictive covenant include trade secrets and confidential information . . . ."). As above, we must therefore first delineate the boundaries of Milliken's confidentiality agreement and determine whether it falls within this scope.

The heart of Morin's claim is that the confidentiality provision is so broad that it prevents him from using his own general skills, knowledge, and inventive ability as opposed to just restricting the dissemination of Milliken's propriety information.[8] The definition of confidential information in Milliken's Associate Agreement contains five elements, all of which must be met in order for the information in question to be deemed confidential:

(1) competitively sensitive information
(2) of importance to and
(3) kept in confidence by Milliken,
(4) which becomes known to the employee through his employment with Milliken, and
(5) which is not a trade secret.

It does not take much elaboration to see that rather than covering general skills and knowledge, it encompasses only important information not generally known to the public which becomes known to the employee through his employment with Milliken. Thus, the court of appeals did not err in holding that "[t]he three-year provision did not prohibit Morin from disclosing or using any and all information he learned working at Milliken, or using the general knowledge and skills he learned while working there." *Milliken*, 386 S.C. at 11-12, 685 S.E.2d at 834.

Milliken accordingly has a legitimate business interest it can protect through the use of the confidentiality agreement, and the agreement does not sweep any broader than this on its face. Although not necessarily required,

[8] Although Morin's brief lodges a multi-faceted attack against the confidentiality clause, the sole issue on which we granted certiorari is whether it is facially enforceable as a matter of law.

the agreement is also reasonably limited to only three years. *See Rental Uniform Serv.*, 278 S.C. at 676, 301 S.E.2d at 143. Furthermore, it is not unduly harsh and oppressive as Morin is perfectly able to use his general skills and knowledge in a new line of employment. While Morin may be restricted from using certain information he learned at Milliken for his own personal advantage, these agreements are designed to strike an appropriate balance between protecting an employer's valuable interest in its proprietary information and permitting an employee to find gainful employment in his chosen field. *See GTI Corp.*, 309 F. Supp. at 768; *Serv. Ctrs. of Chicago, Inc. v. Minogue*, 535 N.E.2d 1132, 1135 (Ill. App. Ct. 1989). In our opinion, Milliken's agreement, on its face, strikes a valid balance and therefore is enforceable.

CONCLUSION

We therefore hold confidentiality and invention assignment clauses are not in restraint of trade and should not be strictly construed in favor of the employee. Under a more general reasonableness standard of enforceability, Milliken's agreements here are reasonably tailored and therefore enforceable as a matter of law. We accordingly affirm the court of appeals, modifying its opinion only to the extent that we adopt the standard enunciated above.

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

The Supreme Court of South Carolina

In the Matter of Shana Denice Jones-Burgess,
Respondent.

Appellate Case No. 2012-212539

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Joseph O. Burroughs, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Burroughs shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Burroughs may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Joseph O. Burroughs, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Joseph O. Burroughs, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Burroughs' office.

Mr. Burroughs' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Costa M. Pleicones A.C.J.
FOR THE COURT

Columbia, South Carolina

July 26, 2012

The Supreme Court of South Carolina

RE: Amendments to the Rules of Professional Conduct,
Rule 407, South Carolina Appellate Court Rules

Appellate Case No. 2011-198067

ORDER

Rules 1.5, 1.15, and 1.16, RPC, Rule 407, SCACR, are hereby amended as set forth in the attachment to this order. The rule amendments address the charging of advance fees by lawyers.

The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

July 30, 2012

Rule 1.5, RPC, Rule 407, is amended by adding Paragraph (f):

(f) A lawyer may charge an advance fee, which may be paid in whole or in part in advance of the lawyer providing those services, and treat the fee as immediately earned if the lawyer and client agree in advance in a written fee agreement which notifies the client:

(1) of the nature of the fee arrangement and the scope of the services to be provided;

(2) of the total amount of the fee and the terms of payment;

(3) that the fee will not be held in a trust account until earned;

(4) that the client has the right to terminate the lawyer-client relationship and discharge the lawyer; and

(5) that the client may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

Comment 4 to Rule 1.5 is amended to provide:

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

The following Comments are added to Rule 1.5:

Payment of Fees in Advance of Providing Services

[10] A lawyer may treat a fee paid in advance of providing services as the property of the lawyer and deposit the fee in the lawyer's operating account, rather than hold the fee in trust, if the client agrees in a written fee agreement which complies with Paragraph (f)(1) through (5), and the fee is reasonable under the factors listed in Rule 1.5(a). The language describing such arrangements varies, and includes terms such as flat fee, fixed fee, earned on receipt, or nonrefundable retainer, but all such fees are subject to refund if the lawyer fails to perform the agreed-upon legal services.

[11] When the lawyer has regularly represented a particular client, the written fee requirement in Paragraph (f) may be satisfied by a single agreement with the particular client that is applicable to multiple current or future matters or files, without the need for the lawyer and client to enter into a new written agreement for each individual matter.

Paragraph (c) of Rule 1.15, RPC, Rule 407, SCACR, is amended to provide as follows:

(c) A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the lawyer and the client have entered into a written agreement concerning the handling of fees paid in advance pursuant to Rule 1.5(f).

Comment 9 to Rule 1.16, RPC, Rule 407, SCACR, is amended to provide as follows:

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15. When permitted, a nonrefundable retainer still must comply with Rule 1.5 and not be unreasonable.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client, preferably in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, provided that a lawyer may charge a contingency fee in collection of past due alimony or child support; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) A lawyer may charge an advance fee, which may be paid in whole or in part in advance of the lawyer providing those services, and treat the fee as immediately earned if the lawyer and client agree in advance in a written fee agreement which notifies the client:

(1) of the nature of the fee arrangement and the scope of the services to be provided;

(2) of the total amount of the fee and the terms of payment;

(3) that the fee will not be held in a trust account until earned;

(4) that the client has the right to terminate the lawyer-client relationship and discharge the lawyer; and

(5) that the client may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. The South Carolina version of the rule differs from the Model Rule by making the test in paragraph (a)(2) objective rather than subjective. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established, preferably in writing. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written

statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A

lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter. A lawyer

should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Also, when a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See Rule 416, SCACR. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Payment of Fees in Advance of Providing Services

[10] A lawyer may treat a fee paid in advance of providing services as the property of the lawyer and deposit the fee in the lawyer's operating account, rather than hold the fee in trust, if the client agrees in a written fee agreement which complies with Paragraph (f)(1) through (5), and the fee is reasonable under the factors listed in Rule 1.5(a). The language describing such arrangements varies, and includes terms such as flat fee, fixed fee,

earned on receipt, or nonrefundable retainer, but all such fees are subject to refund if the lawyer fails to perform the agreed-upon legal services.

[11] When the lawyer has regularly represented a particular client, the written fee requirement in Paragraph (f) may be satisfied by a single agreement with the particular client that is applicable to multiple current or future matters or files, without the need for the lawyer and client to enter into a new written agreement for each individual matter.

Amended by Order dated July 30, 2012.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation. A lawyer shall comply with Rule 417, SCACR (Financial Recordkeeping).

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the lawyer and the client have entered into a written agreement concerning the handling of fees paid in advance pursuant to Rule 1.5(f).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f)(1) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person ("trust account") unless the funds to be disbursed have been deposited in the account and are collected funds.

(2) Notwithstanding Subsection (f)(1) above, a lawyer may disburse funds from a trust account at the lawyer's risk in reliance on the following deposits when the deposit is made:

(i) in cash or other items treated by the depository institution as equivalent to cash;

(ii) by verified and documented electronic funds transfer;

(iii) by a properly endorsed government check;

(iv) by a certified check, cashier's check, or other check drawn by a depository institution or an insurance company, provided the insurance company check does not exceed $50,000;

(v) by any other instrument payable at or through a depository institution, but only if the amount of such other instrument does not exceed $5,000 and the lawyer has a reasonable and prudent belief that the deposit of such other instrument will be collected promptly; or

(vi) by any other instrument payable at or through a depository institution and at least ten (10) days have passed since the date of deposit without notice to the lawyer that the credit for, or collection of, such other instrument has been delayed or is impaired.

If the actual collection of deposits described in Subsections (i) through (vi) above does not occur, the lawyer shall, as soon as practical but in no event more than five (5) business days after notice of noncollection, deposit replacement funds in the account.

(g) A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(h) Every lawyer maintaining a law office trust account shall file with the financial institution a written directive requiring the institution to report to the Commission on Lawyer Conduct when any properly payable instrument drawn on the account is presented for payment against insufficient funds. No law office trust account shall be maintained in a financial institution that does not agree to make such reports. The inadvertent failure of the institution to provide the report required by this rule shall not be construed to establish a breach of duty of care, or contract with, the Court or any third party who may sustain a loss as a result of an overdraft of a lawyer trust account.

(i) Absent any obligation to retain a client's file which is imposed by law, court order, or rules of a tribunal, a lawyer shall securely store a client's file for a minimum of six (6) years after completion or termination of the representation unless:

(1) the lawyer delivers the file to the client or the client's designee; or

(2) the client authorizes destruction of the file in a writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

If the client does not request the file within six (6) years after completion or termination of the representation, the file may be deemed abandoned by the client and may be destroyed unless there are pending or threatened legal

proceedings known to the lawyer that relate to the matter. A lawyer who elects to destroy files shall do so in a manner which protects client confidentiality.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with prudent accounting practice and must comply with any recordkeeping rules established by law or court order. See, e.g., Rule 417, SCACR (Financial Recordkeeping).

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The requirement in Rule 1.15(f)(1) that funds be deposited and collected in the lawyer's trust account prior to disbursement is fundamental to proper trust accounting.

[6] Based on the lawyer's relationship with the depository institution or other considerations, deposited funds of various types may be made "available" for immediate withdrawal by the depository institution; however, lawyers should be aware that "available funds" are not necessarily collected funds since the credit given for the available funds may be revoked if the deposited item does not clear.

[7] Subsections (i) through (vi) of Rule 1.15(f)(2) represent categories of trust account deposits which carry a limited risk of failure so that disbursements may be made in reliance on such deposits without violating the fundamental rule of disbursing only on collected funds. In any of those circumstances, however, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. The lawyer's risk includes deposited instruments that are forged, stolen, or counterfeit. If any of the deposits fail for any reason, the lawyer, upon receipt of notice or actual knowledge, must promptly act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such items personally pays the amount of any failed deposit within five (5) business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

[8] A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than Subsections (i) through (vi) of Rule 1.15(f)(2) may be grounds for a finding of professional misconduct.

[9] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[10] The Lawyers' Fund for Client Protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Under Rule 411, SCACR, each active or senior member of the Bar is required to make an annual contribution to this fund.

[11] A lawyer's obligations with regard to identified but unclaimed funds are set forth in the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq.

[12] A lawyer who destroys a client file pursuant to Paragraph (i) must do so in a manner which protects client confidentiality, such as by shredding paper copies of the file. This rule does not affect the lawyer's obligation to return the client file and other client property upon demand in accordance with Rule 1.15 or the lawyer's obligations pursuant to Rule 1.16(d).

[13] A lawyer may not destroy a file under Paragraph (i) if the lawyer knows or has reason to know that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files. Examples include post-

conviction relief and professional liability actions against the lawyer. Nothing in the rule prohibits a lawyer from converting files to an electronically stored format, provided the lawyer is capable of producing a paper version if necessary. Attorneys and firms should create file retention polices and clearly communicate those policies to clients.

Last amended by Order dated July 30, 2012.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefor and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. The lawyer may retain a reasonable nonrefundable retainer.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The

lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation. The South Carolina version of paragraph (b)(5) specifically recognizes that nonpayment for services may be a basis for withdrawal.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15. When permitted, a nonrefundable retainer still must comply with Rule 1.5 and not be unreasonable.

Amended by Order dated July 30, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BMW of North America, LLC, Appellant,

v.

Complete Auto Recon Services, Inc., d/b/a C.A.R.S., Inc., and Colony Insurance Company, Defendants, of Whom Colony Insurance Company is Respondent.

Appellate Case No. 2009-137207

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 5012
Heard April 10, 2012 – Filed August 1, 2012

AFFIRMED

H. Donald Sellers and Christopher B. Major, both of Haynsworth Sinkler Boyd, PA, of Greenville, for Appellant.

Jennifer D. Eubanks, of Gallivan White & Boyd, PA, of Greenville, for Respondent.

LOCKEMY, J.: In this insurance action, BMW of North America, LLC (BMW) appeals the trial court's granting of summary judgment in favor of Colony Insurance Company (Colony). BMW argues the trial court erred in (1) determining its insurance coverage was not triggered by damage to its cars; (2) determining Colony did not act in bad faith in denying BMW's claim; (3)

determining the policy Colony issued to BMW was not illusory; and (4) dismissing its motion to compel as moot. We affirm.

FACTS/PROCEDURAL BACKGROUND

On May 6, 2006, Colony issued a Garage Insurance Policy (the Policy) to Complete Auto Recon Services, Inc. (CARS), under which CARS was the only named insured. The Policy included both "Liability" and "Garage Keepers" coverage. Under "Liability" the coverage included "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which [the insurance applied] caused by an 'accident' and resulting from 'garage operations' other than the ownership, maintenance or use of covered 'autos'" and "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which [the insurance applied] caused by an 'accident' and resulting from 'garage operations' involving the ownership, maintenance or use of 'covered autos.'" Within the "Garage Keepers" coverage, the Policy provided for two different types of coverage labeled "Comprehensive" and "Collision." Generally, the "Garage Keepers" coverage provided the insurer would:

> pay all sums the "insured" legally must pay as damages for "loss" to a "customer's auto" or "customer's auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" under:
>
> a. Comprehensive Coverage
> From Any cause except:
> (1) The "customer's auto's" collision with another object; or
> (2) The "customer's auto's" overturn . . .
> c. Collision Coverage
> Caused By:
> (1) The "customer's auto's" collision with another object; or
> (2) The "customer's auto's" overturn.

The Policy also included an endorsement naming BMW as an additional insured. The endorsement provided in pertinent part, "Under LIABILITY COVERAGE WHO IS AN INSURED is changed to include [BMW], but only for liability arising out of the ownership, maintenance and use of that part of the described

premises which is leased to [CARS]." The endorsement did not mention any other types of coverage, nor did the Policy include any further endorsements with respect to BMW.

During this same time period, BMW entered into a service agreement with CARS under which CARS provided washing and maintenance services on a fleet of BMW vehicles used at a BMW test track. On May 3, 2007, one of CARS's employees left the windows to six BMW vehicles (the Vehicles) open during a severe rain storm. As a result, the Vehicles suffered property damage totaling $601,720 and BMW filed a claim for the damage to the Vehicles to Colony. After BMW filed the claim, Colony investigated and declined to make payment in a July 12, 2007 letter. On September 16 and 28, 2007, BMW followed up with two letters requesting Colony to pay its claim, citing reprimands issued to two CARS employees and sufficient notice of the severe storms to protect the vehicles. In October 2007, Colony again reviewed BMW's claim. Subsequently, BMW filed suit against CARS for breach of contract under their service agreement and negligence for failing to secure the windows to the Vehicles.[1] BMW also sued Colony alleging breach of an insurance contract and bad faith refusal to pay an insurance contract. Colony counterclaimed asking the court to enter a declaratory judgment stating it owed no duty to BMW under the policy with regard to the Vehicles.

After some written discovery, BMW served notice of a deposition on Colony's claims adjuster who dealt with the Vehicles. As a result, Colony filed a motion for a protective order against deposing the adjuster and BMW filed a motion to compel. Colony also filed a motion for summary judgment. At the motion hearing, Colony argued BMW's coverage under the Policy was limited to third-party liability coverage. Thus, because CARS, not BMW, was liable for the damage to the cars arising out of CARS's negligence, Colony owed no duty to BMW under the Policy. BMW responded that because they were listed as an additional insured in the Policy and the Policy included comprehensive coverage, Colony owed BMW a duty as to the Vehicles. BMW further argued the Policy was at least ambiguous in what coverage the Policy afforded them; therefore, it should have been interpreted in favor of coverage. Further, BMW argued an interpretation that BMW was only afforded liability coverage under the Policy would render it meaningless as to BMW. BMW explained third-party coverage

[1] On February 24, 2010, a jury verdict was rendered and judgment was entered against CARS in the amount of $216,000 in actual damages resulting from CARS's negligence.

would be meaningless to them because CARS's employees never interacted with third-parties to whom BMW could become liable. BMW finally argued, even without a breach of the Policy, Colony could still be liable for a bad faith claim.

