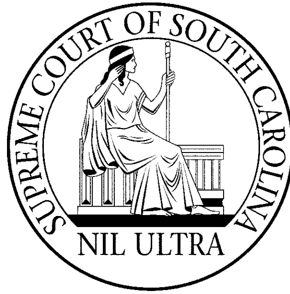

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
June 29, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Franklin Warren, III,
Respondent.

Appellate Case No. 2015-002378

Opinion No. 27643
Heard May 17, 2016 – Filed June 29, 2016

DISBARRED

Disciplinary Counsel Lesley M. Coggiola and
Deputy Disciplinary Counsel Barbara M. Seymour, for
the Office of Disciplinary Counsel.

William Franklin Warren, III, Respondent, pro se.

PER CURIAM: In this attorney disciplinary matter, Respondent William Franklin Warren, III, admits misconduct including, among other things, misappropriating over $171,392 held in various trusts for which he served as trustee, converting client funds for his personal use, failing to perform work for which he had been paid, failing to return unearned fees, failing to record deeds and other original documents, and failing to respond to inquiries by the Office of Disciplinary Counsel (ODC). ODC filed formal charges against Respondent, which resulted in a hearing before a panel of the Commission on Lawyer Conduct (the Panel). The Panel recommended that Respondent be disbarred, to which Respondent took no exception. In light of the egregious nature of Respondent's misconduct, we disbar Respondent.

I.

On December 18, 2013, Respondent was placed on interim suspension by Order of this Court. *In re Warren*, 406 S.C. 483, 752 S.E.2d 548 (2013). The current proceedings arise from four separate complaints. Respondent failed to answer the formal charges, and by failing to answer, Respondent thus admitted the allegations. Rule 24(a), RLDE, Rule 413, SCACR. The factual allegations in the formal charges are summarized below.

A.
Misappropriation of Client Funds

Respondent mismanaged and misappropriated $171,392 from three trust accounts for which he served as trustee, using the stolen funds to operate his law firm and to support a lifestyle that he could not otherwise afford.[1] We note Respondent is the uncle and godfather of the beneficiaries of the trusts from which he stole money.

B.
Failing to Perform Services

In three different matters, Respondent undertook representation and accepted over $40,000 in fees, but failed to perform the services promised or reimburse fees for work not completed. Following Respondent's interim suspension, the attorney appointed to protect Respondent's clients' interests reported being unable to find any operating account or trust account for Respondent's law practice and that there were no funds available to reimburse any monies.

C.
Mishandling of Corporate and Estate Matters

Respondent collected over $20,000 in fees to perform estate planning and

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[1] In November 2012, Respondent signed a settlement agreement promising to repay the stolen funds plus 8% interest, along with three confessions of judgment, which were to be filed in the event Respondent failed to make payments under the agreed-upon repayment plan set forth in the settlement agreement. Respondent failed to make payments, and the confessions of judgment were filed in July 2013.

corporate work for a client; however, Respondent mishandled the estate plan and allowed the client's corporate registration to lapse for seven years, resulting in forfeiture of the client's corporate charter and the client incurring $1,700 in penalties and more than $13,000 in attorney's fees paid to different counsel to reinstate the corporate charter and correct the client's estate plan.

D.
Failure to Safeguard Funds

Respondent prepared a will for a client, and after the client's passing, $18,000 cash was found in the client's home and delivered to Respondent to hold in trust. Respondent converted those funds, and none of the funds remained in trust at the time of Respondent's interim suspension.

E.
Failure to Record Original Documents

Following Respondent's interim suspension, a review of client files revealed Respondent's possession of numerous original documents (primarily deeds conveying real property into living trusts, some several years old) that had not been filed by Respondent, despite Respondent having been paid fees to do so.

F.
Failure to Respond

Respondent failed to respond to several investigative inquiries by ODC, including follow-up letters pursuant to *In re Treacy*[2] advising him to file a written response.

II.

In light of the nature and extent of Respondent's misconduct, the Panel recommended Respondent be disbarred. The Panel further recommended Respondent be ordered to pay restitution in the amount of $244,772.22 and the costs of these proceedings. Respondent took no exception to the Panel report.

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[2] 277 S.C. 514, 290 S.E.2d 240 (1982).

III.

This Court "may accept, reject, or modify in whole or in part the findings, conclusions[,] and recommendations of the Commission [on Lawyer Conduct]." Rule 27(e)(2), RLDE, Rule 413, SCACR. "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope, RPC, Rule 407, SCACR. "This Court has never regarded financial misconduct lightly, particularly when such misconduct concerns expenditure of client funds or other improper use of trust funds." *In re Johnson*, 385 S.C. 501, 504, 685 S.E.2d 610, 611 (2009) (internal quotation marks omitted). As we have recognized, "[t]he primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." *In re Burr*, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976).

Respondent has admitted theft that has resulted in significant harm to his clients and failed to participate in the disciplinary investigation. At oral argument before this Court, Respondent requested that his "license be taken."[3] Because of the prevalent nature of Respondent's theft and wrongdoing, we find Respondent committed misconduct in the respects identified by the Panel. Thus, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.2(a) (consult with client); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5(a) (charging an unreasonable fee); Rule 1.5(b) (communicate basis for fee); Rule 1.15 (safekeeping property); Rule 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (misconduct); Rule 8.4(b) (criminal act); Rule 8.4 (c) (criminal act involving moral turpitude); Rule 8.4(d) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (conduct prejudicial to the administration of justice). We also find Respondent's misconduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules

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[3] On the eve of oral argument, Respondent requested permission to surrender his law license upon the condition that he be permitted to seek readmission to the Bar in the future. However, during oral argument, when Respondent learned his proposed conditional resignation was not permitted under Rule 35, RLDE, Rule 413, SCACR, he withdrew his resignation request and asked instead to be disbarred.

of Professional Conduct); Rule 7(a)(3) (knowing failure to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice and to bring the courts and the legal profession into disrepute or demonstrating an unfitness to practice law); and Rule 7(a)(6) (violation of the Lawyer's Oath).

We concur with the Panel's recommendation of disbarment. *See, e.g.*, *In re Jones*, 413 S.C. 29, 774 S.E.2d 467 (2015) (disbarring attorney for misappropriating client funds and failing to communicate with clients); *In re Lafaye*, 399 S.C. 12, 731 S.E.2d 282 (2012) (disbarring attorney for misappropriating client funds in two trust accounts); *In re Crummey*, 388 S.C. 286, 696 S.E.2d 589 (2010) (disbarring attorney for misappropriating client funds, failing to diligently pursue client matters, failing to communicate with clients, writing trust account checks that were returned for insufficient funds, and failing to cooperate with ODC); *In re Williams*, 376 S.C. 640, 659 S.E.2d 100 (2008) (disbarring attorney for misappropriating $400,000 of client assets and pleading guilty to one count of exploitation of a vulnerable adult); *In re Cunningham*, 371 S.C. 503, 640 S.E.2d 461 (2007) (disbarring attorney for misappropriating approximately $70,000 in estate funds, failing to maintain separate trust and operating accounts, and providing false information to his client in an attempt to conceal his misappropriation of estate funds); *In re Kennedy*, 367 S.C. 355, 626 S.E.2d 341 (2006) (disbarring attorney for falsifying a HUD-1 Settlement Statement, failing to remit loan proceeds, issuing a title insurance policy which included a forged signature and false certifications, misappropriating at least $280,000 in client funds, and pleading guilty to one count of mail fraud).

IV.

In light of Respondent's pervasive misconduct, Respondent is hereby disbarred, retroactive to the date of his interim suspension. Within sixty days of the date of this opinion, Respondent shall enter into a monthly payment plan with the Commission on Lawyer Conduct to pay restitution in the amount of $244,722.22. Additionally, Respondent is ordered to pay the costs of these proceedings within sixty days of the date of this opinion. Further, within fifteen days of the date of this opinion, Respondent shall surrender his Certificate of Admission to the

Practice of Law and shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Didier Van Sellner, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-002472

ON WRIT OF CERTIORARI

Appeal from Orangeburg County
The Honorable Maite Murphy, Circuit Court Judge

Opinion No. 27644
Submitted May 17, 2016 – Filed June 29, 2016

REVERSED

Appellate Defender Laura R. Baer, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, and Assistant Attorney General Megan H. Jameson, both of Columbia for Respondent.

JUSTICE HEARN: Didier Van Sellner pled guilty to armed robbery and later applied for post-conviction relief (PCR), asserting his counsel was ineffective for

advising him to take a plea deal when the State could not demonstrate all of the elements of armed robbery. The PCR court denied him relief, finding he received effective assistance of counsel. We reverse.[1]

FACTS/PROCEDURAL HISTORY

Van Sellner was charged with armed robbery. After consulting with counsel, he learned he could be subject to life imprisonment without the possibility of parole due to his prior convictions in New Jersey and New York for robbery and various drug offenses. *See* S.C. Code Ann. § 17-25-45 (2015). As a result of counsel's advice, Van Sellner decided to accept the plea offered by the State.

At the plea hearing, the State explained that Van Sellner entered the South Carolina Bank and Trust (the Bank) in Orangeburg and waited in line to speak with a teller. When it was his turn, he handed the teller a note "requesting her to give him [$3,000] in used bills, indicating to her not to give him any dye packs, and that if she did not comply he would shoot her."[2] The teller partially complied by giving Van Sellner $492. After receiving the money, Van Sellner fled the scene. The police captured Van Sellner that day wearing the same clothes he had on during the robbery. Van Sellner confessed to the police and the FBI.

Following the State's presentation of facts, trial counsel informed the court that she believed the plea was in Van Sellner's best interest based on his prior record and the potential that the State could seek life without the possibility of parole. The trial court asked Van Sellner whether he understood the elements of armed robbery and confirmed the State had not influenced his plea. Van Sellner informed the trial court that he wanted to plead guilty because he was trying to avoid returning to jail for a prolonged period of time.

Ultimately, the trial court accepted the plea, stating, "I find that there is a factual basis for you to plead guilty to this charge, and so I am going to accept your guilty plea at this time." The trial court sentenced Van Sellner to twelve years' imprisonment.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] At the PCR hearing, Van Sellner testified the note said, "freeze this is a stick up, I have a gun please give me 3,000 dollars in large, loose, bills. No Games or I'll shoot."

Van Sellner subsequently filed for PCR, alleging that because he did not display a weapon during the robbery, trial counsel incorrectly advised him to plead to armed robbery. At the PCR hearing, Van Sellner testified the research he conducted during incarceration revealed his counsel did not properly advise him on the law. In support, he pointed to other available charges for robbery crimes. He testified trial counsel told him he was "stuck," and armed robbery was the only possible crime he could be charged with under the circumstances. Van Sellner testified it was a "take it[,] or leave it[and] get life" situation because the armed robbery charge and sentence could not be reduced given his prior record. Van Sellner repeatedly testified he did not have a weapon or make any physical indication that he had a weapon on his person at the time of the robbery.