The trial court granted Colony's motion for summary judgment and as a result found the motions to compel and for a protective order moot. Specifically, the trial court found, based on the Policy's language, BMW was only afforded liability coverage. Further, the trial court found BMW presented no evidence BMW was liable to a third party for the damage to the Vehicles which could trigger its liability coverage. Additionally, the trial court ruled because BMW was not afforded coverage under the Policy as to the Vehicles, there was no breach of the Policy, nor did BMW have a bad faith claim against Colony. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: 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." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Id.* "If triable issues exist, those issues must go to the jury." *Id.*

LAW/ANALYSIS

Coverage

BMW argues the trial court erred in finding the Policy did not provide BMW coverage. Specifically, BMW contends the Policy shows CARS was paying premiums for "Comprehensive" coverage under the "Garage Keepers" coverage, which is separate and distinct from any liability premiums CARS paid, and BMW was an additional insured to that coverage. BMW further asserts the Policy is ambiguous as to the "Comprehensive" coverage, and the ambiguity must be resolved in favor of coverage. We disagree.[2]

[2] Initially, Colony asserts this issue is not preserved for review. We disagree. At the summary judgment hearing, BMW argued the Policy afforded them

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the language of a contract is clear and unambiguous, it alone determines the contract's force and effect. *Id.* "This [c]ourt must give policy language its plain, ordinary, and popular meaning." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage." *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134.

Colony argues that although BMW is listed as an "additional insured" in the Policy, the Policy provides only "Liability" and "Garage Keepers" coverage to BMW. Thus, because liability coverage extends to cover an insured's liability to a third party and BMW has not been found liable to a third party, Colony argues the Policy provides no coverage for BMW.

We find the trial court did not err in determining BMW was not afforded coverage under the Policy as to the Vehicles. BMW is not a named insured on the Policy itself. As a result, the Policy as a whole does not initially cover BMW as an insured. However, BMW is added to the Policy by way of an endorsement to the Policy. This endorsement, however, which is the only way BMW under the policy could be an insured, provides only liability coverage. Importantly, the endorsement makes no mention of comprehensive coverage. Additionally, the endorsement specifically provides, "The provisions of the Coverage Form apply unless modified by the endorsement." Thus, because "WHO IS AN INSURED" as to the comprehensive coverage was not modified by the endorsement, the original form applies, meaning only CARS, the named insured, is entitled to that coverage. Therefore, according to the plain language of the Policy, BMW is only an insured as to liability.

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comprehensive coverage. Additionally, the trial court found, according to its plain language, the Policy only included liability coverage. Therefore, this issue was properly raised to and ruled upon by the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

Because BMW is only an insured as to liability coverage under the Policy, for Colony's duty to pay BMW as an insured to be triggered, BMW must have first been liable to some third party. *See Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003) (stating liability insurance contracts are generally contracts "whereby the insurer . . . agrees to pay the insured . . . the amount of any damages the insured may become legally liable to pay to a third party"); *see also* Black's Law Dictionary 997 (9th ed. 2009) (defining liability as "[t]he quality or state of being legally obligated or accountable; legal responsibility to another"). BMW failed to present any evidence tending to show it was in any way liable to a third party due to the damage caused to the Vehicles. Further, in BMW's response to Colony's request for admissions, BMW admitted no one had filed suit against it regarding damage to the Vehicles. Accordingly, the trial court did not err in determining the Policy did not afford BMW coverage with respect to the Vehicles.

Bad Faith

BMW argues the trial court erred in granting Colony's summary judgment motion as to its bad faith claim. Specifically, BMW asserts it was an additional insured under the Policy and by ignoring BMW's correspondence, refusing to provide explanations as to the denial of coverage, and refusing to acknowledge CARS's liability, Colony acted in bad faith in processing and denying BMW's claim. We disagree.[3]

> The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 359, 415 S.E.2d 393, 396-97 (1992). "[A]n insurer acts in bad faith when there is no reasonable basis to

[3] Colony argues this issue is not preserved for review because it was never ruled on by the trial court. We disagree. In its order, the trial court ruled Colony did not act in bad faith in denying BMW's claim.

support the insurer's decision [for contesting a claim]." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). However, where an insurer has a reasonable ground for contesting a claim, there is no bad faith. *Id.* Additionally, this good faith obligation includes an insurer's duty to investigate a claim. *Flynn v. Nationwide Mut. Ins. Co.*, 281 S.C. 391, 395, 315 S.E.2d 817, 820 (Ct. App. 1984). Importantly, an insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action. *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996).

Colony contends that because no coverage existed as to the claim BMW made, Colony could not have acted in bad faith in refusing to pay BMW. We agree. As previously discussed, with respect to the Vehicles, the Policy did not afford BMW coverage for this claim. The Fourth Circuit, in *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485 (4th Cir. 2005), while interpreting South Carolina insurance law, determined a similar situation to the present case provided reasonable grounds for the insurer to deny coverage. In *Myrick*, the insured sought to insure three pieces of equipment from loss. *Id.* at 487. Just weeks after the policy became effective, a fire destroyed one of the pieces of equipment the insured sought to have covered under the policy. *Id.* at 488. After the insured made a claim on the destroyed equipment, the insurer correctly determined although the policy at issue did provide property coverage for one machine of the type destroyed, it did not provide such coverage for the specific machine that burned. *Id.* at 494. As a result, the court held that although the parties admitted a contract existed between them, the insurer's refusal to pay benefits was reasonable because the subject matter of the claim allegedly triggering payment did not actually fall within coverage. *Id.* at 494-95.

The present case bears comparison to *Myrick*. Just as destruction of the machine in *Myrick* could never trigger coverage as to the insured because it was not covered in the policy, so too could there never be coverage under the Policy where, as here, BMW did not face any sort of liability to third parties. As a result, just as was the case with the insurer in *Myrick*, we find Colony had reasonable grounds upon which to not only contest, but also refuse BMW's claim.[4] Accordingly, the trial court did not err in granting Colony summary judgment on BMW's bad faith claim.

[4] We note the *Myrick* court also determined the insurer adequately investigated the insured's claim. Here, the trial court did not address BMW's allegation of bad faith in processing BMW's claim in its order. Additionally, BMW failed to raise this issue in a Rule 59(e), SCRCP motion. Therefore, BMW's argument regarding

Illusory Policy

BMW argues an interpretation that the Policy did not provide comprehensive coverage renders the Policy meaningless as to BMW. Specifically, BMW asserts the Policy would be meaningless because customers do not interact with any CARS employees; therefore, BMW could never be covered under the Policy if it only provided liability coverage. Thus, according to BMW, the possibility for liability which could be imputed to BMW through CARS is nonexistent. Although BMW raised the illusory policy issue to the trial court, the trial court never addressed this issue in its order.[5] Additionally, the record is devoid of any evidence BMW ever filed a Rule 59(e) motion. As a result, this issue is not preserved for our review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (holding an issue must have been raised to and ruled upon by the trial court in order to be preserved for appellate review); *see also Elam*, 361 S.C. at 24, 602 S.E.2d at 780 (holding a party must file a Rule 59(e), SCRCP motion to preserve an issue for review that has been raised to but not ruled upon by the trial court).

Motion to Compel

BMW argues because the trial court erred in granting summary judgment, it also erred in finding its motion to compel moot. Based upon our decision to affirm the trial court's grant of summary judgment, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address a remaining issue when disposition of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we affirm the trial court.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

Colony's bad faith in processing its claim is not preserved. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding a party must file a Rule 59(e), SCRCP motion to preserve an issue for review that has been raised to but not ruled upon by the trial court).

[5] We note BMW admits in its brief that the trial court failed to address this issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Geneva Watson, Appellant,

v.

Xtra Mile Driver Training, Inc., and Hartford Underwriters Insurance Co., Respondents.

Appellate Case No. 2010-174006

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Published Opinion No. 5013
Heard January 26, 2012 – Filed August 1, 2012

AFFIRMED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for Appellant.

Kathryn Rose Fiehrer, of Wood & Warder, LLC, of Charleston, for Respondents.

WILLIAMS, J.: In this workers' compensation appeal, Geneva Watson (Watson) challenges the Workers' Compensation Appellate Panel's (Appellate Panel) decision to admit into evidence the strength category portion of the functional

capacity evaluation (FCE). Additionally, Watson asserts the Appellate Panel erred in failing to find her permanently and totally disabled. Watson also claims the Appellate Panel erred in granting her employer, XTRA Mile Driver Training, Inc., and its insurance company, Hartford Underwriters Insurance Company (collectively, XTRA), credit for all temporary disability compensation paid after the date of maximum medical improvement (MMI). We affirm.

FACTS

On September 18, 2007, while working as Director of Placement for XTRA, Watson slipped on a golf ball and fell on her back. Watson was transported to Tuomey Emergency Room where the emergency room physician ordered lumbar and thoracic spine x-rays, which did not reveal any significant injury. A subsequent lumbar MRI of Watson's back revealed, in pertinent part, suspect hemangiomas, mild disc bulges, and spinal stenosis in Watson's back. The emergency room physician ordered Watson not to return to work for two days and instructed her to see a physician before returning to work.

On September 22, 2007, XTRA began paying Watson temporary total disability (TTD) compensation. Five months later, on February 12, 2008, XTRA and Watson executed a consent order wherein the parties stipulated to an average weekly wage of $485.71, with a resulting weekly compensation rate of $323.83.

In accordance with the emergency room physician's instructions, Watson went to XTRA's doctor, Dr. John Pate, and saw XTRA's nurse practitioner, Anita Curl. Ms. Curl ordered Watson not to return to work for one week and referred her to Pee Dee Orthopaedics. On October 1, 2008, Watson saw Dr. Rakesh Chokshi, an orthopaedic surgeon at Pee Dee Orthopaedics. Dr. Chokshi ordered epidural steroid injections, which did not significantly improve Watson's condition. Ultimately, Dr. Chokshi performed lumbar decompression surgery at Watson's L3-4 and L4-5 discs on March 31, 2009.

Dr. Chokshi then referred Watson to Tuomey Outpatient Rehabilitation Service for an FCE to establish her permanent work restrictions. The manager of outpatient rehabilitation at Tuomey Healthcare System, Jerry Shadbolt, performed the FCE on July 6, 2009. Shadbolt testified that during the FCE, he conducted a series of tests to measure Watson's ability to perform physical activities, such as sitting,

walking, and standing.[1] Based on Watson's ability to perform physical activities, Shadbolt identified Watson's physical restrictions.[2] Shadbolt testified he entered Watson's physical restrictions and Watson's job title[3] into a computer, which utilized a software program to generate a report on Watson's strength and ability to return to work based on the DOT[4] guidelines. This report was listed in the strength category of the FCE and concluded:

> The Dictionary of Occupational Titles places Ms. Watson's occupation as a Director of Placement in the sedentary strength category. Therefore, Ms. Watson meets these strength requirements and may return to work as Director of Placement.
>
> Based on the strength classifications as established by the Dictionary of Occupational Titles, Ms. Watson is capable of assuming a position in the light strength category. Her maximum lifting capacity is 10 pounds, and her maximum carrying capacity is 10 pounds. According to the Dictionary of Occupational Titles, the light strength

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[1] The results of the tests revealed, in pertinent part: (1) Watson has a maximum lifting capacity of ten pounds, placing her into the light category for lifting capacity; and (2) Watson has a maximum carrying capacity of ten pounds, placing her in the light category for carrying capacity as defined by the Dictionary of Occupational Titles (DOT).

[2] Watson's job factor restrictions included: (1) no continuous standing for more than twelve minutes; (2) no continuous sitting for more than three minutes; (3) no continuous walking for more than 0.1 miles; (4) no pushing more than twenty pounds; (5) no pulling more than twenty pounds; (6) no stopping; and (7) no crawling on her hands and feet.

[3] Watson selected her job title, Director of Placement, in the Dictionary of Occupational Titles, which established the strength category necessary to perform that occupation.

[4] The DOT is a U.S. government publication that provides a description of occupational titles for most jobs in the United States and establishes a strength classification for each of these occupations. These strength classifications are sedentary, light, medium, heavy, and very heavy.

> category is defined as having the ability to lift 10 [to] 20 pounds and carry 5 to 10 pounds.

Shadbolt testified that his opinion as to whether Watson could return to work was not contained in the strength category of the FCE report. Shadbolt noted he is only an expert in conducting the tests to see how long Watson can perform physical tasks, and the computer generates the report based on the results of those tests. However, Shadbolt testified he believed the strength category report's conclusion that Watson could return to light strength work was consistent with Watson's physical restrictions contained in the FCE.

XTRA sent Watson a letter instructing her to return to work on Monday, September 28, 2009. Watson returned to work accompanied by her restrictions as listed in the FCE. Upon reviewing those restrictions, XTRA declined to offer her any work within the restrictions and sent her home.

At Watson's request, J. Adger Brown, a vocational analyst, reviewed Watson's FCE. Brown found the job factor restrictions provided by the FCE left Watson totally and permanently disabled and incapable of even sedentary employment.

PROCEDURAL HISTORY

On November 9, 2009, XTRA filed a Form 21 claiming Watson reached MMI on August 12, 2009.[5] Watson filed a Form 50, and XTRA timely responded by filing a Form 51.

At the hearing before the single commissioner, Watson alleged she was permanently and totally disabled and requested a lump sum payment of total disability benefits and lifetime causally-related medical treatment. XTRA claimed credit for overpayment of TTD paid after August 12, 2009, and sought a final determination concerning Watson's entitlement to future benefits.

Although Watson admitted the FCE into evidence before the single commissioner, she objected to the strength portion of the FCE generated by the computer, which

[5] XTRA previously filed a Form 21 on September 2, 2009, and September 15, 2009, but filed an amended Form 21, which began the current action, on November 9, 2009.

used the DOT guidelines to conclude Watson was capable of assuming an employment position in the light strength category. The single commissioner overruled Watson's objection.

Taking into account the record as a whole, including Watson's testimony, the FCE, medical reports, the consent order, the depositions of Dr. Chokshi and Shadbolt, and the vocational assessment by Brown, the single commissioner found, in pertinent part: (1) Watson sustained an injury to her back as a result of the work-related accident; (2) XTRA provided Watson adequate medical care; (3) Watson reached MMI for injuries causally related to the accident by August 12, 2009; (4) Watson was not permanently and totally disabled; and (5) Watson sustained a 50% permanent partial disability to her back pursuant to section 42-9-30(21) of the South Carolina Code (Supp. 2011).

In accordance with these findings, the single commissioner ordered: (1) XTRA was responsible for all causally-related medical treatment that was incurred on or before August 12, 2009; (2) Watson was entitled to future *Dodge*[6] medical treatment as needed to lessen Watson's causally-related disability from the September 18, 2007 accident; (3) XTRA's stop payment application was granted, and XTRA was entitled to stop payment of TTD effective August 12, 2009; (4) XTRA had no liability for any further TTD; and (5) XTRA must pay a lump sum payment to Watson representing compensation for 50% permanent loss of use to the back, while XTRA was allowed to take credit for all TTD paid to Watson for the period after August 12, 2009.

Watson appealed the single commissioner's order. The Appellate Panel affirmed the single commissioner in full, and this appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C. Code Ann. § 1-23-380 (Supp. 2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35,

[6] *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 579-80, 514 S.E.2d 593, 596 (Ct. App. 1999) (holding a finding that claimant has reached MMI does not preclude an award of additional medical benefits for purposes of lessening the period of disability).