Trial counsel testified that there was no evidence that Van Sellner had a gun during the robbery or made any representation of a weapon. Moreover, she testified that police reports stated Van Sellner was not armed.

The PCR court found trial counsel was not deficient for advising Van Sellner to plead guilty to armed robbery. In denying relief, the PCR court explained Van Sellner "failed to meet his burden of establishing any deficiency" because "[b]y passing the teller a note threatening her with a deadly weapon, [Van Sellner's] conduct comported to the armed robbery statute by alleging with words that he was armed with a deadly weapon." Further, the PCR court found Van Sellner could not establish prejudice from the alleged deficiencies "as there [wa]s no reasonable likelihood that the result of proceeding would have been different or that [Van Sellner] would have proceeded to trial."

Van Sellner filed a petition for a writ of certiorari, which this Court granted.

ISSUE PRESENTED

Did the PCR court err in denying Van Sellner's application for PCR based on plea counsel's advice to him to plead guilty to armed robbery when the evidence demonstrated Van Sellner's actions during the robbery did not support a conviction under section 16-11-330(A) of the South Carolina Code (2015), as analyzed in *State v. Muldrow*, 348 S.C. 264, 559 S.E.2d 847 (2002)?

STANDARD OF REVIEW

This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

LAW/ANALYSIS

Van Sellner argues he was denied his Sixth Amendment right to effective assistance of counsel because plea counsel advised him to plead guilty to the offense of armed robbery even though the facts did not support a conviction for armed robbery. We agree.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). The two-part test also "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (emphasis added) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

In addressing the adequacy of a PCR applicant's guilty plea, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing. *Id*. at 573, 713 S.E.2d at 615 (citing *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007)). "[T]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Under section 16-11-330(A)[3], the State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements. The State must prove either (1) the robber was armed with a deadly weapon, or (2) the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person during the commission of a robbery would reasonably believe to be a deadly weapon. *See id.*

In *State v. Muldrow*, this Court addressed whether words alone are sufficient to establish the presence or a witness's reasonable belief of a deadly weapon under section 16-11-330(A). 348 S.C. at 264, 559 S.E.2d at 847. There, Muldrow entered a convenience store and gave the clerk a note that read, "Give me all your cash or I'll shoot you." *Id*. at 267, 559 S.E.2d at 849. The clerk asked Muldrow if he was serious, to which Muldrow responded affirmatively and told her to hurry up before he shot her. *Id*. In reviewing the plain language of section 16-11-330(A), this Court found that words alone are not sufficient to support a conviction for armed robbery. *Id*. at 269, 559 S.E.2d at 849–50. As a result, this Court held the State must show "evidence corroborating the allegation of being armed, i.e., the use of a physical representation of a deadly weapon, to establish armed robbery." *Id*.

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[3] Section 16-11-330(A) states:

> A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or *while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon*, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence.

(Emphasis added).

Here, the facts presented by the State do not include the requisite corroborating evidence for armed robbery. During the plea hearing, the State did not allege Van Sellner was armed, nor did it allege Van Sellner took any type of action which would allow a witness to reasonably believe he was armed. The State also failed to introduce any evidence to address the adequacy of Van Sellner's guilty plea at the PCR hearing. In neither proceeding did the State present sufficient evidence to satisfy the test set forth in *Muldrow*. Therefore, plea counsel's advice to Van Sellner that he could be convicted of armed robbery without proof of a physical representation of a deadly weapon rendered counsel's performance deficient, and the PCR court erred in finding plea counsel effective.

CONCLUSION

Based on the foregoing, we reverse the PCR court's denial of relief and grant Van Sellner a new trial.

BEATTY, KITTREDGE and FEW, JJ., concur. PLEICONES, C.J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of George Hunter McMaster, Respondent.

Appellate Case No. 2016-001332

ORDER

The Commission on Lawyer Conduct has notified this Court that it has initiated proceedings pursuant to Rule 28(b)(2) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, in this matter. We therefore transfer respondent to incapacity inactive status until further order of this Court.[1] Rule 28(b)(2)(A), SCACR.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

June 23, 2016

[1] Respondent was placed on interim suspension on July 2, 2014, and remains subject to the injunction set forth therein. *See In re McMaster*, 409 S.C. 48, 760 S.E.2d 413 (2014).

The Supreme Court of South Carolina

In the Matter of Frampton Durban, Jr., Respondent.

Appellate Case No. 2016-001336 and 2016-001348

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 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 the Receiver 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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. Lumpkin's office.

Mr. Lumpkin's 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 C.J.

Columbia, South Carolina

June 24, 2016

The Supreme Court of South Carolina

RE: Rule 402 of the South Carolina Appellate Court Rules

ORDER

Pursuant to Article V, §4, of the South Carolina Constitution, Rule 402 of the South Carolina Appellate Court Rules is amended to read as shown in the attachment to this order. This amended rule is effective immediately, and shall apply to all applications for admission to practice law in South Carolina based on the Uniform Bar Examination (UBE) starting with the February 2017 bar examination. Applications for admission based on a transfer of a UBE score from another jurisdiction will not be accepted for filing until May 1, 2017.

The current version of Rule 402 shall remain in effect for the July 2016 South Carolina Bar Examination and shall continue to govern all aspects of admission based on South Carolina Bar Examinations conducted prior to February 2017.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
June 24, 2016

RULE 402
ADMISSION TO PRACTICE LAW

(a) Purpose. This rule provides for the admission of persons to practice law in South Carolina. A person admitted under this rule is eligible to be a regular member of the South Carolina Bar under Rule 410 of the South Carolina Appellate Court Rules. Other rules provide for the issuance of limited certificates of admission and *pro hac vice* admission in South Carolina.

(b) Definitions.

(1) ABA Approved Law School: A law school that was approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the degree was conferred. An approved law school includes a school that is provisionally approved by the Council.[1]

(2) Board of Law Examiners: The Board established by section (k) of this rule.

(3) Committee on Character and Fitness: The Committee established by section (l) of this rule.

(4) Existing UBE Score: A Uniform Bar Examination (UBE) score previously obtained in South Carolina or another jurisdiction.

(5) Filing: For the purposes of this rule, filing means:

(i) delivering the document to the Clerk of the Supreme Court;

(ii) depositing the document in the U.S. mail, properly addressed to the Clerk of the Supreme Court, with sufficient first class postage attached; or

(iii) uploading the document or information on the Bar Admissions page of the South Carolina Judicial Department Website to the extent that electronic filing is provided by that website.[2]

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[1] Additional information on ABA Approved Law Schools is available at www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.

[2] The Bar Admissions page is located at www.sccourts.org/bar/index.cfm.

The date of filing shall be the date of delivery, the date of mailing, or the date of uploading.

(6) MPRE: The Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.[3]

(7) Supreme Court: The Supreme Court of South Carolina.

(8) UBE: The Uniform Bar Examination prepared by the National Conference of Bar Examiners. The UBE is composed of the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and the Multistate Bar Examination (MBE), which are prepared by, given, and graded in accordance with the standards established by the National Conference of Bar Examiners.[4]

(c) Qualifications for Admission. Except as provided in section (j) below, no person shall be admitted to the practice of law under this rule unless the person:

(1) is at least twenty-one (21) years of age;

(2) is of good moral character;

(3) has received a JD or LLB degree from an ABA Approved Law School. An applicant who has applied to take the UBE in South Carolina and has not provided proof of graduation by July 10th for the July UBE or February 10th for the February UBE shall not be allowed to sit for the examination. An applicant, however, who has not graduated may sit for the UBE in South Carolina if the law school certifies in writing that the applicant has completed all requirements for graduation by July 10th for the July examination or February 10th for the February examination; the applicant must provide proof of graduation by April 1st following the February examination or October 1st following the July examination;

(4) has been found qualified by a panel of the Committee on Character and Fitness;

(5) has received a score of 266 or higher on the UBE administered in South Carolina or any other jurisdiction. A UBE score that is more than three (3) years old may not be used to satisfy this requirement. For a UBE administered in February, this three (3) year period shall begin on March 1st following the examination. For a UBE administered in July, this three (3) year period shall begin on August 1st following the examination. Applications seeking admission based on an existing UBE score from another jurisdiction will not be accepted until May 1, 2017;

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[3] Additional information about the MPRE is available at www.ncbex.org.

[4] Additional information regarding the content of the UBE is available at www.ncbex.org.

(6) has received a scaled score of at least seventy-seven (77) on the MPRE. This score must be from an administration of the MPRE that occurred within three (3) years of the date on which the application for admission is filed with the Clerk of the Supreme Court. While an application for admission can be filed without proof of completion of this requirement, applicants are warned that failure to timely submit proof of completion of this requirement can significantly delay admission as indicated by section (h)(2) of this rule;

(7) is not disbarred, suspended from the practice of law, or the subject of any pending disciplinary proceeding in another jurisdiction;

(8) has successfully completed a Course of Study on South Carolina Law. The content and method of delivery of this Course of Study shall be determined by the Board of Law Examiners. The Course of Study may not be taken prior to the filing of a complete application with the Clerk of the Supreme Court. Successful completion of the Course of Study may be used to satisfy the requirements of this rule for subsequent applications filed within three (3) years of the date of completion of the Course of Study. Applicants are warned that the failure to promptly complete this requirement can significantly delay admission as indicated by section (h)(2) of this rule; and

(9) has paid the fees required by this rule and taken the oath or affirmation specified by section (h)(3) of this rule.

(d) Application for Admission.

(1) Filing Application. Any person desiring to be admitted to practice law under this rule shall file an application for admission with the Clerk of the Supreme Court. The application form shall be approved by the Committee on Character and Fitness and shall be available on the Bar Admissions page of the South Carolina Judicial Department Website. An application will not be considered complete until both the fully completed application (along with any required attachments) and fee(s) are received by the Clerk of the Supreme Court. The application fees shall be paid by check or money order made payable to the Clerk of the Supreme Court.

(2) Applications for Admission Based on an Existing UBE Score. Applications based on an existing UBE Score (as defined in section (b) of this rule) will not be accepted for filing until May 1, 2017. On and after that date, these applications may be filed at any time. If based on a UBE Score from another jurisdiction, the applicant must have the score transferred to South Carolina by the National Conference of Bar Examiners.[5]

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[5] Information about UBE score transfers is available at www.ncbex.org/ncbe-exam-score-services/ube-score-services.

The non-refundable application fee shall be $1,000. If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application for admission is filed, the applicant shall pay an additional fee of $750. If the application is withdrawn, the applicant shall not be entitled to a refund of the application fee(s) or to have the application fee(s) credited to a later application.

(3) Applications for Admission Where the Applicant Will Take the UBE in South Carolina. Applications for admission shall be accepted from December 1st to January 31st for the July UBE and from August 1st to September 30th for the February UBE for applicants who desire to take the UBE in South Carolina. The non-refundable application fee shall be:

> **(i)** $1,000 for applications filed from December 1st to January 10th or from August 1st to August 31st.
>
> **(ii)** $1,500 for applications filed during the remainder of the application periods.