276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the [Appellate Panel] reached in order to justify its actions." *Broughton v. S. of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999) (internal citation omitted).

LAW/ANALYSIS

I. The FCE

Watson argues the Appellate Panel erred in admitting the strength category contained in the FCE that indicates Watson was capable of light strength work. Watson asserts the vocational opinion was generated by a computer system, and XTRA offered no evidence to establish the computer was qualified as a vocational expert to give an opinion under Rule 702 of the South Carolina Rules of Evidence. We disagree.

Because the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission, and Watson offers no other authority for this court to reverse the Appellate Panel, we affirm the decision to admit the FCE into evidence. *See Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("[T]he South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission."); *Hallums v. Micheline Tire Corp*, 308 S.C. 498, 504, 419 S.E.2d 235, 239 (1992) (holding the Workers' Compensation Commission is allowed wide latitude of procedure and is not restricted to the strict rule of evidence adhered to in a judicial court); *see also Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) (holding appellant has the burden of proof to convince a reviewing court that the lower court was in error, and to do this, appellant must place in the record a sufficient foundation for his or her argument).

Accordingly, we affirm the Appellate Panel's decision to admit the strength category portion of the FCE into evidence.

II. Permanent and Total Disability

Watson argues the Appellate Panel erred in failing to find permanent and total disability (PTD) under section 42-9-10 of the South Carolina Code (Supp. 2011) or, in the alternative, section 42-9-30(21) of the South Carolina Code (Supp. 2011). We disagree.

A. Section 42-9-10

First, Watson contends the Appellate Panel erred in failing to find PTD under section 42-9-10. We disagree.

Section 42-9-10 provides for PTD "when the incapacity for work resulting from an injury is total." The extent of disability is a question of fact to be proved as any other fact is proved. *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 384, 335 S.E.2d 91, 95 (Ct. App. 1985). In *Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961), our supreme court stated:

> Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require complete helplessness. . . . The generally accepted test of total disability is inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."

(internal citations omitted).

Here, there is substantial evidence in the record to support the Appellate Panel's conclusion that Watson is not permanently and totally disabled. At the hearing before the single commissioner, Watson testified as to her education and work experience: (1) she graduated high school and attended several training courses in health and life insurance, as well as vocational training in secretarial duties; (2) she is versed in the operation of computers; (3) she has experience in contract negotiation, customer service, accounting, ad design, and other types of secretarial work; and (4) she has extensive experience and training in occupations of a sedentary nature. As to her physical capabilities, Watson testified: (1) she is able

to drive continually for thirty to thirty-five minutes and can drive longer if she takes breaks; (2) she performs some household chores; (3) she goes grocery shopping; (4) she handles all her money and pays her bills; and (5) she no longer takes any anti-inflammatories or pain medication.

Further, both Dr. Chokshi and Shadbolt evaluated Watson and testified she could return to work in an occupation that complied with her job factor restrictions. While the dissent points out Watson's restrictions, we find Watson's testimony describing her capabilities, and the testimony of Dr. Chokshi and Shadbolt provide substantial evidence to conclude Watson is not permanently and totally disabled.

Based on the record as a whole, we find Watson failed to show that she was unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *See Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965) (holding the burden is on the employee to prove he or she is totally disabled, specifically that he or she is unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist). Therefore, we affirm the Appellate Panel's conclusion that Watson was not permanently and totally disabled under section 42-9-10.

B. Section 42-9-30(21)

Watson also contends the Appellate Panel erred in failing to find PTD under section 42-9-30(21). We disagree.

While PTD is generally based on loss of earning capacity, section 42-9-30(21) states there is a rebuttable presumption of PTD when a claimant has 50% or more loss of use of the back. Therefore, a claimant with 50% or more loss of use of the back is not required to prove loss of earning capacity to establish PTD. *Bateman v. Town & Country Furniture Co.*, 287 S.C. 158, 160, 336 S.E.2d 890, 891 (Ct. App. 1985) (holding a claimant who suffers a 50% or more loss of use of the back need not show a loss of earning capacity to recover PTD).

Here, the Appellate Panel affirmed the single commissioner's finding that Watson sustained 50% impairment to the use of her back. The Appellate Panel also agreed that while there was a presumption Watson was totally and permanently disabled under section 42-9-30(21), XTRA rebutted that presumption. We find there is

substantial evidence in the record to support the Appellate Panel's conclusion that XTRA rebutted the presumption that Watson was permanently and totally disabled.

The Appellate Panel relied, in part, on the FCE, which concluded Watson is capable of assuming a position in the light strength category. The Appellate Panel also reviewed the testimony of Dr. Chokshi who stated, "As long as the work is within the particular restrictions, I believe it is reasonable for her to continue working." Dr. Chokshi also determined that according to the American Medical Association (AMA) guidelines, Watson had a 10% impairment rating of the whole person. Shadbolt testified he believes Watson could perform a sedentary job if she was able to stand up and sit down periodically. Further, Watson testified she is willing to work within her strength restrictions, but admitted she has not looked for any employment within those restrictions.

We recognize the testimony of Brown, the vocational analyst, who asserted the conclusions of the FCE were inconsistent, and Watson was permanently and totally disabled. However, the Appellate Panel is reserved the task of weighing the evidence, and it ultimately concluded Watson was not permanently and totally disabled. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (holding the appellate panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence). We find the Appellate Panel's conclusion that Watson is not permanently and totally disabled is supported by substantial evidence in the record. Accordingly, we affirm the Appellate Panel.

III. Credit for TTD

Watson argues the Appellate Panel erred in granting XTRA credit for all TTD paid after Watson reached MMI on August 12, 2009. We disagree.

We find substantial evidence in the record to support Watson reached MMI; therefore, we hold XTRA is entitled to recover any payment it made to Watson for TTD after that date. Dr. Chokshi found Watson reached MMI on August 12, 2009. On appeal, Watson does not object to Dr. Chokshi's finding of MMI, but instead argues equity demands that XTRA not receive credit for payments it made to Watson after she had reached MMI. Because equity follows the law, XTRA is entitled to credit for any TTD compensation payments it made to Watson after the date of MMI. *See Curiel v. Envtl. Mgmt. Servs. (MS)*, 376 S.C. 23, 29, 655 S.E.2d

482, 485 (2007) ("[T]he date of maximum medical improvement signals the end of entitlement to temporary total disability benefits."); *Smith v. S.C. Dep't of Mental Health*, 335 S.C. 396, 398-401, 517 S.E.2d 694, 695-97 (1999) (finding employer was entitled to stop payment of temporary total disability benefits upon a showing that the claimant has reached maximum medical improvement); *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (holding a court may not ignore statutes, rules, and other precedent when providing an equitable remedy).

Accordingly, the Appellate Panel's decision is

AFFIRMED.

SHORT, J., concurs.

GEATHERS, J., concurs in part, and dissents in part.

GEATHERS, J., concurring in part and dissenting in part.

Respectfully, I concur in part and dissent in part. I concur with the majority's holdings that: (1) Watson's strength assessment was properly admitted into evidence, and (2) the employer is entitled to a credit for payment of temporary disability benefits made after Watson reached maximum medical improvement. I respectfully dissent, however, from the majority's holding that Watson is not permanently and totally disabled, pursuant to sections 42-9-10 and 42-9-30(21) of the South Carolina Code (Supp. 2011).

In South Carolina, there are two models of workers' compensation; the first, an economic model, compensates workers for reductions in earning capacity, while the second is based on the degree of medical impairment:

> "South Carolina's workers' compensation law represents a combination of two competing models of workers' compensation, one economic and the other medical." *Stephenson v. Rice Servs., Inc.*, 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). Under the more traditional economic theory, the goal of worker's [sic] compensation

> law is to compensate workers for reductions in their earning capacity caused by work-related injuries. *Id.* This is the criterion for compensation under the Workers' Compensation Act. *See* S.C. Code Ann. § 42-1-120 (1985) ("The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.").
>
> "Notwithstanding the definition of disability in section 42-1-120, South Carolina's workers' compensation law also recognizes a competing concept of disability that is tied to medical impairment rather than to wage loss or to any reduction in earning capacity. *The schedule[d] injuries, which typically provide for fixed awards of workers' compensation based on degrees of medical impairment to certain listed body parts, are compensable without regard to whether the employee is able to continue working at the same job.* In other words, with schedule[d] injuries, the fact the employee still is able to work constitutes no bar to compensation." *Stephenson*, 323 S.C. at 117, 473 S.E.2d at 701 (emphasis added). Under the medical theory, the focus is on the medical impairment of the employee. *Id.*

Simmons v. City of Charleston, 349 S.C. 64, 73-74, 562 S.E.2d 476, 480-81 (Ct. App. 2002).

While an award under general disability requires proof of a loss in earning capacity, an award under a scheduled loss does not require such proof:

> Under our Worker's Compensation Act, a claimant may proceed under § 42-9-10 or section 42-9-20 to prove a general disability; *alternatively,* he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. It is well-settled that an award under the general disability statutes must be

> predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award.

Fields v. Owens Corning Fiberglas, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990) (emphasis added) (citations omitted). In my opinion, Watson is permanently and totally disabled pursuant to both statutory models (economic and medical).

The following facts are undisputed: (1) in a workplace setting, Watson now can sit continuously for no longer than three minutes; (2) in a workplace setting, Watson now can stand continuously for no longer than twelve minutes and can walk no farther than 0.10 mile; (3) Adger Brown, the vocational analyst who reviewed Watson's restrictions, found these job factor restrictions rendered Watson permanently and totally disabled; and (4) when claimant returned to her job, which is classified as sedentary, her employer sent her home, stating there was no work available that could accommodate Watson's job restrictions.

As stated by the majority, the standard for determining total disability under section 42-9-10 is the inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961). In other words, "[t]he ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability." *Simmons*, 349 S.C. at 74, 562 S.E.2d at 481 (citation omitted).

The majority reasons that because Watson's strength rating was "sedentary" and because her work at the time of injury was also sedentary, Watson remains capable of returning to sedentary work within the restrictions of sitting no more than three minutes and standing no more than twelve minutes. However, the very existence of these restrictions beg the question of whether they so limit the quality, dependability, or quality of the services Watson is able to perform that there exists no stable job market for those services. The record includes compelling evidence that the sitting and standing restrictions on Watson's work renders her services unmarketable. When Watson attempted to return to her sedentary job,

unsurprisingly, her employer informed her that it could provide no work within her job restrictions.

The majority points out the fact that Watson had previously worked as a secretary. However, there is no relevant distinction between the nature of Watson's former job and that of a secretary. Watson's secretarial skills, which also require "sedentary" strength, do not mitigate the impact of the restrictions on her sitting, standing, and walking—basic requirements of all sedentary jobs. Contrary to the majority viewpoint, I would contend there is no "reasonably stable" market for services that can be performed by this claimant. In my opinion, Watson cannot perform workplace services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Accordingly, I would hold that Watson is permanently and totally disabled pursuant to section 42-9-10.

I also disagree with the majority's analysis under the scheduled disability statute, section 42-9-30(21). It is particularly significant that section 42-9-30(21) provides a rebuttable presumption of total and permanent disability when a claimant has experienced a loss of use of 50% or more of the back. Here, the Commission found that, as a result of Watson's workplace accident, Watson had sustained a 50% loss of use to her back, which triggered the presumption that Watson is totally disabled. The majority found the employer successfully rebutted this presumption by relying on Dr. Chokshi's statement that Watson can work within her restrictions and Watson's testimony that she was willing to work within her restrictions. In my opinion, these statements are not probative of the existence of a stable market for work as severely restricted as Watson's work is. *See McCollum v. Singer Co.*, 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct. App. 1989) ("Under Workers' Compensation Law 'total disability' does not require complete, abject helplessness. Rather it is an inability to perform services *other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them*." (emphasis added)). There is simply no probative evidence in the record to rebut the presumption of Watson's total disability under section 42-9-30(21). *Id.* (rejecting an employer's argument that the claimant's ability to drive a car for an hour, walk for ten minutes, and go shopping made the claimant employable).

For the foregoing reasons, under each of the workers' compensation models—economic and medical—I would reverse the Commission's holding that Watson is not totally and permanently disabled.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Revenue and Raymond Alford, Respondents,

v.

Sandalwood Social Club, d/b/a Spinners Resort and Marina, Appellant.

Appellate Case No. 2011-190026

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

Opinion No. 5014
Heard June 20, 2012 – Filed August 1, 2012

REVERSED AND REMANDED

John C. Bradley, Jr. and S. Jahue Moore, Sr., both of Moore Taylor & Thomas, PA, of West Columbia, for Appellant.

Benjamin J. Tripp, Milton G. Kimpson, Sean G. Ryan, all of Columbia, for Respondent South Carolina Department of Revenue. James J. Corbett, of Holler Dennis Corbett, Ormond Plante & Garner, of Columbia, for Respondent Raymond Alford.

LOCKEMY, J.: In this administrative action, Sandalwood Social Club d/b/a Spinners Resort and Marina (Spinners) appeals the Administrative Law Court's (ALC) decision to suspend its on-premises beer and wine permit and private club liquor by the drink license for sixty days. Further, Spinners contends the penalties imposed by the ALC violated its due process rights. We reverse and remand.

FACTS

Spinners is a private, lakefront resort located on Lake Murray in Saluda County, South Carolina. It consists of two restaurants, a fine dining restaurant that is open year round to the public, and an outdoor restaurant that is open from mid-April until the end of summer. From mid-April through Labor Day, Spinners offers live music from its outdoor music stage on Friday and Saturday nights until 10:30 p.m. On Sunday afternoons, it offers live acoustic music.

In a prior matter before the ALC, Raymond Alford was one of several interveners protesting the renewal of Spinners' on-premises beer and wine permit.[1] The Department of Revenue (DOR) found while Spinners met the statutory requirements for renewal of that permit, protests from the interveners were sufficient to deny it. Spinners filed a contested case with the ALC, but the parties resolved the matter by entering into a consent order of dismissal that contained twelve stipulations. Stipulation number four provided:

> Not later than January 1, 2010 Petitioner will install and maintain a decibel monitoring device on the corner post of the bandstand nearest to Mr. Alford's home. Said device will have a red light as part of it that is clearly visible from across the cove. Petitioner shall control the noise level of all music at all times on the licensed premises so that the sound level at said decibel monitoring device does not exceed 100 decibels from the Petitioner's band stand. The said decibel monitoring device shall be posted at or around thirty (30) feet from the band stand. The device shall be constructed so as to cause the red light to light up at all times if and when the

[1] Alford lives across the cove from Spinners, and his dock is approximately 150 feet from Spinners' outdoor music stage.

> decibel level exceeds 100 decibels. Further, the Petitioner shall control the noise level of all music at all times on the licensed premises so that sound level does not exceed 75-80 decibels from Mr. Alford's dock.

Spinners' license was then renewed by DOR with the inclusion of the agreed-upon stipulations.

In January of 2010, James R. Causey, a field investigator in licensing and enforcement with the South Carolina Alcohol Beverage Control Commission received a phone call from a "member of the community" inquiring about the stipulations placed on Spinners' license. As a result of that phone call, Causey contacted DOR and obtained a copy of the order containing the twelve stipulations. He then visited Spinners' property on February 24, 2010, and March 30, 2010, finding the business closed on both occasions with no one present on the property.

Causey returned to Spinners on April 2, 2010, and while it still had not opened for the summer season, one of the owners, Theresa LeJohn, was present. Causey inspected the premises with LeJohn and noted compliance with a number of the stipulations contained in the consent order of dismissal.

Causey asked LeJohn about stipulation number four regarding the installation of the decibel or light meter. LeJohn informed Causey the decibel meter had been purchased, but she had not hung the decibel meter on the designated pole yet because Spinners had not opened for business. She explained she would have the meter up "two or three days from now" before Spinners opened for business. She further showed Causey the pole where the meter was to be placed and told him that her electrician had already installed wiring to the pole. Causey told LeJohn the stipulations of the consent order were "self explanatory," and since the meter was "supposed to be up January 1," he had "no choice but to issue an administrative citation for violation of the stipulation" pursuant to regulation 7-200.1(I) of the South Carolina Code of Regulations (2011).