If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed, the applicant shall pay an additional fee of $750. If the application is withdrawn or the applicant fails to sit for the examination, the applicant shall not be entitled to a refund of the application fee(s) or to have the application fee(s) credited to a later application.

An applicant taking the UBE in South Carolina must sit for all portions of the examination in South Carolina, and may not use scores from a previous examination to satisfy this requirement.

(4) Applicants Who Have Failed to Receive a Qualifying Score on Three or More Bar Examinations. An applicant who has failed to receive a qualifying score on three or more bar examinations shall not be eligible to sit for the UBE in South Carolina until at least one (1) year following the administration of the last bar examination resulting in a non-qualifying score. For the purpose of this provision, an applicant shall be treated as receiving a non-qualifying score on a bar examination if: (1) the applicant failed a bar examination in South Carolina prior to February 2017; or (2) the applicant sat for the UBE in this or any other jurisdiction and failed to receive a score of 266 or higher.

(5) Duty to Keep Application Current. Until admitted, an applicant is under a continuing obligation to keep the application for admission current and must update responses whenever there is an addition or a change to information previously filed with the Clerk of the Supreme Court. These updates must be filed with the Clerk of the Supreme Court along with all relevant documentation.

(6) Special Accommodations for Disabled Applicants. An applicant needing special accommodations for the administration of the UBE in South Carolina due to a disability shall submit a written request for such accommodations to the Board of Law Examiners. The procedure and forms to be used in making a written request shall be specified in the rules of the Board of Law Examiners.[6] Unless the chair of the Board determines there is good cause to allow a late request, written requests for special accommodations must be submitted by November 1st for the February UBE and April 1st for the July UBE.

(e) False and Misleading Information. An applicant who knowingly provides false or misleading information in an application (to include any attachments to the application), document, or statement submitted or made to the Committee on Character and Fitness, the Board of Law Examiners, or the staff of the Supreme Court shall be guilty of contempt of the Supreme Court and may be punished accordingly. For the purpose of this rule, false or misleading information shall include the knowing omission of material information by an applicant in the application (to include any attachments to the application) or in response to an inquiry by the Committee on Character and Fitness, the Board of Law Examiners or staff of the Supreme Court. Any allegation that an applicant has violated this section shall be investigated by the Committee on Character and Fitness using the procedures in sections (g) and (l)(5) of this rule. If it is determined that the applicant has violated this section, the Supreme Court may take such action as it deems appropriate. This may include, but is not limited to, finding the applicant in contempt, finding the applicant unfit for admission, prohibiting the applicant from using the results of the examination for admission, and/or preventing the applicant from reapplying for admission for up to five (5) years. Further, if the applicant has already been admitted, the Supreme Court may vacate the admission or discipline the lawyer under Rule 413 of the South Carolina Appellate Court Rules.

(f) Administration of the UBE in South Carolina.

(1) When Given. The UBE shall be administered twice each year on the last consecutive Tuesday and Wednesday in February and July. The MPT and MEE will be given on Tuesday, and the MBE will be given on Wednesday.

(2) Anonymous Grading; Prohibited Comments in Answer Sheets and Booklets. Applicants taking the UBE in South Carolina shall be assigned an identification number that shall be used for the purposes of taking and grading the examination. Except for the identification number and any other information the applicant may be directed to provide by those administering the examination, answer sheets or booklets for the examination shall contain no other information revealing the identity of the applicant. Any reference to the applicant's economic status, social standing, employment, personal hardship, or other extraneous information in the answer sheets or booklets is prohibited.

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[6] The Rules of the Board of Law Examiners are available at www.sccourts.org/courtReg/Part4AppendixA.html

(3) Notification of Results. For applicants who take the UBE in South Carolina, the Clerk of the Supreme Court shall notify each applicant of the score received on the UBE and on the MBE. Additionally, the names of those receiving a score of 266 or higher on the UBE, and the identification numbers of those receiving a score of less than 266 on the UBE shall be posted on the Bar Admissions page of the South Carolina Judicial Department Website.

(4) Access to Examination Answers; Re-grading or Other Review. No applicant shall be given access to the answers the applicant submitted during a UBE taken in South Carolina. The results reported for the examination are final, and no applicant shall be allowed to seek re-grading or any other review of the results of the examination.

(5) Request for Verification of Multistate Bar Examination. While no review or inspection of the MBE will be permitted, an applicant who took the UBE in South Carolina may request a hand grading of the MBE. Any such request must be filed with the Clerk of the Supreme Court, along with the applicable fee, within fifteen (15) days of the date of the notification in (3) above.[7]

(6) Prohibited Contacts. An applicant shall not, either directly or through an agent, contact any member of the Board of Law Examiners or any member of the Supreme Court regarding the questions on any section of the examination, grading procedures, or an applicant's answers. This provision does not prohibit an applicant from seeking verification of the MBE score as permitted by (5) above.

(7) Cheating and Other Prohibited Acts. An applicant taking the UBE in South Carolina shall not:

(i) cheat or attempt to cheat on the UBE in South Carolina;

(ii) assist or attempt to assist another in cheating on the UBE in this or any other jurisdiction;

(iii) possess an item on the premises of the examination site or in the examination room if the possession of that item is prohibited by the Board of Law Examiners; or

(iv) remove or attempt to remove any testing material from the examination room or site.

Any allegation that an applicant has violated this section shall be investigated by the Committee on Character and Fitness using the procedures in sections (g) and (l)(5) of this rule. If it is determined that the applicant has violated this section, the Supreme Court

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[7] The fee is currently fifty dollars ($50) and must be paid by check or money order made payable to the National Conference of Bar Examiners.

may take such action as it deems appropriate. This may include, but is not limited to, finding the applicant unfit for admission, prohibiting the applicant from using the results of the examination for admission, and/or preventing the applicant from reapplying for admission for up to five (5) years. Further, if the applicant has already been admitted, the Supreme Court may vacate the admission or discipline the lawyer under Rule 413 of the South Carolina Appellate Court Rules. Finally, an applicant committing one of these prohibited acts shall be guilty of contempt of the Supreme Court and may be punished accordingly.

(g) Determination of Character and Fitness for Admission.

(1) Determination by Committee on Character and Fitness. The Committee on Character and Fitness shall consider the application and any further information it deems relevant to determine if the applicant has the requisite qualifications and character to be admitted to practice law in this state. The Committee shall notify the Clerk of the Supreme Court whether it finds the applicant qualified or unqualified and, if found to be unqualified, the Clerk shall notify the applicant of this finding. An applicant found to be unqualified shall not be allowed to sit for the UBE in South Carolina. If the Committee has not made a determination of the applicant's qualification by July 1st for the July examination or February 1st for the February examination, the applicant shall be allowed to sit for the examination, and the Committee shall make its determination after the examination is administered.

(2) Determination of Fitness of Certain Law Students. A student enrolled in an ABA Approved Law School who has a character problem that might disqualify the student from being admitted to practice law may have the matter resolved by filing a provisional application. The application shall be made on a form approved by the Committee on Character and Fitness and shall be filed in duplicate with the Clerk of the Supreme Court. Each request must be accompanied by a non-refundable fee of $100. The Committee on Character and Fitness may begin an immediate investigation of the individual's character and shall promptly notify the individual of its determination. No adverse inference concerning an applicant's character and fitness shall be drawn because the applicant filed a provisional application, nor does the filing of a provisional application relieve an applicant from fully complying with the normal application process.

(3) Review by Supreme Court of Fitness Determination; Re-application. Any applicant dissatisfied with the determination of the Committee on Character and Fitness may petition the Supreme Court for review within fifteen (15) days of the date of the notification advising the applicant of the Committee's determination. The petition shall comply with the requirements of Rule 240 of the South Carolina Appellate Court Rules, to include the filing fee required by that rule. An applicant who is found not to be qualified by the Committee or whose petition for review of the Committee's

determination has been denied may not reapply for admission until two (2) years after the date of the notification advising the applicant of the Committee's determination.

(h) Admission.

(1) Admission Ceremonies. Admission ceremonies shall be conducted by the Supreme Court in February, May, September, and November. Applicants must have submitted proof of completion of all requirements for admission (see section (c) of this rule) at least ten (10) days prior to the scheduled date of the ceremony to participate in that ceremony. Applicants who take the February UBE in South Carolina are expected to have all requirements for admission completed for the May ceremony following the examination, and applicants who take the July UBE in South Carolina are expected to have all requirements for admission completed for the November ceremony following the examination. Applicants will be notified of the date and time of the admission ceremony.

(2) Special Admission Ceremonies. On petition, the Supreme Court may schedule applicants for admission on other dates based on compelling circumstances such as illness or irreconcilable conflicts that prevent the applicant from appearing at one of the ceremonies established in (1) above. Applicants who are ineligible to participate in one of the admission ceremonies established in (1) above due to their failure to timely submit proof of completion of the MPRE or the Course of Study on South Carolina Law are not eligible to be admitted at a special admission ceremony.

(3) Fee and Oath. To be admitted, the applicant must pay a fee of $50 and take and subscribe the following oath or affirmation:

Lawyer's Oath

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect, and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment, and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable

under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge, or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

[So help me God.]

The oath or affirmation shall be administered in open Court, and all persons admitted shall sign their names in a book, kept for that purpose, in the office of the Clerk of the Supreme Court.

(i) Failure to be Admitted.

(1) Applicants Seeking Admission Based on An Existing UBE Score. If an applicant seeking admission based on an existing UBE score (as defined in section (b) of this rule) is not admitted within one (1) year of the date of the filing of the application, the applicant must file a supplemental application with the Clerk of the Supreme Court. The supplemental application shall be on a form prescribed by the Committee on Character and Fitness, and the applicant may not be admitted to the South Carolina Bar unless the Committee on Character and Fitness makes a re-determination that the applicant is qualified. The filing shall be accompanied by a fee of $250. Further, the application for admission (along with the supplemental application) shall be treated as being withdrawn if the applicant fails to be admitted within two (2) years of the date of the filing of the application.

(2) Applicants Taking the UBE in South Carolina. If an applicant taking the UBE in South Carolina is not admitted within one (1) year of the date of the notification advising the applicant that the applicant has received a qualifying score on the UBE for admission, the applicant must file a supplemental application with the Clerk of the Supreme Court. The supplemental application shall be on a form prescribed by the Committee on Character and Fitness, and the applicant may not be admitted to the South Carolina Bar unless the Committee on Character and Fitness makes a re-determination

that the applicant is qualified. The filing shall be accompanied by a fee of $250. Further, the application for admission (along with the supplemental application) shall be treated as being withdrawn if the applicant fails to be admitted within two (2) years of the date of the notification advising the applicant that the applicant has received a qualifying score on the UBE for admission.

(j) Admission of Certain Law Professors. A person serving as the Dean or as a tenured professor at the University of South Carolina School of Law or the Charleston School of Law may be admitted to practice law in this State without complying with the requirements of sections (c)(5) (qualifying UBE score), (c)(6) (qualifying MPRE scaled score), and (c)(8) (successful completion of Course of Study on South Carolina Law) of this rule if the Dean or professor:

(1) has been admitted to practice law in the highest court of another state or the District of Columbia for at least five (5) years;

(2) has been a full-time and continuous member of the faculty of the law school with the rank of assistant professor of law or higher for the previous three (3) or more complete academic years; and

(3) has been recommended for admission by the Dean of the law school, or in the case of the Dean, by the President of the University of South Carolina or the Chairman of the Board of Directors of the Charleston School of Law.

The application for admission shall be made on a form prescribed by the Committee on Character and Fitness, and shall be filed with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of $1,000. The Dean or professor must comply with all other requirements of section (c) of this rule. If found qualified by the Committee on Character and Fitness, the Dean or professor shall be admitted upon taking the oath and paying the fee specified by section (h) of this rule.

(k) Board of Law Examiners.

(1) Members. The Board of Law Examiners shall consist of members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been members of the South Carolina Bar for at least seven (7) years. Members of the bar who are inactive members, judicial members, military members, administrative law judge or workers' compensation commission members, retired members, or limited members shall not be appointed to the Board. The Board members shall be appointed by the Supreme Court for three (3) year terms and shall be eligible for reappointment. At least one member shall be appointed from each Congressional District. In case of a vacancy on the Board, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair from among the members of the Board of Law Examiners. The Clerk of the Supreme Court shall serve as secretary of the Board *ex officio*.

(3) Duties. The Board of Law Examiners shall conduct the UBE in South Carolina. The Board shall be responsible for grading the MPT and the MEE portions of the examination. The Board shall develop a Course of Study on South Carolina Law that an applicant must successfully complete prior to being admitted under this rule. The content and method of delivery of this Course of Study shall be determined by the Board. The Board may promulgate rules and regulations including those relating to the accommodation of applicants with disabilities. These rules and regulations shall not become effective until at least ninety (90) days after they are approved by the Supreme Court.

(l) Committee on Character and Fitness.

(1) Members. The Committee on Character and Fitness shall consist of twelve (12) members of the South Carolina Bar who shall be appointed by the Supreme Court for five (5) year terms. Members of the bar who are inactive members, judicial members, military members, administrative law judge or workers' compensation commission members, retired members, or limited members shall not be appointed to the Committee. In case of a vacancy on the Committee, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair and a secretary from among the members of the Committee on Character and Fitness.

(3) Panels and Meetings. The members shall be divided by the chair into panels composed of three (3) members. The chair may rotate membership on the panels, and may substitute members between panels. Panels shall meet when scheduled by the chair or the Committee, and the full Committee may meet to consider administrative matters. Meetings of the Committee other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the Committee.

(4) Quorum. A quorum for a meeting of the full Committee shall be seven (7) members, and a quorum for a panel shall be three (3) members.

(5) Duties. The Committee on Character and Fitness shall investigate and determine whether an applicant for admission possesses the qualifications prescribed by this rule as to age, legal education, and character. The applicant must establish to the reasonable satisfaction of a majority of a panel that the applicant is qualified. In conducting investigations, a panel may take and hear testimony, compel by subpoena the attendance of witnesses, and require the applicant to appear for a hearing before a panel or for a personal interview before a single member of the Committee. An applicant will not be

denied admission by the Committee without being afforded the opportunity for a hearing before a panel. Any member of the Committee may administer oaths and issue subpoenas. The Committee may adopt rules that shall become effective upon approval by the Supreme Court. In addition, the Committee shall perform the duties specified by Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, and any other duties as directed by the Supreme Court.

(m) Confidentiality and Release of Information.

(1) The files and records maintained by the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to applications for admission, examinations, and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee, or the Clerk of the Supreme Court to carry out their responsibilities. The Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court may disclose information to the National Conference of Bar Examiners and to the bar admission authorities in other jurisdictions, and may disclose the names of those persons who have received a score of 266 or higher on a UBE administered in South Carolina, or those who are or will be admitted and the date of their admission. Information may be released as provided by Rule 410(f) of the South Carolina Appellate Court Rules. The Supreme Court may authorize the release of confidential information to other persons or agencies.

(2) Beginning with the results of the February 2017 examination, the Clerk of the Supreme Court may release the following information to a law school regarding a graduate of that law school who has taken the UBE in South Carolina: the name of the graduate, the UBE and scaled MBE scores the graduate received, and the number of times the graduate has taken a bar examination in South Carolina. Any information released to law schools pursuant to this rule shall be kept confidential by the law school, shall only be used for statistical analysis, and shall only be released for purposes of reporting aggregated information to accrediting bodies. Each law school requesting the release of the above information shall, on a form approved by the Supreme Court, agree to comply with the confidentiality and use restrictions placed on this information

(n) Immunity.

(1) The Board of Law Examiners, the Committee on Character and Fitness, and the members, employees, and agents of the Board of Law Examiners or the Committee of Character and Fitness, are absolutely immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted, readmitted, or reinstated to the practice of law.

(2) Records, statements of opinion, testimony and other information regarding an applicant for admission, readmission or reinstatement to the Bar communicated by any

entity, including any person, firm, or institution, to the Board of Law Examiners, the Committee on Character and Fitness, or to the members, employees or agents of the Board of Law Examiners or Committee on Character and Fitness, are absolutely privileged, and civil suits predicated thereon may not be instituted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vivian Atkins, Robert P. Frick and Kay Hollis, in their official capacities as members of the Town Council of the Town of Chapin, Appellants,

v.

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, and the Town of Chapin, Defendants,

Of whom James R. Wilson, Jr. and Gregg White are Respondents.

Appellate Case No. 2014-000829

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

Opinion No. 5388
Heard January 5, 2016 – Filed March 9, 2016
Withdrawn, Substituted and Refiled June 29, 2016

AFFIRMED IN PART AND REVERSED IN PART

Spencer Andrew Syrett, of Columbia, for Appellants.

Matthew Todd Carroll, of Womble Carlyle Sandridge & Rice, LLP, of Columbia, for Respondents.

GEATHERS, J.: In this declaratory judgment action, Appellants, Vivian Atkins, Robert Frick, and Kay Hollis, a majority of the members of Chapin Town Council, seek review of the circuit court's order granting the motion of Respondents, Mayor James Wilson, Jr. and Councilman Gregg White, to invalidate actions taken by Appellants at two special Council meetings. Appellants also initially challenged the circuit court's order denying their motion for a preliminary injunction and dismissing their complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP). However, at oral arguments, Appellants advised the court they wished to waive their assignments of error as to this particular order. Therefore, we summarily affirm this order without further discussion. As to the circuit court's order invalidating the actions taken by Appellants at the two special meetings, we reverse.

FACTS/PROCEDURAL HISTORY

In November 2013, the voters of the Town of Chapin elected a new mayor, Respondent Wilson, and a new Council member, Respondent White. The Mayor's term of office began on January 7, 2014. According to Appellant Atkins, before the Mayor was sworn in, he announced that he had hired Karen Owens to serve as "Director of Communication and Economic Development" although Council had not voted to create the position or make it a part of the Town's budget.[1] The Mayor also (1) refused to honor a retainer agreement between the Town and an attorney for the Town's utility department, (2) signed a contract to hire Nicole Howland as Town Attorney without first submitting the contract to Council for approval, (3) refused to place several items on the agendas for Council meetings despite requests from certain Council members, and (4) refused to schedule a special meeting at Atkins' request.

Accordingly, on February 26, 2014, Appellants filed a complaint invoking the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 to -140 (2005), seeking a judgment declaring section 2.206(b) of the Chapin Town Code unenforceable to the extent it grants the Mayor control over the agendas for

[1] At a subsequent meeting, Council voted to create the position but did not discuss compensation.

Council meetings. Section 2.206 appears in the Town Code with the catchword "Agenda" as follows:

> 2.206. AGENDA.
>
> a. Matters to be considered by the Mayor and Council at a regular meeting shall be placed on a written agenda and publicly posted at least twenty-four (24) hours prior to the meeting. Matters not on the agenda may be considered upon request of a member unless a majority of Council objects.
>
> . . .
>
> b. The agenda shall be approved by the Mayor, prior to distribution. It shall be prepared under the supervision of the Clerk/Treasurer.

The complaint also sought a preliminary injunction requiring the Mayor to "place on the agenda of the next Council meeting . . . any item requested by any member of Council." Appellants filed a separate motion for a preliminary injunction seeking an order requiring the Mayor "to place any item requested by any member of Council on the agenda of the next occurring Council meeting after the request, without any delay." At the motions hearing, Appellants explained that the Freedom of Information Act (FOIA) prohibited them from exercising their power under section 2.206(a) to amend the agenda during the meeting. *See Lambries v. Saluda Cty. Council* (*Lambries I*), 398 S.C. 501, 506, 728 S.E.2d 488, 491 (Ct. App. 2012) ("[T]he purpose of FOIA is best served by prohibiting public bodies governed by FOIA from amending their agendas during meetings."), *rev'd* (*Lambries II*), 409 S.C. 1, 760 S.E.2d 785 (2014), *superseded in part by* 2015 Act No. 70.[2]

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[2] *Lambries I* was issued on June 13, 2012, and *Lambries II* was issued on June 18, 2014. In the present action, Appellants filed their complaint on February 26, 2014. The order dismissing the complaint was dated March 18, 2014, and filed the following day. Therefore, *Lambries II* did not affect the present case at the time of the motions hearing. Further, in 2015 Act No. 70, the legislature superseded the

On March 18, 2014, the circuit court issued an order denying Appellants' request for a preliminary injunction and granting Respondents' motion to dismiss. In addressing the motion for a preliminary injunction, the circuit court stated, "the Mayor must sign off on the agenda prior to its distribution to Council, and there is no requirement that the Mayor place items on the agenda that he believes do not merit Council's consideration." In addressing Respondents' motion to dismiss, the circuit court stated, "Ordinance § 2.206(b) grants Mayor Wilson the authority and discretion to approve and, inherently, to deny any item requested to be on the agenda for a Council meeting."

The circuit court addressed the complaint's assertion that if section 2.206 grants the Mayor complete control over the agenda, this provision violates the state and federal constitutions. Despite Appellants' FOIA argument, the circuit court stated that section 2.206(a) allows matters not on the agenda to be considered upon request of a member unless a majority of members object. The circuit court also stated that Council's ability to amend the agenda during the meeting acted "as a safeguard against autocratic mayoral action that may otherwise rise to a constitutional depravation [sic] of basic rights." On April 8, 2014, the circuit court denied Appellants' motion to reconsider pursuant to Rule 59(e), SCRCP. Appellants filed and served a Notice of Appeal of the circuit court's orders on April 22, 2014.

In the meantime, on April 5, 2014, Atkins carried to Appellant Robert Frick's home a prepared notice calling for a special meeting of Council on April 10, 2014, to amend section 2.206(b) of the Chapin Town Code to require the

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primary holdings of *Lambries II*, i.e., that FOIA does not require an agenda to be issued for a regularly scheduled meeting and, thus, FOIA does not prohibit public bodies from amending an agenda for a regularly scheduled meeting. Act No. 70, which became effective on June 8, 2015, amended section 30-4-80(a) of the South Carolina Code (2007) to prohibit the amendment of a posted meeting agenda during the meeting without a finding of exigent circumstances and a two-thirds vote of the members present.