After his April 2 visit, Causey prepared an administrative report citing Spinners for one violation. Specifically, he cited a violation of the portion of stipulation number four that stated, "No later than January the 1st, 2010, Petitioner shall install and maintain a decibel monitoring device on the corner pole of the bandstand nearest Mr. Alford's home." The report provided that the first-time violation

required a $500 penalty. Causey did not return to Spinners after his April 2 visit. DOR issued a determination on August 30, 2010, stating

> [Spinners] noted that it previously purchased an expensive red light decibel monitoring device, but only mounted the device when live music is being played. [Spinners] stated its reasoning for sparingly mounting the device is because the device is not all-weather and is not under warrantee [sic]. However, [Spinners] stated that the device is hung in complete compliance with the stipulations during live band performances. Unfortunately for [Spinners], the section four of the stipulations does not make an exception for [its] actions. Thus, [Spinners] has knowingly violated the stipulations.

Thereafter, DOR found that on April 2, 2010, Spinners violated stipulation four of its license under regulation 7-200.1(I) of the South Carolina Code of Regulations (2011), which states

> Stipulations. Any written stipulation and/or agreement which is voluntarily entered into by an applicant for a permit or license between the applicant and the Department, if accepted by the Department, will be incorporated into the basic requirements for the enjoyment and privilege of obtaining and retaining the permit or license and shall have the same effect as any and all laws and any and all other regulations pertaining to the permit or license. Knowing violation of the terms of the stipulation or agreement shall constitute sufficient grounds to revoke said license.

DOR imposed a $500 penalty for what it termed a "first offense sale for a violation against a Licensee's beer and wine permit." Further, it found "[Spinners] [had] not provided sufficient mitigating circumstances to lessen this violation." DOR did not find any further violations against Spinners.

Spinners timely filed a request with the ALC for a contested case on the ground that stipulation four was ambiguous and unenforceable and needed revision to be

clear and non-contradictory to all parties. The matter was set for a hearing on November 22, 2010. Prior to the hearing, Alford and several other individual property owners across the cove from Spinners moved to intervene in the action claiming "repeated, consistent and blatant violation[s] of the Consent Order allowing a permit for the premises . . . have adversely and substantially [a]ffected each intervener and other neighbors to the premises." On November 22, 2010, the ALC allowed Alford to intervene ***"for the limited purpose of presenting evidence and argument related to the violation and fine assessed by DOR concerning the placement and maintenance of a decibel device."*** (emphasis added). The ALC elaborated on the restrictions to Alford's testimony, noting the additional violations, fines, and injunctive relief he sought to be addressed were "outside the scope of this contested case." The ALC explained "[w]ith respect to the allegations of additional violations, the statutory scheme for enforcement of alcohol laws does not include a provision allowing a private right to prosecute violations before the ALC" and "any action to declare a violation and seek a penalty or license revocation must be initiated by [DOR]." The hearing was then continued until January 27, 2011.

Spinners did not appear on January 27, 2011, and the hearing was held in its absence.[2] DOR informed the ALC it was seeking a $500 fine for this first violation against the license within the three previous years. Alford asked to testify regarding an alleged seventeen separate incidents with Spinners, the purpose being to show "the intent and lack of intent of installing the noise meter." When discussing the implications of allowing that testimony, the ALC stated its "understanding of the law [was] that only [DOR] has the right to bring a violation. However, [it] believe[d] there may be some flexibility in . . . the penalty for that first violation." In allowing the testimony, the ALC further stated that "while this is a first violation and [would] be considered only [as] a first violation," it had discretion as to what penalty to impose based upon the testimony in the record. Alford presented evidence pertaining to Spinners' conduct around the time of the alleged violation. He further testified that he made approximately seventeen complaints to Spinners and local police about noise levels between April and the end of July 2010. Alford also maintained the first time he saw the decibel meter at Spinners was mid-August of 2010. He presented photographs depicting his own decibel meter on his dock recording noise levels over eighty decibels on eleven

[2] The administrative law judge (ALJ) who conducted the hearing on the merits was not the same ALJ who granted Alford's motion to intervene.

different days between the end of May and mid-July of 2010 and police reports based upon his complaints about the noise level.

On January 31, 2011, Spinners filed a motion to re-open the record on the basis that it overlooked the hearing date within the ALC's order granting an intervention and continuance. Spinners stated, "Respondent wishes to be heard on the issue of the appropriate penalty to be imposed for the alleged violations . . . The respondent admits the allegations made by the petitioner but does believe they can offer evidence in mitigation." The ALC granted the motion and a second hearing was held on February 17, 2011. All parties appeared at this hearing.

LeJohn stated Spinners would like to address the mitigation of the fine, as well as the interpretation of the particular stipulation Spinners allegedly violated. She then admitted to violating the stipulation regarding installing and maintaining a decibel meter, "by virtue of the word, install." LeJohn explained that the decibel meter was not installed yet at the time of Causey's visit because it was an expensive piece of equipment, she did not want it exposed to the elements for no reason while Spinners was not open. At the time of the violation, she testified they had a week before they were supposed to open, and no bands were scheduled to be played until that time either.

On cross-examination, LeJohn stated the stipulations were a result of protracted negotiations, and that she entered into the agreement freely and voluntarily. While she mentioned during negotiations that January 1 was an illogical date for the decibel meter installation, she ultimately agreed to it and signed the document. However, she also testified that while the agreement says January 1, Spinners would be in compliance with the stipulations if they were completed by the day it opened. Alford introduced the ALC's order denying reconsideration from the previous contested case regarding Spinners' license renewal into evidence. The motion for reconsideration requested relief regarding the agreement's stipulations. The order stated "the parties in this matter entered into [the] [c]onsent [o]rder freely and willingly. The [c]onsent [o]rder was negotiated among all parties and was drafted by the parties before it was submitted to the [c]ourt."

Alford offered scenarios to LeJohn of how the decibel meter could be protected from the elements, and when asked if those would be possible, LeJohn stated, "I could do a number of things, I'm sure." Alford continued with a line of questioning pertaining to the decibel level at his dock being over 80 decibels.

Spinners objected on the basis that it was not relevant because there was no cited violation of the stipulation requiring the sound to be kept at a certain level on Alford's property. Alford responded that the questioning was in "mitigation she's testified . . . she's fully complied with the consent order," and the ALC overruled the objection.

On March 29, 2011, the ALC issued its order finding Spinners violated Regulation 7-200.1(I) and suspended Spinners' on-premises beer and wine permit and private club liquor by the drink license for sixty days beginning April 15, 2011. In the ALC's findings of fact, it states,

> [Alford] has a device installed on his dock to allow [Spinners] to monitor the sound level to assure compliance with [stipulation] 4, which states, '[Spinners] shall control the noise level of all music at all time[s] on the licensed premises so that sound level does not exceed 75-80 decibels from . . . Alford's dock.' Between April and September, 2010, Alford made telephone calls to [Spinners] and the Saluda County Sheriff's Department (Sheriff's Department) complaining about loud music on 17 occasions. Additional complaints were made by other neighbors on other occasions. LeJohn admits that neither she nor anyone from [Spinners] has ever checked the decibel monitor on Alford's dock and that the club has never attempted to determine if it has been in compliance with the stipulated condition requiring [Spinners] to control the noise level of music at all times so that the sound does not exceed 80 decibels on . . . Alford's dock. [Alford's] Exhibits 1-5 and 7-8 contain photographs depicting the monitor on Alford's dock on eleven different dates between May 21, 2010 and July 17, 2010 showing the reading on the device between 82 to 88 decibels. I find, therefore, that [Spinners] has made no attempt to comply with the stipulated condition requiring it to control the noise level of music so that the sound does not exceed 75-80 decibels at . . . Alford's dock. [Spinners] violated the condition limiting the noise level

> as measured from Alford's dock on at least eleven separate dates in 2010.

Additionally, the ALC stated,

> Stipulation . . . 2 of the Renewal Order requires [Spinners] to cease playing all music no later than 10:30 p.m. The Sheriff's Department Incident reports include documentation of complaint calls made by [Alford] at 10:44 p.m. on June 26, 2010, and 10:34 p.m. on July 16, 2010. I find that [Spinners] has violated [stipulation 2] of the Renewal Order on those two occasions.

The ALC recognized DOR's recommended penalty for the violation, then stated,

> Furthermore, because I find that this violation was accompanied by other conduct which constitutes ongoing knowing violations of other conditions contained in the permit and license, I conclude that the appropriate penalty in this case is a sixty-day suspension of the beer and wine permit and liquor by the drink license.

Spinners timely moved for a reconsideration and supersedeas on April 5, 2011. The ALC denied those motions in orders dated April 11, 2011, and April 12, 2011. This appeal followed. Spinners also moved for supersedeas on April 15, 2011, asking this court to stay the ALC's order suspending its license. That same day, this court temporarily granted its motion. On April 28, 2011, this court ordered an indefinite stay of the ALC's order of suspension.

ISSUES ON APPEAL

1. Did the ALC err by suspending Spinners' on-premises beer and wine permit and private club liquor by the drink license pursuant to section 7-200.1(I) of the South Carolina Code of Regulations (2011)?

2. Did the ALC err by imposing penalties that violated Sandalwood's due process rights?

STANDARD OF REVIEW

"Appeals from the ALC are governed by the Administrative Procedures Act (APA)." *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011); *see* S.C. Code Ann. §§ 1-23-310 to -400 (2005 & Supp. 2011). "Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *MRI at Belfair*, 394 S.C. at 572, 716 S.E.2d at 113 (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2010)). "'As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence.'" *Id.* (quoting *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008)).

LAW/ANALYSIS

Substantial Evidence to Support a Finding of a Willful Violation

Spinners argues the ALC's finding that it knowingly and willfully violated Regulation 7-200.1(I) by failing to have a working monitoring device installed by January 1, 2010 is clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. We disagree.

LeJohn testified she entered the stipulations freely and voluntarily. However, she stated that while stipulation four called for the installation of the decibel meter by no later than January 1, in her mind, if it was installed by the opening of the summer band season, Spinners would have been in compliance. We do not agree with LeJohn's interpretation of the stipulation. She testified that these stipulations were the result of a long negotiation, and that she ultimately signed the agreement, which states installation of the decibel meter must be completed by January 1. Interpreting the terms of the stipulation as written, LeJohn admitted to violating the stipulation regarding the installation and maintenance of a decibel meter. Thus, we find there is substantial, reliable, and probative evidence on the record for the ALC

to find Spinners violated stipulation four. For the forgoing reasons, we affirm the ALC on this issue.

Error in Penalizing Spinners for Other Violations

Spinners maintains the ALC abused its discretion and committed an error of law by penalizing Spinners for violations not cited by DOR. We agree.

"An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) (citing *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)). DOR is charged with the responsibility of administering and enforcing the laws and regulations governing the manufacture and sale of alcoholic beverages, including beer, wine, and alcoholic liquors. S.C. Code Ann. § 61-2-20 (2009) ("The functions, duties, and powers set forth in this title are vested in the department and the division. The department must administer the provisions of this title, and the division must enforce the provisions of this title."). "Contested case hearings arising under the provisions of [Title 61, Alcohol and Alcoholic Beverages] must be heard by the [ALC] pursuant to the South Carolina Revenue Procedures Act and the [APA]." S.C. Code Ann. § 61-2-260 (2009).

DOR has the authority to determine an appropriate administrative penalty, within the statutory limits established by the legislature, after the parties have had an opportunity for a hearing on the issues. *See Walker v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 209, 210-11, 407 S.E.2d 633, 634-35 (1991). Further, in assessing a penalty, DOR "should give effect to the major purpose of a civil penalty," which is "deterrence." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 313 S.C. 210, 212, 437 S.E.2d 120, 121 (Ct. App. 1993).

DOR can issue monetary penalties pursuant to section 61-4-250 of the South Carolina Code (2009), which states

> For violations of this chapter, or of Chapter 21 or 33 of Title 12, and for a violation of any regulation pertaining to beer or wine, the department may, in its discretion, impose a monetary penalty upon the holder of a beer or wine license in lieu of suspension or revocation.

> In these cases, the amount of any penalty imposed must be determined within the limits prescribed in this section in each case by the department after a hearing as provided in the South Carolina Revenue Procedures Act and the [APA]. For these violations:
>
> (1) retail beer and wine licensees are subject to a penalty of not less than twenty-five dollars nor more than one thousand dollars; and
>
> (2) wholesale beer and wine licensees are subject to a penalty of not less than one hundred dollars nor more than one thousand five hundred dollars.
>
> . . . .

Revenue Procedure 04-4, the advisory opinion cited in DOR's final determination, states "[t]he Department recognizes that insuring compliance with the law, not punishment, is the reason for administrative penalties." S.C. Revenue Procedure 04-4 (2004). It must be noted that the revenue procedures do not establish a binding norm, and they "do not restrict [DOR's] authority to impose any sanction within the statutory authority granted by the General Assembly." *Id.* However, according to the relevant procedure, a $500 penalty is recommended for a first violation of the beer and wine permit. *Id.*

In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the *de novo* contested case proceeding. *See, e.g.*, *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). "As an administrative agency, [the ALC] is the fact-finder and it is [the ALC's] prerogative . . . to impose an appropriate penalty based on the facts presented." *Walker v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 209, 210, 407 S.E.2d 633, 634 (1991).

Here, DOR cited Spinners for the sole violation of failure to install and maintain a decibel meter on its property on April 2, 2010, in accordance with Spinners' beer and wine permit, which was a first offense violation. DOR sought a $500 dollar civil penalty pursuant to Revenue Procedure 04-4. As stated previously, only DOR

may bring violations under its regulations, and no private right exists to bring a claim against a business under DOR's regulatory scheme. *See* S.C. Code Ann. § 61-2-20 (2009). Despite the ALC clearly granting Alford leave to intervene "for the limited purpose of presenting evidence and argument related to the violation and fine assessed by DOR concerning the placement and maintenance of a decibel device,"[3] Alford was permitted to testify as to other alleged violations at trial. The ALC relied on much of the evidence presented by Alford to find violations supplemental to the violation cited by DOR. While the evidence of Spinners' conduct after the cited violation had some relevance to LeJohn's mitigation argument, i.e., she intended to install Spinners' meter by mid-April, the ALC should have considered the post-citation conduct for the sole purpose of determining the credibility of this mitigation argument.

In its findings of fact, the ALC listed at least two other violations that were not cited by DOR. The ALC's sixty-day suspension of Spinners' beer and wine permit and liquor by the drink license was specifically based upon not only the one violation cited by DOR, but also the additional violations found by the ALC. We find the ALC's consideration of post-citation conduct for any purpose other than the credibility of Spinners' mitigation argument was an abuse of discretion, while the allowance of what amounted to a private citizen bringing a claim under DOR's

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[3] We are placed in the rare position of addressing restrictions on an intervenor's testimony in an alcohol enforcement matter. The ALC Rules allow "any person" to intervene in "any pending contested case" upon a showing that (1) he will be aggrieved or adversely affected by the final order, (2) his interests are not being adequately represented by existing parties, and (3) the intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties. ALC Rule 20(B). While intervenors are common in initial licensing matters, a third party will typically not be able to establish the second prong of the test, as DOR will generally adequately represent private citizens' interests in license enforcement matters. However, here, Alford's status as an intervenor is not an issue on appeal. We discourage the practice of allowing an intervenor in a license enforcement matter, which grants them leave to call witnesses and cross-examine witnesses brought by DOR. Permitting that type of action easily opens the door to what has happened here, essentially a private citizen bringing a claim against a licensee under the DOR license enforcement regulatory scheme. As an alternative, we believe it would be appropriate for the third party to instead be called as a witness by DOR if necessary.

regulatory scheme was an error of law. Because this error formed part of the basis for a more severe penalty, we reverse the ALC's decision. We remand this case to determine whether the $500 dollar penalty assessed by DOR was appropriate in relation to the one violation cited by DOR.[4]

CONCLUSION

For the foregoing reasons, we reverse the ALC's decision and remand the matter in accordance with this decision.