Mayor to place on a meeting agenda any item requested by a member of Council.[3] Atkins discussed the notice with Frick, who agreed to call for a special meeting and signed the notice. On April 6, 2014, Atkins took the notice to Appellant Kay Hollis's home and discussed the notice with her. Hollis also agreed to calling a special meeting and signed the notice.

On April 7, 2014, Atkins took the notice to the Town Clerk and asked her to post the notice at Town Hall and on the Town's website and to notify the news media.[4] On this same day, Respondents filed a "Motion to Enforce Order and to Enjoin Contrary Conduct" with the circuit court. In this motion, Respondents complained that Appellants noticed the special meeting with an agenda that was never presented to the Mayor for his approval and alleged that Appellants were "disregarding the [circuit court's] March 18th Order with respect to the Mayor's authority to approve or reject agenda items under Ordinance § 2.206(b)." Respondents sought "an order enforcing the [circuit court's] prior ruling and enjoining [Appellants] from taking any action contrary to that ruling, including going forward with the improperly-noticed [special] meeting." On April 8, 2014, the circuit court's presiding judge sent a letter to the parties advising them of his availability for a hearing and stating his opinion that any actions taken by Appellants "in contravention of the [circuit court's] March 18, 2014 Order . . . could be illegal and of no force and effect."

Neither the Mayor nor White attended the April 10 and 17, 2014 special meetings. Therefore, Atkins presided over these meetings in her capacity as Mayor pro tempore. At the April 10 meeting, a first reading was given to the proposed amendment to section 2.206(b).[5] Additional business was conducted at

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[3] Section 2.202(3) of the Chapin Town Code gives a majority of Council members the authority to call special meetings. Section 2.202 states, "Special meetings may be held: 1. whenever called by the Mayor in cases of emergency, or; 2. when, in the judgment of the Mayor, the good of the municipality requires it, or; 3. by a majority of the members of Council."

[4] Atkins repeated the same procedure for another special meeting conducted on April 17, 2014.

[5] Counsel for Appellants later discovered a scrivener's error in the amendment that referenced "called" meetings.

this meeting, although the record does not indicate the subject of this additional business, only that it was included in the published agenda.

On April 14, 2014, Respondents filed a "Motion for Civil Contempt," seeking an order "holding [Appellants] in civil contempt of court and . . . invalidating any actions that [Appellants] purportedly took at any meeting that they attempted to convene in contravention of [the circuit court's] rulings." Subsequently, Council conducted a second reading of the amendment to section 2.206(b) at the April 17 meeting. Again, additional business was conducted at the April 17 meeting, although the record does not indicate the subject of this additional business, only that it was included in the published agenda.

On April 25, 2014, the circuit court conducted a hearing on Respondents' motion to enforce the March 18, 2014 order and motion for contempt. On May 5, 2014, the circuit court issued an order denying the motion for contempt but purporting to invalidate the actions taken at the April 10 and 17, 2014 special meetings on the ground that Appellants did not present agendas for these meetings to the Mayor for his approval. Appellants filed and served a Notice of Appeal on May 23, 2014, and the Clerk of this court later consolidated the appeal with the previous appeal of the circuit court's March 18, 2014 order.

On March 23, 2015, Respondents filed a motion to dismiss this appeal on the ground that Appellants did not appeal the circuit court's "declarations and rulings as they relate to the Town of Chapin"—a defendant before the circuit court—and, therefore, "those rulings are the law of the case with respect to the Town." On May 29, 2015, then Chief Judge Few issued an order stating, in pertinent part,

> Respondents have not convinced this court that the omission of the Town as a Respondent affects this appeal *other than on a substantive basis as to the merits*. Because Respondents seek dismissal on a substantive basis, which is inappropriate at this stage of the appeal, the motion is denied. *This court will consider the merits of this appeal once briefing is complete and the appeal has been assigned to a panel*.

(emphases added). Notably, Respondents did not amend their appellate brief to list this issue as an additional sustaining ground or to otherwise argue this issue. We address the motion to dismiss the appeal, which we deny, at the end of this opinion.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable. The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Kinard v. Richardson*, 407 S.C. 247, 256, 754 S.E.2d 888, 893 (Ct. App. 2014) (citation omitted) (quoting *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003))).[6] Here, Respondents were seeking, and were granted, an invalidation of

[6] We note Respondents did not correctly invoke the circuit court's authority to rule under the Uniform Declaratory Judgments Act (the Act). While the circuit court's March 18, 2014 order merely granted Respondents' motion to **dismiss** Appellants' declaratory judgment action, Respondents' memorandum supporting their motions emphasized the order's statement that the Mayor must sign off on the agenda prior to its distribution to Council and characterized that statement as a "declaration." The circuit court then stated in its May 5, 2014 order that it had previously "declared" that agendas for Council meetings had to be approved by the Mayor prior to the agenda's distribution. Again, we emphasize the circuit court's March 18 order **dismissed** the declaratory judgment action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, which allows for dismissal of a case for "failure to state facts sufficient to constitute a cause of action." Therefore, the circuit court incorrectly invoked section 15-53-120 of the South Carolina Code (2005), which states that further relief based on a declaratory judgment may be granted whenever necessary or proper, in support of its "declaratory ruling."

In any event, we construe Respondents' motion to enforce the March 18 order as a new action seeking declaratory relief under the Act, specifically section 15-53-30 of the South Carolina Code (2005), which allows any person "whose rights, status or other legal relations are affected by" a municipal ordinance to have determined "any question of construction" arising under the ordinance and "obtain a declaration of rights, status or other legal relations thereunder." *See* S.C. Code Ann. § 15-53-130 (2005) (requiring courts to construe and administer the

Appellants' actions at the two special meetings; such a remedy can be characterized as injunctive relief. *See Bus. License Opposition Comm. v. Sumter Cty.*, 311 S.C. 24, 27-28, 426 S.E.2d 745, 747-48 (1992) (noting FOIA authorizes injunctive relief and characterizing invalidation of an ordinance as injunctive relief). "An order granting or denying an injunction is reviewed for [an] abuse of discretion." *Lambries II*, 409 S.C. at 7, 760 S.E.2d at 788, *superseded on other grounds by* 2015 Act No. 70. However, Respondents based their motion on their interpretation of sections 2.202 and 2.206 of the Chapin Town Code. Because this is a question of law, this court need not give deference to the circuit court's interpretation of the disputed provision. *Cf. id.* at 8, 760 S.E.2d at 788 ("[W]hile an injunction is equitable and subject to the trial court's discretion, where the decision turns on statutory interpretation[,] . . . this presents a question of law. As a result, [the appellate court] need not give deference to the trial court's interpretation. If, based on this [c]ourt's assessment, the trial court committed an error of law in its interpretation of [a statute], that would constitute an abuse of discretion by the trial court.").

LAW/ANALYSIS

Appellants contend the circuit court erred in invalidating the actions taken by Council at the April 10 and 17, 2014 special meetings, arguing the requirement of section 2.206(b) of the Chapin Town Code that the Mayor approve meeting agendas does not apply to section 2.202 governing special meetings. We agree.

"The primary consideration in legislative construction is to ascertain the intent of the legislative body enacting the legislation." *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 481, 366 S.E.2d 15, 19 (Ct. App. 1988), *superseded by statute on other grounds as indicated in Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 406, 552 S.E.2d 42, 45 (Ct. App.

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provisions of the Act liberally). We also interpret the circuit court's May 5, 2014 order as an original declaratory judgment issued under the authority of section 15-53-20 of the South Carolina Code (2005), which gives courts of record the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed" and confers on such declarations "the force and effect of a final judgment or decree."

2001). "[W]hen interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). The plain language of section 2.206 indicates it applies only to regular meetings. Respondents' argument to the contrary is based on the premise that subsection (b) of section 2.206 is an ordinance unto itself, stands alone, and should be read in isolation.[7] We reject this premise. *See Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context.").

As previously stated, section 2.206, in its entirety, appears in the Town Code with the catchword "Agenda" as follows:

> 2.206. AGENDA.
>
> a. Matters to be considered by the Mayor and Council at a regular meeting shall be placed on a written agenda and publicly posted at least twenty-four (24) hours prior to the meeting. Matters not on *the agenda* may be considered upon request of a member unless a majority of Council objects.
>
> . . .
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> b. *The agenda* shall be approved by the Mayor, prior to distribution. It shall be prepared under the supervision of the Clerk/Treasurer.

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[7] Specifically, Respondents assert, "the Town of Chapin has a single ordinance governing how agendas for Council meetings must be established: Ordinance § 2.206(b). This ordinance provides that '[t]he agenda shall be approved by the Mayor, prior to distribution' to Councilmembers and to the public. Chapin, S.C., Code. § 2.206(b)." Respondents also assert, "Because it is the sole ordinance that discusses meeting agendas, it is no surprise that Section 2.206(b) does not distinguish how agendas should be prepared based on the type of meeting being held."

(emphases added). Like the second sentence of subsection (a), subsection (b) employs the article "the" immediately before "agenda," rather than referencing "an agenda," "a written agenda," or "a meeting agenda." This implies that subsection (b), like the second sentence of subsection (a), is referring back to previous language, i.e., the language in the first sentence of subsection (a). This sentence specifically references agendas for regular meetings only: "Matters to be considered by the Mayor and Council at a regular meeting shall be placed on a written agenda . . . ." *See State v. Leopard*, 349 S.C. 467, 472-73, 563 S.E.2d 342, 345 (Ct. App. 2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *S.C. Dep't of Consumer Affairs v. Rent–A–Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001)).

Therefore, the general reference to "[t]he agenda" in subsection (b) invokes a written agenda that includes only those "[m]atters to be considered by the Mayor and Council at a regular meeting," as limited by the specific language in subsection (a). *See Singletary,* 316 S.C. at 161, 447 S.E.2d at 235 ("When the legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated."); *see also State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.").

It is logical that the plain language of section 2.206 limits its applicability to regular meetings rather than purporting to control special meeting agendas because, as we explain below, the very nature of a special meeting inherently controls the content of that meeting's agenda. The provisions governing special meetings are section 5-7-250(a) of the South Carolina Code (2004) and section 2.202 of the Chapin Town Code. Section 2.202 states in full, "Special meetings may be held: 1. whenever called by the Mayor in cases of emergency, or; 2. when, in the judgment of the Mayor, the good of the municipality requires it, or; 3. by *a majority of the members of Council*." (emphasis added). Section 5-7-250(a) also grants a majority of Council members the power to call a special meeting: "The council, after public notice[,] shall meet regularly at least once in every

month at such times and places as the council may prescribe by rule. Special meetings may be held *on the call of* the mayor or of *a majority of the members*." (emphases added).