REVERSED AND REMANDED.

THOMAS and GEATHERS, JJ., concur.

[4] We acknowledge Spinners' due process argument; however, we do not think it is necessary to address it in light of our determination of the other issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin J. Williams, Appellant.

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5015
Heard April 10, 2012 – Filed August 1, 2012

REVERSED AND REMANDED

Wanda H. Carter, Deputy Chief Appellate Defender, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General David A. Spencer, all of Columbia; Solicitor I. McDuffie Stone, III, of Beaufort, for Respondent.

WILLIAMS, J.: Kevin Williams (Williams) appeals his convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime, arguing the circuit court erred in (1) allowing the State to comment on Williams' post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976);

and (2) denying Williams' request to charge the jury on defense of habitation. We reverse and remand.

FACTS

On the night of July 9, 2007, Williams was at home with his common-law wife of eighteen years, Valerie Young (Valerie); their two children, Kevin Jr. and Kelsey; and Valerie's eighteen-year-old son, Rodney. The following relevant testimony was elicited at trial regarding the events surrounding that evening.

Valerie testified she and Williams were arguing in their bedroom when their thirteen-year-old son, Kevin Jr., entered the room and inquired what was going on between them. She told Kevin Jr. everything was fine and to leave. Valerie stated Williams then hit her on the leg with a small curtain rod and pulled her hair, causing her to scream. At that point, Rodney came into the bedroom to try to stop the fight, and Valerie claimed Williams said, "I knew this day would come." Valerie testified Rodney told Williams, "Dad, my mom deserves to go out and have a good time, she don't (sic) deserve that," and then Rodney left the room. Williams retrieved his shotgun from underneath the bed and pulled some shotgun shells out of his top dresser drawer. After Williams left the bedroom, Valerie stated she heard a loud boom and ran outside to find that Williams had shot Rodney in the leg. Rodney died later that evening from the gunshot wound.

Williams and Valerie's son, Kevin Jr., also testified. Describing the night in question, Kevin Jr. stated he went to his parents' bedroom because he heard his mother crying. When Kevin Jr. asked why they were fighting, his parents said everything was fine. Rodney then came into the room, and he and Williams began to argue. Kevin Jr. testified that Rodney left the house but that Rodney was coming back up the steps onto the porch when Williams shot him. Kevin Jr. further testified that Williams was standing in the doorway of the front door when he shot Rodney and that Rodney never tried to reenter the house before Williams shot him.

Williams testified in his own defense at trial. Williams, who had been the lead supervisor and shift operator at a chemical plant for twenty years, stated he worked a full shift on the day of the shooting. Williams claimed that on the night in question, he and Valerie were arguing about her failure to clean the master bedroom despite Valerie being off from work that day. Williams said as they were

arguing, Valerie picked up a small curtain rod, but he snatched it from her. He then proceeded to "poke" her with it and hit her on her leg before throwing it on the ground. He claimed Valerie started yelling and cursing at him, at which time Kevin Jr. came into the bedroom and asked Williams if everything was all right. According to Williams, after he assured Kevin Jr. everything was okay, Kevin Jr. left, and Rodney came into their bedroom. Williams had his back turned away from the door, so Rodney was able to grab Williams behind the neck. Williams stated Rodney turned Williams around and tried to grab his neck again. Williams testified he slapped Rodney's hands down and said, "I know you're not going to put your hands on me," to which Rodney responded, "You're a dead mother f*cker. . . . You better get your damn gun."

Williams stated Rodney then ran out of the bedroom, through the living room, and out the front door, leaving the front door open behind him. Once Rodney ran out, Williams looked through the window blinds and saw headlights outside. Williams ran back to his bedroom, grabbed his shotgun, and ran into the living room where he heard Rodney on the porch. Williams stated he told Rodney not to come into the house. Williams claimed Rodney's posture was very menacing, and he was telling Williams, "You're going to die tonight." Williams stated Rodney had one hand behind the back of his thigh, and he heard a clicking sound that convinced him Rodney was carrying a gun. Williams stated Rodney kept repeating that he was going to kill Williams, and because he knew Rodney had a gun behind his back, he shot him in the leg.

Williams left the house in his car but turned himself into police later that evening. Upon his arrest, he was advised of his *Miranda* rights and transported to the sheriff's department. At the sheriff's department, Williams met with Investigator John Kelleher (Investigator Kelleher).

At trial, Investigator Kelleher testified he also advised Williams of his *Miranda* rights and then asked Williams whether he wanted to talk. Williams responded that he did not want to talk. At this point during Investigator Kelleher's testimony, Williams objected, arguing the State could not comment on his post-arrest silence. The circuit court overruled this objection. Later during trial, the State made two additional comments on Williams' post-arrest silence, to which defense counsel failed to object.

After the close of evidence, the circuit court charged the jury on murder, the lesser-included offenses of voluntary and involuntary manslaughter, and self-defense. The circuit court also instructed the jury on possession of a weapon during the commission of a violent crime and on criminal domestic violence of a high and aggravated nature. The circuit court refused Williams' requested charge on defense of habitation. The jury found Williams guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. He was sentenced to eighteen years on the manslaughter conviction to run concurrently with a five-year sentence on the weapons conviction. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* This court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. *State v. Moore*, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007).

LAW/ANALYSIS

Doyle v. Ohio violation

Williams claims the circuit court erred when it allowed the State to comment on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). We agree.

In *Doyle v. Ohio*, the United States Supreme Court held the due process clause of the Fourteenth Amendment is violated when the State seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving *Miranda*[1] warnings. 426 U.S. at 611. The rationale for *Doyle* is that it would be a violation of due process to allow the State to comment on the silence which *Miranda* warnings have encouraged. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

In addressing why it was error in *Doyle* for the State to ask the defendant why he did not assert his innocence after his arrest by telling police his exculpatory story, the Supreme Court held:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 617-18.

A review of the record reveals the State improperly highlighted Williams' post-arrest silence on four occasions during trial. Williams objected to the State's first two comments on Williams' post-arrest silence, but failed to object to the State's two subsequent comments. Despite Williams' failure to object to these subsequent instances, we review the entire record in determining whether the misconduct is sufficient to warrant reversal.[2] *See State v. Arther*, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986) (holding a *Doyle* violation "does not require reversal of a

[2] We are cognizant of *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990), in which the supreme court implied the State improperly commented on the defendant's post-arrest silence in violation of *Doyle*. *Id.* at 258, 391 S.E.2d at 555. Although the supreme court in *Myers* acknowledged the State repeatedly and improperly drew attention to the defendant's right to remain silent, it found defense counsel's failure to raise an objection prevented appellate review. *Id.* at 258-59, 391 S.E.2d at 555. Moreover, it indicated the circuit court's curative instruction was sufficient to cure "these errors," but it strongly cautioned solicitors against violating the *Doyle* prohibition and urged such comments to be avoided in the future. *Id.* at 259, 391 S.E.2d at 555. We find *Myers* distinguishable from the instant case because Williams objected on two separate occasions, and the circuit court failed to issue a curative instruction.

conviction if a review of the *entire* record establishes that any error was harmless beyond a reasonable doubt") (emphasis added).

This court will not reverse Williams' conviction if the comments amounted to harmless error. For a *Doyle* violation to be harmless, the record must establish:

> that the reference to silence be a single reference; that the single reference never be repeated or alluded to in either the trial or in jury argument; that the prosecutor does not directly tie the defendant's silence to his exculpatory story; that the exculpatory story be totally implausible[] [and] transparently frivolous; and that evidence of guilt be overwhelming.

State v. Hill, 360 S.C. 13, 17-18, 598 S.E.2d 732, 734 (Ct. App. 2004) (internal citation omitted).

On appeal, Williams specifically objects to the State's questioning of Investigator Kelleher, who spoke with Williams the night he was brought to the sheriff's department. When asked whether he had any conversations with Williams that night, Investigator Kelleher responded, "On that night at the Investigation Office I advised him of his *Miranda* rights. I asked him if he wants to tell me what happened and he stated he doesn't want to talk." Williams immediately objected, arguing Williams' decision to invoke his right to remain silent was inadmissible. In response, the circuit court overruled Williams' objection, stating, "It creates no inference of guilt. I mean he can say that he offered him that."

In addition, prior to Investigator Kelleher's testimony, Williams objected to the State's questioning of Corporal Keith Gregg (Corporal Gregg), who was on call the evening of the incident. The State asked Corporal Gregg whether he spoke to Williams when he was arrested. Corporal Gregg stated he read Williams his *Miranda* rights. When questioned about this exchange, Corporal Gregg testified Williams understood his rights and was very calm and compliant. Corporal Gregg stated he told Williams he was being arrested for murder. The State then asked Corporal Gregg, "Well did he tell you that he someone (sic) had tried to kill him that night?" Corporal Gregg stated, "No," to which Williams immediately objected.

The third comment on Williams' post-arrest silence occurred during Williams' testimony. The State asked Williams on cross-examination why he never told Investigator Kelleher that Rodney pulled a gun on him. The State followed up saying, "Twelve hours later, after you slept on it you told them [Rodney pulled a gun on you]." In response, Williams stated, "No, I didn't answer [Investigator Kelleher's] questions. He read me my rights. I didn't say anything. What he did, [] twelve hours later was serve me another warrant and that's when I spoke to him." The State proceeded, "You didn't tell anybody when they tell you you're charged with murder, you don't tell anybody, well, he had a gun." Williams replied, "Yes, I did. . . . I did tell them," to which the State replied, "After you had some time to think about it. That's when you come up with the gun story; isn't that true?" Defense counsel did not object to this colloquy between the State and Williams.

The last improper comment on Williams' post-arrest silence occurred during closing arguments. In the State's attempt to disprove Williams' claim of self-defense, the State argued Williams fabricated the story about Rodney being armed with a gun. The State posed the question to the jury, "Or [was] . . . [Rodney being armed with a gun] another figment of his imagination that [Williams] came up with during the twelve hours he waited to talk to law enforcement?" Williams did not object.

Reviewing the entire record, as we must, we find the cumulative effect of the State's comments to be prejudicial error. *See Arther*, 290 S.C. at 296, 350 S.E.2d at 190 (holding a *Doyle* violation "does not require reversal of a conviction if a review of the *entire* record establishes that any error was harmless beyond a reasonable doubt") (emphasis added). On at least four occasions during trial, the State highlighted Williams' silence during the first night of his custody, and Williams immediately objected to the State's tactics on two of these occasions. We find the State's comments to be prejudicial because the State attempted to show that if Williams acted in self-defense, he would have immediately explained this to the police. *See Brown v. State*, 375 S.C. 464, 473, 652 S.E.2d 765, 770 (Ct. App. 2007) ("The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent."). Because the State directly tied Williams' silence to his claim of self-defense, the error cannot be harmless. *See Hill*, 360 S.C. at 18, 598 S.E.2d at 734 (reversing conviction for violation of defendant's due process rights and holding "[i]n essence, the prosecution attempted to show had [the defendant] acted in self-defense he would have immediately explained this to authorities. Because the State directly tied [the defendant's]

silence to his defense, the error cannot be harmless"). Accordingly, we reverse on this ground.[3]

CONCLUSION

Based on the foregoing, we **REVERSE** Williams' conviction and **REMAND** for a new trial.

REVERSED and REMANDED.

THOMAS and LOCKEMY, JJ., concur.

[3] Our decision to reverse on this issue disposes of Williams' remaining argument on appeal. Therefore, we decline to address Williams' remaining argument. *See Futch v. McAllister Towing, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and Toney Trout, Appellants.

Appellate Case No. 2010-154507

Appeal From Greenville County
John C. Few, Circuit Court Judge
D. Garrison Hill, Circuit Court Judge

Opinion No. 5016
Heard June 7, 2012 – Filed August 1, 2012

REVERSED

Boyd B. Nicholson, Jr. and Bonnie A. Lynch, both of Haynsworth Sinkler Boyd, PA, of Greenville, for Appellants.

James G. Carpenter and Jennifer J. Miller, both of Carpenter Law Firm, PC, of Greenville, for Respondents.

GEATHERS, J.: Respondents, South Carolina Public Interest Foundation and Edward D. Sloan, Jr. (collectively, SCPIF), brought this declaratory judgment action against Appellants, Greenville County and the individual members of Greenville County Council (Council) (collectively, the County), challenging the County's establishment of the "County Council Reserves" account as an unlawful delegation of legislative authority. The County seeks review of the trial court's order granting summary judgment to SCPIF, arguing that the account in question is lawful and SCPIF's current action is barred by res judicata. The County also seeks review of a second order granting SCPIF's request for attorney's fees and costs. We reverse.

FACTS/PROCEDURAL HISTORY

For its 1994-95 fiscal year, the County established an account in its annual operating budget entitled "County Council Reserves." Funds in this account were set aside to enable Council to address "special community needs not normally falling with [sic] the operational purview of County government" and to "provide for nonrecurring community requests." In 1996, Council adopted a resolution limiting the use of the Council Reserves account to "infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds."

In 1996, Edward D. Sloan, Jr. (Sloan), filed an action against the County challenging the legality of the Council Reserves account, beginning with fiscal year 1994-95. Sloan's Third Amended Complaint listed donations from the County to several private organizations and political subdivisions spanning "from 1994 through September, 1997." The complaint, which set forth eleven causes of action, took issue with the use of Council Reserves for non-county matters. The complaint also cited perceived procedural irregularities in the continued use of Council Reserves without Council voting on each expenditure or appropriation.

The complaint sought a declaration that establishing the Council Reserves account and disbursing public funds as described in the complaint violated "the applicable statutes, Constitutions, ordinances, and policies." The complaint also sought preliminary and permanent injunctions against the County's "appropriation, expenditure, disbursement, and donation of public funds from the 1996-97 'Council Reserves' in violation of the S.C. Constitution and Code and the Greenville County Codes [sic] regarding procedures for appropriation and expenditures."

Sloan subsequently filed a motion for summary judgment. In his supporting memorandum, Sloan explained his allegation that the Council Reserves account violated section 7-81 of the County of Greenville, South Carolina Code of Ordinances (Greenville County Code) as follows:

> [Section 7-81(b) requires that] all "requests for county funds will be submitted to council for review during the regular county budget process . . . ." Rather than the *entire council* reviewing "requests for county funds" that are "submitted for council review during the regular county budget process," *individual council members* receive requests throughout the year and respond to them by submitting *individual requisitions* to the clerk of county council . . . .

(emphases added). The summary judgment motion and supporting memorandum requested, among other relief, an order enjoining Council's appropriations of public funds to entities when: (1) the appropriations were not made by County Council as a whole, but rather by individuals in violation of section 7-81(a) of the Greenville County Code, and (2) the requests were not submitted to Council during the regular county budget process, in violation of section 7-81(b) of the Greenville County Code. On February 10, 1998, the circuit court conducted a bench trial on stipulated facts. The circuit court subsequently issued an order concluding that the County was entitled to judgment in its favor, with one exception not relevant to this case.[1] Sloan did not appeal this order.

Subsequently, on August 2, 2005, the County passed an ordinance adopting its budget for the 2006-07 fiscal year. Included in the operating expenses for the County Council Division of the Legislative and Administrative Services Department were line items for the Council Reserves, which included a separate line item for each Council member. Each individual Council member's routine expenses were funded from these line items. The line items were also available to fund costs "associated with special, non-recurring community requests for infrastructure purposes" and for "contributions to local governments in Greenville

[1] The circuit court addressed in a separate order a proposed disbursement to the Crestwood Forest Village Committee. The court found that this proposed disbursement was in violation of Council's guidelines for use of Council Reserves.