Our supreme court has described a special meeting as a meeting "*called for a special purpose* and at which nothing can be done beyond *the objects specified for the call*." *Brock v. Town of Mount Pleasant*, Op. No. 27621 (S.C. Sup. Ct. filed April 13, 2016) (Shearouse Adv. Sh. No. 15 at 21, 25) (emphases added) (quoting *Lambries II*, 409 S.C. at 15, 760 S.E.2d at 792)). In other words, the actions of a public body at a special meeting "may not exceed the scope of the purpose *for which the meeting was called*." *Id.* at 26 (emphasis added). This means that those who lawfully call the special meeting have a purpose for the meeting, and this purpose is the only item on which action may be taken.[8] *Brock* at 25, 26. Accordingly, this purpose, which is generated by the person or persons calling the special meeting, will be the sole item listed in the meeting's written agenda. *Brock* at 25, 26.[9] Therefore, a requirement that the Mayor approve this written agenda would be incompatible with the very nature of a special meeting called by a majority of Council members.[10]

Taking Respondents' argument to its logical conclusion would render the provisions granting Appellants authority to call a special meeting a nullity. If the Mayor can disapprove an agenda for a special meeting called by a majority of Council members—an agenda that must be limited to the purpose for calling the special meeting—the special meeting will be left without a reason to proceed, effectively stripping the majority of its authority to call the meeting. We decline to infer such an intent on the part of Council when it adopted the Chapin Town

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[8] Of course, to the extent there is more than one purpose, action may be taken on these purposes.

[9] Further, this written agenda must be included in the public notice of the special meeting. *Lambries II*, 409 S.C. at 13-14, 760 S.E.2d at 791 (emphasizing FOIA's requirement that public notice for a special meeting must include the meeting's agenda).

[10] It would be unnecessary for the Mayor to approve the agenda for a special meeting called by the Mayor himself.

Code.[11] *See Somers*, 319 S.C. at 67, 459 S.E.2d at 843 ("[W]hen interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used."); *id.* at 68, 459 S.E.2d at 843 ("An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); *id.* ("In construing ordinances, the terms used must be taken in their ordinary and popular meaning."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.").

Likewise, we decline to infer such an intent on the part of the legislature when it enacted section 5-7-250(a). *See State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000))); *id.* ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992))); *id.* at 351, 688 S.E.2d at 575 ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or

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[11] Respondents also argue the catchword "Agenda" indicates the provisions of section 2.206 apply to agendas for all types of meetings. In support of this argument, Respondents cite *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 373, 718 S.E.2d 432, 436 (2011), for the proposition that an appellate court may consider the title or caption of legislation in determining legislative intent. Respondents' reliance on *Beaufort* is misplaced. Chapin's Town Code itself governs this particular aspect of legislative interpretation. Section 1.204 of the Town Code states, in pertinent part, "The catchlines of the several sections of this code printed in capital letters, a different type or underlined are intended as mere catchwords to indicate or emphasize the contents of such sections, *not as any part of the section* . . . ." (emphasis added). Therefore, while the catchword "Agenda" indicates that section 2.206 discusses meeting agendas, it cannot supplant the plain language of the section itself that specifically limits the ordinance to regular meetings.

would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.").

Based on the foregoing, Appellants acted within their authority under section 5-7-250(a) and section 2.202(3) of the Chapin Town Code when they called the two special meetings and published meeting agendas limited to the meetings' purposes without first presenting the agendas to the Mayor. The circuit court's invalidation of Council's actions at these two meetings on the ground that the agendas were not approved by the Mayor was based on an error of law and, thus, constituted an abuse of discretion.

Motion to Dismiss

In their motion to dismiss this appeal, Respondents argue the law-of-the-case doctrine renders the circuit court's rulings conclusive as to the Town due to Appellants' failure to designate the Town as a respondent on appeal. Respondents also argue the judgments below apply equally to all defendants and, therefore, Appellants "cannot seek an inconsistent decision from this Court."

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). In other words, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). While the doctrine has been referenced as discretionary,[12] it is recognized that principles "of authority . . . do inhere in the

[12] *See State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 n.5 (2014) (referring to the law-of-the-case doctrine as a "discretionary appellate doctrine with no preclusive effect on successive trial proceedings"); *S. Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922) ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res adjudicata. One directs discretion: the other supersedes it and compels judgment. In other words, in one it

'mandate rule' that binds a lower court on remand to the law of the case established on appeal." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002).

Given all of the surrounding circumstances under which Respondents ask us to apply the law-of-the-case doctrine, we conclude such an application is inappropriate. While no attorney claims to represent the Town in this appeal, all five Council members, which include the Mayor, are parties to this appeal, and Appellants represent a majority of Council members. We note that before Appellants filed this litigation, the Mayor refused to add to a meeting agenda the topic of appointing an interim town attorney despite Atkins' request. Further, after this litigation was filed, counsel for the Mayor purported to represent the Town as well. Now, in claiming the Town has not been served with the Notice of Appeal, Respondents do not indicate the attorney or other individual(s) to whom Appellants should have sent the Notice of Appeal to effect service on the Town. They base their argument that Appellants failed to serve the Town on merely the failure to designate the Town as a respondent in the case caption and in the text of the Proof of Service.

Based on all of these circumstances, we conclude Appellants have properly perfected their appeal of the circuit court's orders as to all parties in this case, including the Town. To hold otherwise would place form over substance when doing so would not further the interests of justice.

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is a question of power, in the other of submission."); *Slowinski v. Valley Nat'l Bank*, 624 A.2d 85, 89 (N.J. Super. App. Div. 1993) ("'Law of the case' . . . operates as a discretionary rule of practice and not one of law."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("So long as the same case remains alive, there is power to alter or revoke earlier rulings."); 5 C.J.S. *Appeal and Error* § 991 (2007) ("The doctrine is discretionary rather than mandatory. Nonetheless, it should be disregarded only upon a showing of good cause for failure timely to request reconsideration of the original appellate decision, and only as a matter of grace rather than right." (footnotes omitted)).

CONCLUSION

Accordingly, we deny the motion to dismiss this appeal and affirm the circuit court's March 18, 2014 order denying Appellants' motion for a preliminary injunction and dismissing their complaint. We reverse the circuit court's May 5, 2014 order invalidating Council's actions at the April 10 and 17, 2014 special meetings.

AFFIRMED IN PART and REVERSED IN PART.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary G. Harris, Appellant,

v.

Tietex International Ltd., Respondent.

Appellate Case No. 2014-000902

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

Opinion No. 5418
Submitted May 2, 2016 – Filed June 29, 2016

AFFIRMED

Duane Alan Lazenby and Ginger D. Goforth, both of Lazenby Law Firm, LLC, of Spartanburg, for Appellant.

Fred W. Suggs, Jr. and Lucas James Asper, of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Respondent.

SHORT, J.: In this defamation case, Gary Harris appeals the trial court's grant of summary judgment in favor of Tietex International, Ltd. (Tietex), arguing the trial court erred in finding summary judgment was appropriate based on (1) a lack of genuine issue of material fact, (2) the statute of limitations, (3) res judicata, and (4) collateral estoppel. We affirm.

FACTS

In 1994, Tietex hired Harris as a senior research chemist. In 2006, Harris began to complain of having difficulty breathing and experiencing flu-like symptoms and headaches. Harris believed his health problems were being caused by mold present near his work area in Tietex's laboratory. Tietex had the laboratory tested; however, no mold was detected. A series of emails between Harris and his supervisor, Wade Wallace, indicate they discussed relocating Harris from the lab and allowing Harris to work in another area to protect him from the environment. Wallace explained to Harris that Tietex did not want to take any chances with his health and instructed Harris not to enter the lab under any circumstances.

On February 9, 2007, Wallace sent an email to his supervisor, Mark Isbell, and Human Resources Manager David Wilson, summarizing a conversation he allegedly had with Harris two days earlier. In the email, Wallace explained that Harris had expressed he was overwhelmed with personal problems and was "confused, disoriented, and could not function." However, according to Wallace, Harris eventually stated he could work through his problems and thanked Wallace for his support and patience.

On March 5, 2007, Wallace met with Harris to discuss several issues Harris needed to correct regarding his work performance. Following their meeting, Wallace sent a memo to Wilson, Isbell, and Harris, outlining the issues he and Harris discussed. On June 18, 2007, Wallace sent another memo to Wilson, Harris, and Isbell regarding Harris's work on two projects. Wallace explained Harris initiated the first project by convincing management he could develop a chemical compound that would result in cost savings for Tietex. However, according to Wallace, Harris had made no significant progress after working on the project for six months. Wallace claimed Harris "exercised poor judgement by making claims and commitments that he could not deliver." Wallace also criticized Harris's work on the second project, claiming Harris failed to conduct adequate scientific analysis. Wallace stated Harris's "negligence" was unacceptable for a senior research chemist.

On July 3, 2007, Wallace placed Harris on administrative suspension. On July 18, 2007, Wallace sent a final memo to Wilson and Isbell regarding Harris. Wallace claimed Harris had failed to correct all but one of the issues oulined in the March 5, 2007 memo and described several other problems he had had with Harris's work

performance. Wallace explained he had lost confidence in Harris's ability to perform his job and recommended Tietex terminate Harris's employment. On July 19, 2007, Tietex terminated Harris's employment.

In August 2008, Harris filed a complaint in circuit court asserting causes of action against Tietex for retaliation and discrimination under the Age Discrimination in Employment Act[1] (ADEA), breach of contract, breach of contract accompanied by a fraudulent act, and defamation. Tietex removed the case to United States District Court.

At a deposition, Harris initially claimed the issues Wallace described in the March 5, 2007 memo regarding Harris were false; however, when questioned about each issue individually, Harris did not completely dispute each point. Harris also disputed some of the information contained in the June 18, 2007 memo and July 18, 2007 memo. Additionally, Harris characterized the portion of the June memo that described his work on the second project as "highly misleading as to what really happened." Harris admitted he had no evidence that Tietex shared these memos with anyone other than the individuals to whom they were addressed.

On October 28, 2010, the district court granted summary judgment to Tietex on Harris's ADEA claims and dismissed Harris's state law claims, declining to exercise supplemental jurisdiction. The Fourth Circuit Court of Appeals affirmed the district court's judgment on May 31, 2011.

On October 21, 2011, Harris filed his complaint against Tietex in the instant case. Harris later filed an amended complaint, which included a cause of action for defamation. Harris's amended complaint did not identify the specific statements on which his defamation claim was based. At a deposition, Harris identified seven items related to his lawsuit that he believed were defamatory: (1) the February 9, 2007 email from Wallace to Wilson; (2) the March 5, 2007 memo; (3) the June 18, 2007 memo; (4) the July 18, 2007 memo; (5) "rumors in the industry" that he had been terminated for falsifying a test report; (6) Tietex suspending Harris; and (7) Tietex "banning" Harris from the laboratory. Harris admitted his defamation claim in the first action was not based on the February 9, 2007 email, the July 18, 2007 memo, Tietex banning him from the laboratory, or Tietex suspending him on July 3, 2007.