County for community projects." More specifically, these expenses and costs, designated as "Council District Expense," were described by the County as follows:

> Funds for a Council Member to address:
>
> ●Cost of general business supplies such as pens, paper, stationary, . . . ;
> ●Cost of special documents, incentives and awards given either to the public or county employees . . . ;
> ●Cost of periodicals, professional journals, and reference books;
> ●Cost of per diem and mileage involved in the conduct of county business;
> ●Costs associated with community functions, conferences and training seminars . . . ;
> ●Costs associated with special, non recurring [sic] community requests for infrastructure purposes such as:
>
> - ●Flooding
> - ●Roads
> - ●Lights
> - ●Sewer and drainage
> - ●Public buildings and grounds
> - ●Infrastructure related studies
>
> ●Contributions to local governments in Greenville County for community projects; . . . .

In 2006, SCPIF filed the present action, challenging the Council Reserves account, a/k/a the "Council District Expense" account, within the County's 2006-07 budget.[2] In its complaint, SCPIF specifically challenged "[c]osts associated with special, non[-]recurring community requests for infrastructure purposes[.]" The

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[2] The complaint indicates that this account has been "variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." Likewise, in its appellate brief, the County indicates that several years after creating the Council Reserves account, it began using the name "Council District Expense" for the account. For the remainder of this opinion, we refer to the account as "Council Reserves."

complaint's sole cause of action states, "Council's delegation of legislative power to an individual member . . . is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003[.]"[3]

SCPIF attached a copy of the November 13, 2003 Attorney General opinion to its complaint as an exhibit. The opinion addressed the use of separate funds created by the Florence County Council for each individual district of Florence County, to be spent for "road paving or infrastructure improvements" at the discretion of the council member for each respective district. The opinion concluded, "[A] court would likely conclude that the delegation of discretion to individual members of county council to determine how these funds are spent is unconstitutional." In footnote 2, the Attorney General stated, "The constitutional principle of separation of powers applicable to state government by Article I, § 8 of the [South Carolina] Constitution has been held inapplicable to local political subdivisions of the State[,]"[4] and "County Councils typically exercise the powers of all three branches of government." Nevertheless, the Attorney General concluded, "the legislative and discretionary decision-making authority may not be delegated."

In its complaint, SCPIF sought injunctive relief as well as a declaration that Council's "delegation of [its] discretionary spending authority" was "illegal, invalid, and unconstitutional[.]" The County submitted a motion to dismiss, and the parties submitted cross-motions for summary judgment. In its motion to dismiss, the County asserted that the present action was barred by res judicata and collateral estoppel. However, at the motions hearing, the County expressly waived its collateral estoppel defense.

Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the circuit court concluded that the action was not barred by res judicata by reasoning that the County's different fiscal years were comparable to the different tax years at

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[3] Attorney General opinions are persuasive but not binding authority. *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011); *Anders v. S.C. Parole and Cmty. Corr. Bd.*, 279 S.C. 206, 209-10, 305 S.E.2d 229, 231 (1983).

[4] Article I, § 8 states: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

issue in *Sunnen*. The circuit court also ruled that the creation of the Council Reserves account constituted an illegal delegation of legislative authority by Council to its individual members. However, the court declined to base its ruling on constitutional grounds, stating: "Plaintiffs have alleged a Constitutional basis for the legal proposition that County Council may not delegate legislative authority. However, Defendants' concession that County Council may not delegate legislative authority makes it unnecessary to decide whether this prohibition is based on the Constitution or not."

In a separate hearing, the circuit court received evidence on SCPIF's attorney's fees, pursuant to section 15-77-300 of the South Carolina Code (Supp. 2011).[5] The court subsequently issued an order granting SCPIF's request for $60,084.15 in fees and costs incurred through January 31, 2010. The court also allowed SCPIF to "file an affidavit addressing fees incurred after January 31, 2010." This appeal followed.[6]

ISSUES ON APPEAL

1. Did the circuit court err in concluding that the present action was not barred by res judicata?

2. Did the circuit court err in concluding that the creation of the Council Reserves account unlawfully delegated legislative authority to Council members in their individual capacities?

3. Did the circuit court err in awarding attorney's fees and costs to SCPIF?

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[5] In a case brought by a party contesting "state action," section 15-77-300 authorizes an award of attorney's fees to the prevailing party, other than the State or a political subdivision of the State, under certain circumstances.

[6] The County timely filed a Notice of Appeal following each of the two orders issued by the circuit court; the appeals were consolidated.

STANDARD OF REVIEW

Summary Judgment

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted 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." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

In the present case, the circuit court noted in its order: "The parties agree that the case presents questions of law to be decided on undisputed facts." Neither party challenges this statement on appeal. Therefore, this court need not determine whether there are genuine issues of fact. The court need only concern itself with the resolution of questions of law.

Attorney's Fees

In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party, unless the prevailing party is the State or any political subdivision of the State, if (1) the court finds that the agency acted without substantial justification in "pressing its claim against the party[;]" and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. S.C. Code Ann. § 15-77-300 (Supp. 2011). An appellate court may not disturb such an award unless the appellant shows that the trial court abused its discretion in considering the applicable factors. *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

LAW/ANALYSIS

I. Res Judicata

The County maintains the circuit court erred in concluding that the present action was not barred by res judicata. Specifically, the County argues that the circuit court's reliance on *Sunnen* was misplaced because: (1) *Sunnen* involved an assertion of collateral estoppel, also referred to as issue preclusion, rather than res judicata, also referred to as claim preclusion; (2) after *Sunnen* was decided, the United States Supreme Court limited the reach of *Sunnen*; and (3) Sloan could have asserted (and in fact, did assert) a claim challenging the legality of the Council Reserves account in the prior action. We agree.

A. The *Sunnen* Decision

In the present case, the circuit court relied on the reasoning of *Sunnen* in concluding, "Because the 'Council District Expense Fund' appears in each annual budget for Greenville County, the enactment of each budget creates separate legal claims." The circuit court further stated:

> As the United States Supreme Court has explained in the context of federal income taxes levied on an annual basis, '[e]ach year is the origin of a new liability and a separate cause of action.' *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). The same reasoning applies here. The fact that Mr. Sloan might have, or even did, challenge the legality of an identical line item in a previous budget does not bar Plaintiffs from the causes of action brought in this case.

In *Sunnen*, the United States Supreme Court held,

> [W]here a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. And if the very same facts and no others are

> involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive *as to the same legal issues* which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, *collateral estoppel* does not govern the legal *issues* which recur in the second case.

333 U.S. at 601 (emphases added) (citation omitted). The Court concluded: "Before a party can invoke the *collateral estoppel* doctrine[,] . . . the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Sunnen*, 333 U.S. at 601-02 (emphasis added) (citations omitted).

Therefore, the County is correct in asserting that *Sunnen* addressed collateral estoppel rather than res judicata.[7] Further, the County is correct that after *Sunnen* was decided, the United States Supreme Court limited its application. The County asserts that in *Montana v. United States*, 440 U.S. 147, 161 (1979), the Court

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[7] "Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). In *Beall v. Doe*, this court distinguished the two concepts as follows:

> The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984) (citations and quotation marks omitted).

limited the reach of *Sunnen* by noting only major changes in the law would require departure from the doctrine of collateral estoppel. While we have reservations about the County's interpretation of *Montana*, the Court unequivocally limited the reach of *Sunnen* in *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984):

> [T]he government's argument essentially is that two cases presenting the same legal issue must arise from the very same facts or transaction before an estoppel can be applied. Whatever applicability that interpretation may have in the tax context, *see* [*Sunnen*] (refusing to apply an estoppel when two tax cases presenting the same issue arose from 'separable facts'), *we reject its general applicability outside of that context*.

464 U.S. at 172 n.5 (emphasis added).

Based on the foregoing, the circuit court erred in applying the principles set forth in *Sunnen* to the present case.

B. Application of Res Judicata

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* (citation and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) (emphasis added) (citation omitted); *see also S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct. App. 2001) ("'The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the

principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.'" (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, nemo debet bis vexari pro eadem causa (no one ought to be twice sued for the same cause of action) and interest reipublicae ut sit finis litium (it is the interest of the state that there should be an end of litigation[])[.] . . . Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221-22, 31 S.E.2d at 319-20 (citations omitted); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56-57 (citing *Watson*) (contrasting the origins of res judicata and collateral estoppel).

In the present case, there is no dispute that the 1996 action involved the same parties or their privies—Sloan brought the 1996 action; and, along with the foundation he chaired (SCPIF), he brought the present action. However, SCPIF maintains that in the 1996 action, the circuit court neither ruled on nor could have ruled on the County's 2006 and 2007 appropriations and expenditures. SCPIF argues that res judicata does not bar its challenge to these specific appropriations because "the allegations arise from different fiscal years." We find this argument unavailing. In the present action, SCPIF's complaint challenges the legality of the *practice* underlying these expenditures, i.e., maintaining the Council Reserves account in the County's budget, a practice continuing from year to year since the 1994-95 fiscal year. Likewise, the Third Amended Complaint in the 1996 action challenged this same practice with regard to multiple fiscal years: "*In the last*

three budgets, [the County] has not 'distinctly state[d] [each] public purpose' for which Council Reserves funds would be spent." (emphasis added).

In determining whether allegations arising from different fiscal years must be brought in the same action, the *Restatement (Second) of Judgments* is instructive:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction, or series of connected transactions, out of which the action arose*.
> (2) *What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically*, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982 & Supp. 2012) (emphases added). The plaintiff's claim is extinguished even when the plaintiff is "prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." *Id.* at § 25 (emphasis added).

Here, Sloan's 1996 claim that the practice of maintaining the Council Reserves account in the County's budget was illegal was grounded on an alleged violation of section 7-81 of the Greenville County Code. The assertion of this ground effectively challenged the Council Reserves account as an illegal delegation of legislative authority. *See* Greenville County Code § 7-81 (requiring the appropriation of public funds to be made only by Council as a body); *Gregory v. Rollins*, 230 S.C. 269, 274, 95 S.E.2d 487, 490 (1956) ("It is fundamental that the appropriation of public funds is a legislative function."). The circuit court, in the 1996 action, addressed section 7-81 and concluded that Sloan had not carried his burden of showing any illegal acts on the part of the County. In the present action,

SCPIF bases its claim challenging the legality of the Council Reserves account on the ground that it is "unconstitutional."[8]

Even assuming arguendo that the unconstitutionality theory was neither raised nor ruled on in the 1996 action, the theory could have been brought in the prior action challenging the legality of the Council Reserves account. Hence, both the claim and this theory of relief are barred in the present action. *See Restatement (Second) of Judgments* §§ 24, 25 (1982 & Supp. 2012) (applying claim preclusion "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose" even when the plaintiff is prepared to present a theory in the second action not presented in the first action).

In *Judy*, our supreme court addressed the question of whether a claim should have been raised in a prior action and stated:

> *Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties*. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)) (emphasis added). The court also explained the term "cause of action" for res judicata purposes:

> *[F]or purposes of res judicata, "cause of action" is* not the form of action in which a claim is asserted but, rather *the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon*.

[8] Neither SCPIF's pleadings nor its appellate brief cite any specific constitutional provision supporting the general assertion that the Council Reserves account is unconstitutional. Further, at oral argument, counsel did not articulate any specific constitutional provision on which SCPIF may rely for its assertion.

Id. (emphases added) (citations and quotation marks omitted).

Here, SCPIF's claim challenging the County's inclusion of the Council Reserves account in its budget, constitutes the "same transaction or occurrence" that was the subject of the prior case, i.e., inclusion of the Council Reserves account in the County's annual budget. Although the budget *years* and dollar amounts differ, the "*cause for action*," as defined in *Judy*, is the same in both the 1996 action and the present action. In both actions, Sloan has sought a judicial remedy for the inclusion of the Council Reserves account in the County's annual budgets.

Our application of res judicata to bar SCPIF's present action does not prevent another person, who has the requisite standing and is not in privity with Sloan, from filing an action challenging the Council Reserves account, as might have been the case had Sloan's action been certified as a class action. As to Sloan, he has already had his day in court. Therefore, the public interest would not be served by allowing him, or his privies, to have another bite at the apple.

Our supreme court's recent discussion of res judicata in *Judy* acknowledged that there are certain circumstances in which the policy underlying the doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the *Restatement (Second) of Judgments* § 26 for guidance on those circumstances in which courts should decline to apply res judicata. 393 S.C. at 168 n.5, 712 S.E.2d at 412 n.5 (quoting *Restatement (Second) of Judgments* § 26(1)(a)-(c) (1982 & Supp. 2011)); *see also Wright v. Marlboro Cnty. Sch. Dist.*, 317 S.C. 160, 165, 452 S.E.2d 12, 15 (Ct. App. 1994) (holding that the public policy considerations which form the basis for application of res judicata do not apply where an administrative tribunal must be asked to judge allegations of its own wrongdoing and its own retaliation in response to a report of that wrongdoing); *Restatement (Second) of Judgments* § 26(1)(a)-(f) cmts. a-j (1982 & Supp. 2012) (discussing exceptions to the general rule against claim splitting). Nonetheless, in *Judy*, the court did not find any of these exceptions applicable to the plaintiff's filing of a claim for waste in circuit court after having raised a waste claim in his probate court pleadings. 393 S.C. at 168-74, 712 S.E.2d at 412-15.

Likewise, we find none of these exceptions applicable to SCPIF's present claim. The parties have not cited, nor have we found, any binding authority applying any of these exceptions to a case with facts similar to this case. Here, the record shows

no procedural anomalies, and any person having standing who is not in privity with Sloan may file his own claim challenging the Council Reserves account.

While the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel,[9] the parties have not cited, nor have we found, any binding authority recognizing a comparable exception for res judicata.[10] Rather, the doctrine of res judicata itself is a doctrine founded upon the objective of preserving and protecting the public interest. *See, e.g.*, *Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 ("The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.").

Previous opinions of this court have addressed circumstances in which it was inappropriate to apply the doctrine of res judicata. In *Mr. T v. Ms. T*, the plaintiff filed a paternity action naming his ex-wife as a defendant and alleging that she committed fraud in leading him to believe he was the biological father of her children. 378 S.C. 127, 130-32, 662 S.E.2d 413, 415-16 (Ct. App. 2008). The plaintiff also sought relief from the parties' prior decree of divorce, which had incorporated the parties' settlement agreement and had found that two children were born of the marriage. *Id.* at 130-32, 662 S.E.2d at 414-16. The family court had found that the plaintiff's paternity action was barred by "res judicata/collateral estoppel." *Id.* at 131, 662 S.E.2d at 415. On appeal, the plaintiff argued that the

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[9] *See Restatement (Second) of Judgments* § 28(5) (1982 & Supp. 2012) (referencing the "public interest" exception to collateral estoppel).

[10] We see no injustice in this dichotomy because the reach of issue preclusion is broader than that of claim preclusion. Unlike claim preclusion, issue preclusion can affect the outcome of a different, unrelated claim and can also affect a party in a second action with an unrelated third party. *See Restatement (Second) of Judgments* § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Restatement (Second) of Judgments* § 29 (1982 & Supp. 2012) ("A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

family court erred in this regard. *Id.* at 132, 662 S.E.2d at 415-16. This court reversed the family court's dismissal of the case and remanded the case for further development of the record. *Id.* at 139, 662 S.E.2d at 419.

Also, in *Johns v. Johns*, this court held a consent order's finding that the parties had a common-law marriage should not be given res judicata effect because the marriage was bigamous and South Carolina's policy of not recognizing bigamous marriages had been expressed in a statute declaring them to be void. 309 S.C. 199, 201-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992). Likewise, in *Jennings v. Dargan*, this court held that an order approving a settlement regarding paternity and child support was void and thus did not have a preclusive effect against the child in her action for support because the record did not indicate the family court had complied with statutes requiring a finding that the settlement was in the best interest of the minor and requiring review and approval of the settlement. 308 S.C. 317, 320-21, 417 S.E.2d 646, 647-48 (Ct. App. 1992). The court acknowledged the policy respecting finality of judgments but stated that the policy expressed in the cited statutes (protecting minors) was the overriding concern. *Id.*

We find these opinions to be consistent with the requirement that a judgment must be "valid" in order to preclude a second action concerning the same transaction, and this requirement is already built into the doctrine of res judicata. *See Basnight*, 346 S.C. at 248-49, 551 S.E.2d at 278 (citing *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949)) ("Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, *without fraud or collusion*, is conclusive as to the rights of the parties and their privies." (emphasis added)); *Restatement (Second) of Judgments* § 24(1) (1982 & Supp. 2012) (conditioning the extinguishment of the second claim on the validity and finality of the prior judgment); *Restatement (Second) of Judgments* § 26(1) cmt. j (1982 & Supp. 2012) (discussing the defendant's fraud, misrepresentation, or mistake as a factor contributing to the prior judgment). Therefore, these three cases do not necessarily represent exceptions to res judicata, but rather they demonstrate circumstances in which res judicata does not apply. In each of the these cases, there existed a specific, compelling, and logical reason for not applying the doctrine of res judicata. No such reason has been presented in the present case.

Further, in keeping with the principles of judicial restraint and adherence to precedent, we are reluctant to create a new "public interest" exception that will swallow the rule of res judicata. Such an exception could be used in any case in which the court expresses moral indignation over the outcome, regardless of the

plaintiff's failure to demonstrate truly extraordinary circumstances justifying a departure from res judicata. Rather than seeking to create new public policy, this court best fulfills its mission by enforcing those policies already in existence as expressed by the legislature or our state's highest court.

Based on the foregoing, the circuit court erred in holding that the present action was not barred by res judicata.

II. Attorney's Fees

The County asserts that the trial court abused its discretion in awarding attorney's fees to SCPIF. We agree. In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party under certain circumstances. S.C. Code Ann. § 15-77-300 (Supp. 2011). Because the present action is barred by res judicata, SCPIF does not qualify as the prevailing party. Therefore, we reverse the award of attorney's fees and costs.

CONCLUSION

Accordingly, we reverse the orders granting summary judgment and attorney's fees and costs to SCPIF.

REVERSED.[11]

PIEPER, J., and CURETON, A.J., concur.

[11] Because this action is barred by res judicata, we decline to address the merits of SCPIF's challenge to the Council Reserves account. *See, e.g.*, *Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 (holding that res judicata flows from the principle that public interest requires an end to litigation); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Manning, Appellant.

Appellate Case No. 2010-161686

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Published Opinion No. 5017
Heard May 8, 2012 – Filed August 1, 2012

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General David A. Spencer, all of Columbia; and Solicitor Donald Myers, of Lexington, for Respondent.

WILLIAMS, J.: In this appeal, Christopher Manning (Manning) asserts the circuit court erred by (1) denying Manning's motion to dismiss the case because the State violated section 56-5-2953 of the South Carolina Code (Supp. 2011) by failing to provide an affidavit of the arresting officer certifying that it was physically impossible to provide a video recording as required by the statute when Manning needed emergency medical treatment; (2) denying Manning's motion to suppress

the blood test evidence pursuant to section 56-5-2946 of the South Carolina Code (1991) because there was not sufficient probable cause for an arrest; (3) denying Manning's motion for a mistrial based on prejudice suffered by Manning after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge after the jury was aware Manning was being tried on both charges; and (4) charging the jury on section 56-5-2950(b) of the South Carolina Code (Supp. 2011). We affirm.

FACTS

On July 31, 2009, Manning was working at Boondocks, a private club. Jacob Hill (Hill) was working at a nearby restaurant, Fisherman's Wharf. Hill needed a ride home from work, so he walked to Boondocks where he knew people because he had previously worked there. When he arrived at Boondocks, Hill started drinking with friends.

After Manning's shift at Boondocks was over at 11:00 pm, he began drinking with Hill and his friends until around 4:00 am. Heather Fairchild (Fairchild), one of the bartenders at Boondocks that night, testified that although Manning and Hill consumed a "pretty good amount of alcohol" by drinking beer and taking shots together, neither appeared to be visibly drunk. When Boondocks closed, Fairchild testified she heard Manning and Hill talk about going swimming in Lake Murray and also heard Manning say he had his car and he was going to drive.

Manning and Hill were subsequently in a single car accident, severely injuring Manning and killing Hill. Manning was arrested for felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. During the two-day jury trial, the State argued Manning was the driver. Manning's defense at trial was that Hill was the driver of the vehicle.

Nathan Prouse (Prouse), an employee of the Lexington County Fire Service, testified he received a call shortly before 5:00 am about a vehicle accident on Highway 378. He was the first responder on the scene. When Prouse arrived, he saw two bodies lying on the ground in a field. EMS arrived immediately after Prouse and pronounced Hill deceased. Prouse went to assist Manning, who was severely injured. Prouse testified Manning appeared alert and told Prouse "I f-ed up!" Other emergency responders testified they heard Manning say those same words. Elizabeth Grayson Simmons (Simmons), of Lexington County EMS, testified the first thing she noticed was a strong smell of alcohol as she approached

Manning. Simmons testified Manning's nose was split, and he had a wound as big as a fist in his abdomen exposing his intestines. Simmons testified she heard Manning state "I f-ed up. I should have never done this. Look what I've done." Firefighter Victor Tomaino (Tomaino), who assisted in Manning's care, testified he heard Manning repeatedly say "I f-ed up" and "I should not have been driving."

Corporal Quest Hallman (Corporal Hallman) was the first police officer to arrive at the scene, but Manning had already been transported to the hospital. Corporal Hallman conducted an investigation of the scene to determine the identity of the driver. Corporal Hallman ultimately concluded that Manning was the driver and directed Trooper Jeffrey B. Baker (Trooper Baker) to retrieve a blood sample from Manning at the hospital. In explaining his request for the blood sample, Corporal Hallman testified, "In my experience and my determination, I determined [Manning] was the driver of the vehicle. And with there being a death involved, a legal blood sample was drawn."

Forensic toxicologist, Jennifer Brown (Brown), testified that Manning's blood alcohol level was .173, and Hill's blood alcohol level was .169 at the time of the accident. Brown also testified this level of intoxication would slow an individual's reaction time, impair his or her vision, and adversely affect his or her judgment.

Corporal James O'Donnell (O'Donnell) testified he worked for the South Carolina Highway Department Patrol with the Multidisciplinary Accident Investigation Team (MAIT). The State qualified O'Donnell as an expert in the field of accident reconstruction. O'Donnell further testified that in his opinion, the vehicle was going 89 miles per hour at the time of the accident. He opined that the vehicle went into a curve, went off the shoulder of the road, overturned multiple times, struck a tree, and flew across a ditch where it landed. O'Donnell estimated the vehicle travelled a total of 535 feet during the accident. O'Donnell noted the accident was so violent that the engine was dislodged from the engine compartment. Hill was found lying approximately fifty feet from the vehicle, and Manning was found approximately fifteen feet from the vehicle. O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. O'Donnell did note, however, that a driver has more obstacles than a passenger would to keep from being ejected, and that the steering wheel in this case could have caused Manning's abdominal injuries.

The circuit court severed the felony DUI charge and the schedule three drug charge, and the jury found Manning guilty of felony DUI. The circuit court

sentenced Manning to eighteen years' imprisonment and a $10,000 fine. Manning appeals.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Section 56-5-2953

Manning argues the circuit court erred in denying his motion to dismiss because the arresting officer did not provide an affidavit in compliance with section 56-5-2953. We disagree.

Section 56-5-2953(A) provides that a person who operates a vehicle while under the influence of alcohol "*must* have his conduct at the incident site and the breath test site video recorded." (emphasis added).

Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. § 56-5-2953(B); *see also Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (explaining a previous version of subsection B that is nearly identical to the current version).

Manning relies on *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007), to argue the circuit court erred in failing to dismiss Manning's charges. In *Suchenski*, our supreme court affirmed the dismissal of the defendant's charges for driving with an unlawful alcohol concentration due to the failure of the arresting officer to record a third field sobriety test because he unintentionally ran out of

videotape. 374 S.C. at 14-16, 646 S.E.2d at 879-80. However, in that case, our supreme court found the lower court only considered subsection A of 56-5-2953, and not the exceptions to the videotaping requirement in subsection B of 56-5-2953. *Id.* at 15-16, 646 S.E.2d at 880. Therefore, the *Suchenski* court found any issue dealing with the exceptions outlined in subsection B of 56-5-2953 was not preserved for review. *Id.*

Here, the circuit court found there was no conduct to record under subsection A of section 56-5-2953 because the police arrived after Manning left the scene to seek medical treatment. The circuit court held subsection A of 56-5-2953 was inapplicable because Corporal Hallman and Manning were never simultaneously present at the incident site; therefore, there was nothing to record. Moreover, the circuit court held that even if Corporal Hallman had a duty to record or sign a sworn affidavit certifying that it was physically impossible to produce the video recording because Manning needed emergency medical treatment, section 56-5-2953 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed.

We find section 56-5-2953 was implicated by the facts of this case. Although the officers did not arrive to the incident site before Manning was sent to the hospital, the first sentence of subsection A plainly states that "[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site . . . video recorded." § 56-5-2053(A). The important question here is whether the State satisfied an exception to the video recording requirement outlined in subsection B. § 56-5-2053(B).

We also find the circuit court properly refused to dismiss Manning's charges under subsection B. In this case, it was physically impossible for Corporal Hallman to produce a video recording of Manning at the incident scene because Manning had been transported from the scene for medical treatment prior to Corporal Hallman's arrival. Because the State did not submit an affidavit signed by the arresting officer and stating Manning was transported for medical treatment, Manning's charges should have been dismissed unless another exception under subsection B applied. *See* § 56-5-2953(B) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal . . . if the arresting officer . . . submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment . . . .").

Despite the failure to provide an affidavit under subsection B, the video recording was not required because Corporal Hallman was conducting an investigation of a traffic accident and Manning was arrested at the hospital. *See* § 56-5-2953(B) (“In circumstances including, but not limited to, . . . traffic accident investigations . . . , where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal.”). Moreover, even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. *See* § 56-5-2953(B) ("Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances . . . .").

Accordingly, we find the circuit court properly held section 56-5-2953 did not require the dismissal of Manning's charges.

II. Section 56-5-2946

Manning also argues the circuit court erred in denying his motion to suppress the blood test evidence pursuant to section 56-5-2946 because there was not sufficient probable cause for an arrest. We disagree.

Section 56-5-2946 provides, in pertinent part:

> Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated [the law by driving under the influence] or is under arrest for [driving under the influence]. The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of § 56-5-2945 [offense of felony driving under the influence].

Probable cause to arrest without a warrant exists when the "circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe a crime has been committed by the person to be arrested." *State v. Cuevas*, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005). "In determining whether probable cause exists, 'all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received.'" *Id.*at 204, 616 S.E.2d at 721 (citing *State v. Roper*, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)). "Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Jackson v. City of Abbeville*, 366 S.C. 662, 658, 623 S.E.2d 656, 666 (Ct. App. 2005).

This court reviews the circuit court's probable cause determination under a "clear error" standard. *Baccus*, 367 S.C. at 48-49, 625 S.E.2d at 220. The finding that an arrest was made based upon probable cause is conclusive on appeal where supported by evidence. *State v. Jones*, 268 S.C. 227, 233, 233 S.E.2d 287, 289 (1977).

Here, the circuit court found that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning for felony DUI. We agree.

Under our standard of review, we find a reasonable person with Corporal Hallman's knowledge would have probable cause to arrest Manning for felony DUI. The accident occurred at 5 am and was so violent that the car drifted off the road over 500 feet. Corporal Hallman testified he smelled alcohol in and around the vehicle, and saw a beer bottle in the accident debris. Corporal Hallman also testified he knew the address on the vehicle's registration matched Manning's Department of Motor Vehicle (DMV) record. Most importantly, Corporal Hallman testified he believed Manning to be the driver because Trooper Baker called him and told him Manning stated he was the driver. We find further support for a finding of probable cause based on Corporal Hallman's testimony he arrested Manning for felony DUI after speaking with fire service personnel and EMS at the scene, who were present with Manning shortly after the accident.

Second, if Trooper Baker was deemed to be the arresting officer, we find there is evidence to support Trooper Baker had probable cause to arrest Manning for felony DUI based on a statement made to him by a Highway Patrol officer indicating Manning was the driver, his observations at the hospital that Manning

smelled of alcohol, and his observations that Manning sustained trauma consistent with having been in an accident. Accordingly, because the circuit court's finding that Corporal Hallman and Trooper Baker both had probable cause to arrest Manning is supported by the evidence in the record, we find no clear error. *See State v. Barrs*, 257 S.C. 193, 198, 184 S.E.2d 708, 710 (1971) (holding because there was evidence to support the circuit court's finding that officer had probable cause to make an arrest, it is conclusive on appeal).

III. Severance of charges

Manning argued the circuit court erred in denying his motion for a mistrial based on prejudice caused to Manning after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge because the jury was told at the beginning of the trial that Manning was being tried for both charges, and both indictments were read. We find Manning waived this issue on appeal.

In this case, Manning was indicted for two charges: felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. Manning made a motion to sever the charges after the indictments were read to the jury at the beginning of trial, arguing because he had no hydrocodone or acetaminophen in his system at the time of the accident, it would be highly prejudicial under Rule 403 of the South Carolina Rules of Evidence for the jury to consider his possession of those schedule three substances in determining whether he was guilty of felony DUI. Manning asserted, "the natural assumption of the jury will be that [the possession of the schedule three substances] is something that deals with the felony DUI."

At trial, when the State confirmed the schedule three substances did not appear in Manning's blood stream, the circuit court severed the charges. Manning moved for a mistrial arguing the jurors would still speculate about the severed drug charge because they heard both indictments read at the beginning of trial. The circuit court denied Manning's motion stating:

> You didn't make that motion before the jury was qualified, and the Court is not going to be trapped [into a mistrial] like that. I'll be glad to give whatever instruction

> you want me to give [to the jury], but the case was called for trial in front of the Court. It was qualified. There were no motions at that time, except the one y'all brought to me in chambers on the continuance. So if it prejudices [Manning], that's a self-inflicted wound. That's not a wound inflicted by the State or this Court.

Manning declined the circuit court's offer to give an instruction to the jury to disregard the severed drug charge.

We find Manning waived this issue on appeal. An issue is not preserved when the circuit court offers a curative instruction and it is refused. *State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996); *see State v. Watts*, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) (holding a defendant waives objection if curative instruction is refused).

Here, Manning refused the circuit court's offer to give the jury an instruction to not consider the severed drug charge. After the circuit court denied Manning's motion for a mistrial and offered a curative instruction, Manning stated "I would prefer the Court say nothing [to the jury]." Therefore, Manning waived any objection to the circuit court's denial of his motion for mistrial. *See Watts*, 321 S.C. at 164-65, 467 S.E.2d at 276 (holding because defendant declined a curative instruction after the circuit court denied a motion for a mistrial, the defendant waived the issue on appeal).

IV. Section 56-5-2950(b)

Manning argues the circuit court erred in charging the jury on section 56-5-2950(A) because the statute begins with "a person who drives" which is a statement on the facts and the identification of the driver was the primary issue at trial. We disagree.

Generally, the circuit court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). The law to be charged to the jury is determined by the evidence presented at trial. *Brown*, 362 S.C. at 261-62, 607 S.E.2d at 95. "Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27,

538 S.E.2d 248, 251 (2000). An appellate court will not reverse a circuit court's decision regarding jury instructions absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Section 56-5-2950(A) provides, in pertinent part:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

Here, the circuit court charged the jury, in pertinent part:

> Felony DUI requires proof of three elements: Number one, the actor drives a vehicle under the influence of alcohol and/or drugs; number two, the actor does an act forbidden by law or neglected a duty imposed by law; and number three, the act or negligence, the act of neglect, proximately cause the death to another person . . . . In every case before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A [circuit] judge cannot intimate, state, comment on or make any statement to a jury about the facts in the case. Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial . . . or anything that I say now during the course of this instruction to you that I have any opinion about the facts in the case. . . . An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving the identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you convict the Defendant.

The circuit court subsequently charged the jury with section 56-5-2950(A), reading the statute in its entirety.