[1] 29 U.S.C. §§ 621–634 (2012 & Supp. II 2014).

Tietex subsequently moved for summary judgment. On March 20, 2014, the trial court granted the motion. In its order, the trial court addressed Harris's defamation cause of action as seven separate claims based on the items Harris identified as defamatory at his deposition.[2] The trial court found Tietex was entitled to summary judgment as to Harris's defamation claims relating to the February 9, 2007 email and the three internal memos because these communications were substantially true. Furthermore, the trial court found the email and memos were subject to a qualified privilege because they were internal, performance-related communications.

The trial court also granted summary judgment as to Harris's defamation claims relating to (1) "rumors in the industry" regarding Harris's termination, (2) Tietex suspending Harris's employment, and (3) Tietex "banning" Harris from the laboratory. The trial court explained, "Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, Harris has failed to create a triable issue of fact."

Additionally, the trial court granted summary judgment to Tietex as to the following claims based on the claims being barred by the statute of limitations: (1) the February 9, 2007 email; (2) Tietex "banning" Harris from the laboratory; and (3) Tietex suspending Harris's employment. The trial court explained Harris did not assert these claims in his first action, and therefore, the limitations period was not tolled under 28 U.S.C. § 1367(d). The trial court also found Harris was precluded from asserting these claims under the doctrine of res judicata because they arose out of the same transaction or occurrence as Harris's claims in the first action. Finally, the trial court found Tietex was entitled to summary judgment on all of Harris's claims because he was precluded from arguing facts necessary to support his defamation claims under the doctrine of collateral estoppel based on the federal court's findings in the first action. This appeal followed.

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[2] At a hearing on the motion, Tietex addressed Harris's defamation cause of action as seven separate claims. Harris, however, stated his defamation cause of action was based on the three internal memos. In his brief to this court, Harris claims Tietex "twisted [his] deposition testimony to create 'additional' defamation claims."

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

I. GENUINE ISSUES OF MATERIAL FACT

Harris argues the trial court erred in granting summary judgment because genuine issues of material fact existed. Harris contends his testimony regarding the lack of veracity of the memos created a genuine issue of material fact and argues that even if a qualified privilege applies to the communications, a jury must determine if the privilege was abused. We disagree.

A party asserting a claim of defamation must prove the following elements: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860.

A defendant in a defamation action may assert the affirmative defense of conditional or qualified privilege. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Id.* The party

asserting a qualified privilege must prove the following elements: (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987). Whether an occasion gives rise to a qualified or conditional privilege is generally a question of law for the court. *Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001). This court has previously found the qualified privilege applies "to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. "To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for [the] plaintiff[']s rights." *Id.* at 485, 514 S.E.2d at 134. Although abuse of the conditional privilege is generally an issue for the jury to decide, in the absence of a controversy as to the facts, it is for the court to determine. *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981). Similarly, if the plaintiff fails to present evidence of a genuine issue of fact as to actual malice and the qualified privilege is otherwise applicable, summary judgment may be granted. *See Wright*, 298 S.C. at 474, 381 S.E.2d at 507 (affirming the trial court's grant of summary judgment based on the qualified privilege applying to the alleged defamatory statements and the plaintiff failing to establish a genuine issue of material fact as to actual malice).

Initially, we note Harris has not identified the specific defamatory statements on which he bases his defamation claim or claims. In his brief, Harris simply asserts the three internal memos contained "malicious personal attacks outside any privilege impugning Harris's professional standards and abilities." The memos contain numerous statements regarding Harris and his work performance. Without Harris identifying the specific statement or statements on which he bases his claim, we cannot evaluate whether there existed a genuine issue of material fact as to the truth or defamatory nature of the statements. *See McBride v. Sch. Dist. of*

Greenville Cty., 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010) (finding the plaintiff's description of alleged defamatory statements was too vague to be evaluated).

Furthermore, we affirm the trial court's decision granting summary judgment on the basis of a qualified privilege applying to any statements made in the three internal memos.[3] These communications concerned the evaluation of an employee's job performance; therefore, the qualified privilege applies in the absence of evidence of actual malice or abuse of privilege. Harris fails to set forth an argument explaining what evidence he presented of actual malice or abuse of the qualified privilege in relation to these communications. Accordingly, we affirm the trial court's grant of summary judgment on the basis of the qualified privilege.

II. STATUTE OF LIMITATIONS

Harris also argues the trial court erred in finding his defamation cause of action was barred by the statute of limitations because the limitations period was tolled while the first action was pending in federal court. We disagree.

In South Carolina, defamation claims are subject to a two-year statute of limitation. S.C. Code Ann. § 15-3-550 (2005). The limitations period begins when the alleged defamatory statement is made, not when the plaintiff learns of the statement. *See Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) (affirming the trial court's grant of summary judgment as to the plaintiff's defamation claim because South Carolina has not adopted the discovery rule in libel or slander cases). The limitations period for any claim asserted under a federal court's supplemental jurisdiction is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d) (2012).

The trial court found Harris's defamation claims relating to (1) the February 9, 2007 email, (2) Tietex suspending Harris's employment, and (3) Tietex "banning" Harris from the laboratory were barred by the statute of limitations because Harris

[3] The trial court also found the qualified privilege applied to the February 9, 2007 email. Harris does not challenge this finding on appeal.

admitted his defamation claim in the first action was not based on these "statements."[4] Accordingly, the trial court found the limitations period for these claims was not tolled by the first action. We agree with the trial court's analysis.

Furthermore, we note that although Harris's complaint in the first action did not identify the specific statements on which his defamation claim was based, Harris did allege the defamatory statements had been made "*since his termination*." The three defamation claims the trial court found to be barred by the statute of limitations were based on statements or acts that occurred prior to Harris's termination. Accordingly, Harris's defamation claim in the first action was obviously not based on these "statements," and the limitations period for a claim based on these "statements" was not tolled by the first action.

Additionally, although not ruled upon by the trial court, a review of the record shows that any claim based on statements contained in the memos is also barred by the statute of limitations for this same reason. Harris filed his original complaint in the current action on October 21, 2011, a date later than two years after the three internal memos were written and sent. Because Harris's defamation claims based on the memos were not tolled by the first action, those claims are barred by the statute of limitations. *See* § 15-3-550 (providing that the statute of limitations for actions for libel and slander is two years).

III. REMAINING ISSUES

In light of our finding that the trial court properly granted summary judgment based on the qualified privilege and the statute of limitations, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown,*

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[4] The trial court correctly noted in its order that Tietex instructing Harris not to enter the laboratory was not a statement about Harris but merely a work directive; therefore, it could not form the basis of a defamation claim. The trial court also correctly noted the only statements related to Harris's suspension were (1) Wallace's statement to Harris informing him of his suspension, which could not support a defamation claim because there was no publication to a third party, and (2) an allegation Wallace informed an individual at another company of Harris's suspension, which Harris had only provided inadmissible hearsay evidence of, and, even if Wallace made the statement, it could not form the basis of a defamation claim because the statement was true.

Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address other issues raised by the appellant because resolution of a prior issue was dispositive of the appeal).

CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment is

AFFIRMED.

THOMAS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Arkay, LLC and Robert R. Knoth, Respondents,

v.

City of Charleston, City of Charleston Board of Zoning Appeals, Andrew Pinckney Inn, and Michael A. Molony, Appellants.

Appellate Case No. 2014-001466

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5419
Heard January 13, 2016 – Filed June 29, 2016

REVERSED

Charlton de Saussure, Jr., of Haynsworth Sinkler Boyd, P.A., and Frances Isaac Cantwell, both of Charleston, for Appellants City of Charleston and City of Charleston Board of Zoning Appeals; Wilbur E. Johnson, of Young Clement Rivers, LLP, of Charleston, for Appellant Andrew Pinckney Inn; and Thomas S. Tisdale, Jr., of Hellman Yates & Tisdale, P.A., of Charleston, for Appellant Michael A. Molony.

Capers G. Barr, III, of Barr, Unger & McIntosh, LLC, of Charleston, for Respondents.

WILLIAMS, J.: In this zoning case, the City of Charleston (the City), the City of Charleston Board of Zoning Appeals (the Board), the Andrew Pinckney Inn, and Michael A. Molony (collectively "Appellants") appeal the circuit court's reversal of the Board's denial of Arkay, LLC's (Arkay) application for a special use exception to operate a carriage horse stable. Appellants contend the court erred in (1) finding the special use exception ordinance described a stable as a "use" rather than a physical structure, (2) relying upon the law of horizontal property regime (HPR) as a means of satisfying the separation requirement, and (3) failing to reconcile and construe the zoning and tourism ordinances in a consistent manner. We reverse.

FACTS/PROCEDURAL HISTORY

Robert R. Knoth owns and operates Carolina Polo & Carriage Company (Carolina Polo), one of five franchised horse carriage tour businesses in Charleston, South Carolina. From 1990 to 1996, Carolina Polo's stable was located at 45 Pinckney Street in the historic City Market District. After losing its lease, Carolina Polo relocated to a building on the other side of the same block at 16 Hayne Street. From 1996 to 2009, another horse carriage company ran its business out of the 45 Pinckney Street location. In 2013, Carolina Polo lost its lease at 16 Hayne Street, but Knoth was able to purchase the prior location at 45 Pinckney Street. Knoth placed the property title in the name of Arkay, of which he is the sole member.

In the mid-1990s, the Charleston City Council (the Council) enacted legislation under its zoning code to regulate the horse carriage tour business in the city. Pursuant to section 54-206(p) of the City of Charleston Code of Ordinances (2015), horse stables are permitted in general business and urban commercial zoning districts if they are granted a special use exception by the Board. The Board must grant a special use exception if it finds an applicant has met seven criteria, including when a stable is not located within 100 feet of a residentially zoned district. From the adoption of this legislation until 2009, 45 Pinckney Street—located within 100 feet of a residential district—operated as a nonconforming use under the City's zoning ordinances.

At the time of Arkay's purchase, the 45 Pinckney Street building no longer qualified as a nonconforming use because it was not used as a horse stable for more than three years between 2009 and 2013. Accordingly, in March 2013,

Arkay applied for a special use exception to operate a stable at 45 Pinckney Street—a property zoned for general business—to house Carolina Polo's carriage horses. The Preservation Society of Charleston, the Historic Ansonborough Neighborhood Association, and several neighbors opposed the application. At the evidentiary hearing, Arkay conceded the frontage of the building at 45 Pinckney Street was within 93.5 feet of the closest residential district to the north. Arkay argued, however, that the separation requirement only applied to the use of stabling, not the physical structure.

To separate the "stabling activity" from the residential district, Arkay proposed an HPR to divide the building at 45 Pinckney Street into two units. In the southern rear portion of the building, Unit A would consist of six stalls in which the horses would be fed, groomed, and stored. In the northern front portion of the building, Unit B would contain two offices and be subject to an appurtenant easement for the benefit of Unit A for ingress and egress to Pinckney Street. Unit B would also be subject to a recorded covenant prohibiting the use of that space as a stable. Additionally, Units A and B would be separated in the middle of the building by a common area consisting of two tack rooms, two restrooms, an area for customer waiting, and an area for customer loading and unloading. Because its horse stalls would be located 119 feet from the nearest residential zone, Arkay contended the stabling activity complied with the zoning ordinance's separation requirement. Alternatively, Arkay applied for a *de minimis* variance of 6.5%, arguing only half of the frontage of the building failed to meet the 100-foot requirement by 6.5 feet.