Viewing the jury instruction as a whole, we find the circuit court did not abuse its discretion in charging the jury on section 56-5-2950(A). Prior to charging the jury on section 56-5-2950(A), the circuit court made clear it was not making any statements related to the facts, but rather the jury in its absolute discretion must decide beyond a reasonable doubt if Manning was the driver of the vehicle. It is unlikely that a reasonable juror would have singled out the phrase "a person who drives" and interpreted it as the circuit court's opinion on the facts of the case. *See State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) ("[T]he test is what a reasonable juror would have understood the charge as meaning."). We therefore affirm the circuit court's jury charge on section 56-5-2950(A). *See id.* at 526, 377 S.E.2d at 572 ("Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.").

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alfortina Dawkins, Respondent,

v.

Jessie P. Mozie, West Sebestin Mozie, Ricky L. Mozie, Qwendolyn Davis, Jessie Mozie, Michael Mozie, and Alacia Harper, Appellants.

Appellate Case No. 2010-160326

Appeal From Fairfield County
Robert Lee Hartman, III, Special Referee

Opinion No. 5018
Heard June 20, 2012 – Filed August 1, 2012

AFFIRMED

William L. Pyatt, of Pyatt Law Firm, LLC, of Columbia, for Appellants.

Blake A. Hewitt, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Respondent.

WILLIAMS, J.: In this appeal, Jessie P. Mozie, et al., (Appellants) assert the special referee erred in (1) finding Alfortina Dawkins (Dawkins) was the sole and exclusive owner of the family property based upon adverse possession; and (2) refusing to dismiss the lawsuit on the ground of res judicta. We affirm.

FACTS/ PROCEDURAL HISTORY

This case involves a dispute between family members over the ownership of a piece of property in Fairfield County. The property at issue is a .75 acre tract of land that is a portion of a larger 3.5 acre tract of land originally owned by Mr. S.T. Padgett. In 1984, Mr. Padgett executed a deed (the 1984 deed) conveying the 3.5 acre parcel of land to his wife, Dolly Padgett, during her lifetime, and upon her death to Jessie Mozie, one of his daughters.[1] When Dolly Padgett died in 1992 she left a will that gave the 3.5 acre tract of land and the house on the land to their other daughter, Dawkins, despite Mr. Padgett's 1984 deed providing the land would pass to Jessie Mozie. However, Dolly Padgett's will was never probated. Dawkins moved into the house on the 3.5 acre tract of land in 1992 after her mother died.

In 1993, Mr. Padgett brought a lawsuit seeking to set aside the 1984 deed and have the deed construed as a constructive trust, asserting that his intention was never to have Jessie Mozie own the 3.5 acre tract of land in fee simple, but rather his intention was for all of his heirs to share the property. Mr. Padgett died during the pendency of the lawsuit, and his five daughters were substituted as plaintiffs in the action, which ultimately ended with the circuit court declining to impose a constructive trust.

On December 19, 2005, Dawkins initiated this lawsuit alleging she acquired the property by adverse possession because she moved onto the land in December 1992, and she had been in continuous, hostile, open, actual, notorious, and exclusive possession since that time. Initially, Jessie Mozie was the only defendant, but because Jessie Mozie died, Jessie Mozie's children were substituted as the defendants. Appellants answered and asserted Dawkins' complaint failed to state a cause of action. Appellants also counterclaimed for rent.

The circuit court referred the case to a special referee, who heard the case on October 24, 2008. Dawkins originally claimed title to the entire 3.5 acre tract of land but amended her claim during trial to include only the .75 acre tract. In an order signed March 18, 2010, the special referee found Dawkins was the sole and

[1] Mr. and Mrs. Padgett had five daughters: Dorothy McCants, Bethany Padgett, Pearl Padgett, Alfortina Dawkins, and Jessie Mozie.

exclusive owner of the .75 acre tract of land through adverse possession. Appellants filed a motion to reconsider, which the special referee denied. This appeal follows.

STANDARD OF REVIEW

A claim of ownership based on adverse possession is an action at law. *Miller v. Leaid*, 307 S.C. 56, 61, 413 S.E.2d 841, 843 (1992). "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

LAW/ ANALYSIS

I. Adverse Possession

Appellants argue the special referee erred in finding Dawkins proved by clear and convincing evidence that she possessed the .75 acre tract of land for the requisite ten-year period necessary for adverse possession. We disagree.

"In order to establish a claim of adverse possession, the claimant must prove by clear and convincing evidence that possession of the property was continuous, hostile, actual, open, notorious, and exclusive for the statutory period." *McDaniel v. Kendrick*, 386 S.C. 437, 442, 688 S.E.2d 852, 855 (Ct. App. 2009). "In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years." *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009) (citing S.C. Code Ann. § 15-67-210 (Supp. 2008)).

Here, Appellants only challenge whether Dawkins possessed the property for the required statutory period. Appellants assert Dawkins did not possess the property adversely for the required ten-year period because she claimed ownership of the property under a constructive trust from 1992 to 1996. This argument is based on the lawsuit brought by Mr. Padgett after the death of his wife to set aside the 1984 deed and impose a constructive trust. During the litigation, Mr. Padgett died, and Dawkins and her sisters were substituted as plaintiffs. However, the circuit court declined to impose a constructive trust.

In this case, we find there is evidence to support the special referee's finding that when Dawkins moved onto the .75 acre tract of land in 1992, she was not claiming

ownership of the property pursuant to a constructive trust. Dawkins testified she believed she acquired title to the property pursuant to the will left by her mother, Dolly Padgett. Dawkins stated she never moved from the property, and she has lived there continuously since 1992. Dawkins also testified her two children lived in the home on the property with her from 1992 to 2003. Dawkins asserts she never paid rent for her use of the property, and she made various improvements and repairs to the house on the property since she took possession in 1992. Dawkins maintained she paid taxes on the property from 1992 to 2004.

Further, when Mozie brought an eviction action against Dawkins in 1994, Dawkins testified she refused to vacate the premises and continued to live on the property until 2005. This evinces Dawkins' possession of the .75 acre tract of land has been hostile since at least 1994.

Dawkins filed this lawsuit asserting that she owned the property under a claim of adverse possession in 2005. We hold there is ample evidence in the record to support the special referee's finding Dawkins was in hostile possession of the .75 acre tract of land from at least 1994 to 2005. Because this possession is greater than the requisite ten-year period necessary to establish adverse possession, we affirm the special referee.

II. Res Judicata

Appellants assert that because Dawkins sought title to the .75 acre tract of land in a prior action, she was barred from bringing an action for adverse possession by res judicata. We find this issue not preserved for review.

Res judicata is an affirmative defense that must be pled at trial to be pursued on appeal. *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004). An affirmative defense is waived if not pled. *Id.*

Appellants failed to plead this issue in their answer and counterclaim and failed to raise this issue during the hearing before the special referee. Appellants first raised this issue in a post-trial brief; therefore, this issue is not properly preserved. *See Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (holding an issue may not be raised for the first time in a post-trial motion).

Even if this issue were properly pled, the special referee never ruled on this issue in his order filed on March 18, 2010. In their motion for reconsideration, Appellants failed to request a ruling by the special referee and failed to make a

post-trial motion requesting a ruling. Therefore, because no ruling was ever made on this issue, it is not preserved for appellate review. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue not preserved for appellate review where lower court did not rule on the issue, and the party failed to make a 59(e) motion asking the lower court to rule on the issue); *Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990) (holding an issue not explicitly ruled on by lower court was waived for appellate review where omission was not brought to lower court's attention by way of a proper motion); *see also Fettler v. Genter*, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012) (holding an appellate court cannot address an issue unless it was first raised to and ruled upon by the lower court).

CONCLUSION

Accordingly, the special referee's rulings are

AFFIRMED.

THOMAS and LOCKEMY, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Christopher Johnson, Respondent,

v.

Reginald C. Lloyd, Chief, State Law Enforcement Division, and The State of South Carolina, Appellants.

Appellate Case No. 2011-193227

Appeal From Florence County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5019
Heard June 6, 2012 – Filed August 1, 2012

REVERSED

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Geoffrey K. Chambers, and Assistant Attorney General Jared Q. Libet, all of Columbia, for Appellants.

Elise F. Crosby, of Crosby Law Firm, LLC, of Georgetown, for Respondent.

WILLIAMS, J.: On appeal, Chief of State Law Enforcement Division, Reginald C. Lloyd, and the State of South Carolina (collectively, Appellants) argue the circuit court erred in finding John Christopher Johnson (Johnson) properly raised a claim for equitable relief and could be removed from the South Carolina Sex

Offender Registry (the registry). Additionally, Appellants contend the circuit court erred in concluding they waived their right to assert equitable defenses and erred in concluding Appellants failed to prove an equitable defense. We reverse.

FACTS/PROCEDURAL HISTORY

In May 2003, Johnson pled guilty to lewd act on a child under the age of sixteen in violation of Section 16-15-140 of the South Carolina Code (2003) (the lewd act statute).[1] Johnson was sentenced to ten years' imprisonment suspended upon the service of one hundred days and two years' probation. Johnson was also required to register as a sex offender pursuant to section 23-3-430(C)(11) (2007) (the registry statute).[2] Upon successful completion of his probationary sentence, Johnson learned the registry was not merely a condition of his probation, but that he was required to register as a sex offender for life.

In September 2009, Johnson brought a declaratory judgment action, alleging two causes of action and seeking to be removed from the registry.[3] In his complaint, Johnson argues the requirement that he register as a sex offender constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.[4] Johnson also challenges the requirement that he register, based on his conviction of the lewd act statute, as violating the Equal Protection Clause of

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[1] S.C. Code Ann. § 16-15-140 (2003) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.").

[2] Section 23-3-430(C)(11) (2007) provides, in pertinent part: "[A] person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender . . . committing or attempting lewd act upon child under sixteen . . . ."

[3] Johnson did not appeal his guilty plea or file a post-conviction relief action.

[4] The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

the Fourteenth Amendment to the United States Constitution.[5] Additionally, in his prayer for relief, Johnson requested the circuit court to "order [Appellants] to remove [Johnson's] name from the Sex Offender Registry and for such other and further relief as may be deemed appropriate."

After filing responsive pleadings, Appellants moved to dismiss Johnson's complaint. On February 12, 2010, the circuit court entered an order denying Appellants' motion. Johnson subsequently filed a motion for summary judgment, which was denied by the circuit court on June 1, 2010. A bench trial was held on February 2, 2011, and the circuit court took the matter under advisement. The circuit court issued its order on March 1, 2011, declining to grant Johnson relief on his constitutional challenges, but concluding Johnson is entitled to equitable "personal relief in his unique circumstance[]." The circuit court further found that the legislative intent behind the registry was to protect the public from sexual offenders who may re-offend, and the circuit court concluded Johnson did not satisfy this criteria. Appellants filed a motion to reconsider, which was denied. This appeal followed.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). Whether an individual must be placed on the sex offender registry is a question of law. *See generally Noisette v. Ismail*, 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct. App. 1989) ("Unless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law."). When reviewing an action at law, our scope of review is limited to the correction of errors of law. *S.C. Dep't of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011).

[5] The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

LAW/ANALYSIS

I. Equitable Relief

Appellants assert the circuit court erred in finding Johnson raised a claim for equitable relief. Specifically, Appellants contend Johnson's complaint only alleges two legal causes of action. We agree.

"The character of an action is determined by the main purpose of the complaint." *Jacobs v. Serv. Merch. Co., Inc.*, 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988) (internal citation omitted). An action which is essentially one at law is not converted into an equitable action because it is brought pursuant to the Uniform Declaratory Judgments Act. *See Legette v. Smith*, 226 S.C. 403, 415, 85 S.E.2d 576, 581 (1955). Moreover, "[w]hether an individual must be placed on the sex offender registry is a question of law." *Lozada v. S. C. Law Enforcement Div.*, 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011) (internal citation omitted).

Although Johnson alleges two causes of action challenging the constitutionality of the registry statute and the lewd act statute, he maintains his declaratory judgment action raises a claim for equitable relief. However, an appellate court is not bound by a party's characterization of the actions. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 129 n.2, 399 S.E.2d 163, 164, n.2 (Ct. App. 1990) (internal citation omitted) (stating this court is not bound by a stipulation in the Statement of the Case when the record reflects differently). Notwithstanding Johnson's characterization of his complaint as equitable in nature, he sought a declaration from the circuit court that two statutes were unconstitutional. Specifically, Johnson asked the circuit court to find the requirement he register as a sex offender for life "impermissibly cruel and unusual punishment under the Eighth Amendment." Additionally, Johnson asked the circuit court to declare the registry requirement's distinctions between criminal sexual conduct with a minor in the second degree[6] and the lewd act statute as "unconstitutionally violative of his constitutional rights." Johnson did not assert an additional cause of action seeking equitable relief. Rather, he is asking the circuit court to declare the relevant statutes unconstitutional, which is a question of law. *See Harkins v. Greenville*

[6] *See* § 16-3-655(B)(2) (2003).

Cnty., 340 S.C. 606, 621, 533 S.E.2d 886, 893 (2000) (holding an action for a declaratory judgment that a zoning ordinance is unconstitutional is an action at law).

On appeal, Johnson asserts language in his prayer for relief asking the circuit court to remove Johnson's name from the registry sufficiently raises an equitable cause of action. We disagree. Our courts have held that the "relief to be granted depends not upon that asked for in the prayer but it must be such as is warranted by some allegation contained in the pleadings." *Mortgage Loan Co. v. Townsend*, 156 S.C. 203, 226, 152 S.E. 878, 886 (1930); *see also Speizman v. Guill*, 202 S.C. 498, 515, 25 S.E.2d 731, 739 (1943) ("[I]f a complaint clearly states facts constituting only a legal cause of action and adds a prayer for equitable relief only . . . the prayer must yield to the true character of the action as determined by the facts stated in the complaint."). Here, Johnson's complaint only asserts two legal causes of action. Accordingly, we conclude the circuit court erred in finding Johnson properly asserted a claim for equitable relief.

II. Removal

Appellants also argue the circuit court erred in granting Johnson equitable relief by removing him from the registry. We agree.

"It is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). While equitable relief is generally available when there is no adequate remedy at law, an adequate legal remedy may be provided by statute. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent. *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). Indeed, a "court's equitable powers must yield in the face of an unambiguously worded statute." *Santee Cooper*, 298 S.C. at 185, 379 S.E.2d at 123.

Here, the registry statute found in section 23-3-430 of the South Carolina Code (2007) provides several avenues for an individual to be removed from the registry. Section 23-3-430(E) provides that the

> [South Carolina Law Enforcement Division] shall remove a person's name and any other information

> concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.

In addition, section 23-3-430(F)(2) of the South Carolina Code (2007) states that an offender may be removed from the registry if he receives a pardon and "the pardon is based on a finding of not guilty specifically stated in the pardon." Finally, an offender may be removed from the registry if he receives a new trial following the discovery of new evidence and "a verdict of acquittal is returned at the new trial or entered with the state's consent." S.C. Code Ann. § 23-3-430(G) (2007).

There are several statutory methods in which Johnson can be removed from the registry; he simply does not qualify for them. Johnson failed to file an appeal or a post-conviction relief action, which could entitle him to relief under section 23-3-430(E). Moreover, Johnson has not been granted a pardon, nor has there been any newly-discovered evidence to warrant removing him from the registry. *See* § 23-3-430(F)(2) & (G). The General Assembly enacted an unambiguously worded statute that sets forth the legal remedies available to an individual on the registry. Because the sex offender registry statute provides an adequate remedy for Johnson, it was error for the circuit court to fashion an equitable remedy in this case.[7]

CONCLUSION

Accordingly, we reverse the circuit court's order removing Johnson from the registry for his conviction of a lewd act upon a child under sixteen.

REVERSED.

THOMAS and LOCKEMY, JJ., concur.

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[7] In light of our disposition herein, we decline to address the Appellants' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address all issues on appeal when the disposition of one issue is dispositive).