After hearing from Arkay, the zoning administrator, and other interested parties, the Board denied the application on June 4, 2013, finding the stable did not meet the 100-foot separation requirement. In reaching its decision, the Board rejected Arkay's argument that the ordinance described "stable" as a use and not a physical structure. The Board noted only one building occupies 45 Pinckney Street and the proposed HPR did not alter that circumstance. The east, west, and south sides of the building share common walls with neighbors, and the front of the building is flush with the sidewalk. While Arkay would store the horses in Unit A, the Board found the building contained only one access to a public street and the horses would have to pass through Unit B to reach Pinckney Street. Because Unit B and the proposed appurtenant easement were areas within 100 feet of a residentially zoned district, the Board held 45 Pinckney Street did not qualify as a site for a

stable under the zoning ordinance. The Board also denied Arkay's application for a variance in a separate order on June 4, 2013.

Arkay subsequently appealed the Board's orders to the circuit court. The court issued an order on May 30, 2014,[1] and Appellants filed a Rule 59(e), SCRCP, motion to alter or amend judgment. In response, the court issued a corrected order dated June 19, 2014, reversing the Board's order denying Arkay's application for a special use exception. Through a plain reading analysis of section 54-206, the court held the zoning ordinance's separation requirement applied only to the use of stabling, not the physical structure. The court first noted section 54-206 is titled "[s]pecial exception *uses*" and regulates nineteen different uses of property that can qualify for special zoning exceptions. Accordingly, the court found that, with few exceptions, the special uses set forth in section 54-206 describe specific forms of activity.

Additionally, the court stated the requirements for a stable in section 54-206(p) focus on the use of the property as a horse carriage tour business, not the physical building. Noting section 54-206(p)(2) requires that "[t]he City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable," the court reasoned the certificate described in the City's tourism chapter is not issued for a stable, but rather for a horse carriage vehicle. Thus, the court found the certificate is an aspect of the "use" of the property in general. Similarly, the court found section 54-206(p)(4) prohibits the cleaning, loading, and tacking areas from impeding traffic flow in a public right of way and, therefore, is another regulation on the use of the property.

Most noteworthy, the court found section 54-206(p)(7) requires that "[*b*]*uildings* [be] designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." In contrast, the court noted section 54-206(p)(1) only prohibits the "stable" from being located within 100 feet of any residentially zoned district, not the "buildings." Thus, the court found the Council only intended that the stabling activity and potentially obnoxious characteristics of housing horses be subject to the separation requirement.

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[1] This order was not included in the record on appeal.

The court also noted the city tourism chapter defines *stable* as "the barn where the animals are kept." In the urban context of downtown Charleston, the court reasoned the word *kept* means "preserved or maintained," which would be accomplished by Arkay's proposed HPR. Lastly, the court held the Board erred in measuring the distance of separation from the nearest residential district to the easement, instead of measuring it to the "use" as a stable. The court explained "the horses will no more be 'kept' on the access easement [than] they would be 'kept' on the streets of Charleston through which they come and go every day, and from which they enter 45 Pinckney Street." Because its reversal on the special use exception was dispositive, the court found it unnecessary to address the Board's order denying Arkay's application for a variance. This appeal followed.

STANDARD OF REVIEW

The appellate court gives "great deference to the decisions of those charged with interpreting and applying local zoning ordinances." *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). This court will not reverse a zoning board's decision unless the board's findings of fact have no evidentiary support or the board commits an error of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). "The determination of legislative intent is a matter of law." *Somers*, 319 S.C. at 67, 459 S.E.2d at 843.

LAW/ANALYSIS

Appellants argue the circuit court erred in finding the special use exception ordinance described a stable as a use rather than a physical structure. According to Appellants, in doing so, the court failed to reconcile and construe the zoning and tourism ordinances in a consistent manner. Moreover, Appellants contend the court erred in relying upon the law of HPR as a means of satisfying the separation requirement. We agree.

A governing body's "intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Clear Channel Outdoor v. City of*

Myrtle Beach, 360 S.C. 459, 466, 360 S.E.2d 76, 79 (Ct. App. 2004) (quoting *Somers*, 319 S.C. at 67, 459 S.E.2d at 843). "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Somers*, 319 S.C. at 68, 459 S.E.2d at 843. "In construing ordinances, the terms used must be taken in their ordinary and popular meaning." *Id.* "Moreover, it is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

The ordinance at issue in this case, section 54-206(p), provides the following requirements a stable must meet to receive a special use exception:

> Stables shall be permitted within the GB and UC district as an exception where the Board, after review, finds that:
>
> 1. The stable is not located within 100 feet of any residential zone district.
> 2. The City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable.
> 3. The stable complies with all city, county, and state regulations for stables.
> 4. A site plan is provided showing that the cleaning/loading/tacking area shall not impede traffic flow in a public right-of-way.
> 5. A written explanation is submitted detailing how refuse will be handled in accordance with city, county, state, and federal regulations. This shall be reviewed by the Department of Public Service.
> 6. A plan is submitted showing how drainage on the property is to be collected in accordance with city, county, state, and federal regulations. This shall be reviewed by the Commissioners of Public Works and the Department of Public Service.
> 7. Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.

At the outset, we note the ordinance's seven requirements do not describe "uses" of the property, but rather establish firm prerequisites on how the stable must be configured and how it must operate to receive a special use exception from the Board. Additionally, we disagree with the circuit court's finding that the Council made a relevant distinction between a stable and a building in section 54-206(p)(7) because a stable already comes under the definition of a building in the zoning code. *See* Charleston, S.C., Code of Ordinances § 54-120 (2015) (defining a *building* as "[a]ny structure built for the support, shelter, housing[,] or enclosure of persons, *animals*[,] or property of any kind" (emphasis added)). Thus, we find—and it seems all parties agree—that section 54-206(p)(1) applies the 100-foot separation requirement to a physical location. Consequently, our focus turns to whether the Council intended such physical location to mean a structure or the exact place where horses are kept.

"Stable" is not defined in the City's zoning code. *See* § 54-120. Section 54-206(p)(3), however, requires that stable operators abide by city regulations for stables. Thus, to further gauge legislative intent on what constitutes a stable, we must examine the City's tourism chapter, which provides for substantial regulation of horse carriage businesses operating in Charleston.[2] *See Beaufort Cty.*, 395 S.C. at 371, 718 S.E.2d at 435 (holding that "statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result").

Enacted in 2007, section 29-212 of the City of Charleston Code of Ordinances (2015) specifically focuses on the management of carriage horse businesses and differentiates between stables and stalls. Subsection 29-212(b)(12) defines *stable* as "the barn where the animals are kept." On the other hand, section 29-212(b)(13)

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[2] On appeal, Arkay contends it is not appropriate to consider definitions in the tourism code as a part of the analysis because section 29-212(b) precludes their application to the zoning code providing that, "[e]xcept where the context clearly indicates otherwise, the following terms and phrases as used in this section shall have the following meanings." We disagree because the context of the relevant zoning and tourism sections is the regulation of horse carriage businesses in Charleston.

defines *stall* as the "individual space within the barn where each animal is kept." Thus, stalls are a smaller component of the larger entity that is the stable.

In the case of 45 Pinckney Street, because the building that would keep the horses encompasses the entire lot, we find it is a barn for purposes of the ordinance. Even though the horses would be kept in the rear of the building—and would be separated from the street by areas for customers, tack rooms, restrooms, and offices—this does not change the building's status as a barn. Moreover, we find these areas and rooms in the front portion of 45 Pinckney Street are commonly associated with horse stables. The obnoxious elements—no matter how minimal in scope Arkay claims they will be—are still likely to accumulate in these areas and escape through the front gate abutting Pinckney Street, the building's only point of access.

Additionally, Arkay's proposed definition of *stable* as meaning only where the horses are kept essentially undermines a number of important provisions regulating stables. *See, e.g.*, Charleston, S.C., Code of Ordinances § 29-212(i)(1)(j) ("There shall be no smoking at any time in stables."); § 29-212(i)(3) ("All stables shall have a yearly inspection by the fire department."); § 29-212(i)(1)(i) ("Interior and exterior areas of the stable shall be kept clean, properly drained[,] and free of nuisances including, but not limited to, unreasonable and excessive odors and unreasonable accumulation of refuse and excreta."). Arkay's construction of *stable* would not prohibit smoking in 45 Pinckney Street's customer waiting, loading, and unloading areas that are directly adjacent to the horse stalls. Further, the fire department would only have to annually inspect the horse stalls instead of the entire building for fire hazards. Likewise, Arkay would only have to clean the horse stalls and the areas surrounding them, but not the sidewalk area on Pinckney Street. Accordingly, we find Arkay's interpretation leads to absurd results. *See Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (holding a court will reject an interpretation when it would lead to an absurd result that could not have been intended by the legislative body).

Based upon our review of the language of the relevant ordinances, we find the Council intended to apply the 100-foot separation requirement in subsection 54-206(p)(1) to a physical structure operating as a stable—such as the building at 45 Pinckney Street—and not merely to stalls that house the horses. The purpose of the various requirements of section 54-206(p) is to protect the health and safety of

city patrons and carriage horses, while distancing the unwelcome elements of a barn, including noise, odors, waste, drainage, and pests from residential areas. The circuit court's finding that the ordinance describes the stable in subsection 54-206(p)(1) as a use, rather than a physical structure, runs afoul of the purpose for which the ordinance was enacted. Therefore, mindful of our deferential standard of review, we hold the circuit court erred in reversing the Board's denial of Arkay's application for a special use exception. *See Gurganious*, 317 S.C. at 487, 454 S.E.2d at 916 (noting the appellate court gives "great deference to the decisions of those charged with interpreting and applying local zoning ordinances").

Likewise, we find the circuit court erred in relying upon the law of HPR in holding Arkay satisfied the separation requirement.[3]

Under the South Carolina Horizontal Property Act,[4] an owner of real property may establish an HPR through the recordation of a master deed. *See* S.C. Code. Ann. § 27-31-30 (2007). A property's conversion to an HPR divides the ownership interest in the property but does not subdivide the land itself. *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 274, 651 S.E.2d 617, 621 (Ct. App. 2007).

In our view, Arkay's proposed HPR for 45 Pinckney Street does not change the status of the building as a stable because it does not vertically subdivide the building itself. *See Penny Creek*, 375 S.C. at 274, 651 S.E.2d at 621 (concluding that, under an HPR, "the property and common areas remain intact and the owner

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[3] Arkay argues the circuit court did not rely upon its proposed HPR in holding that Arkay satisfied the 100-foot separation requirement. Arkay contends the proposed HPR was simply a showing of good faith to the Board, as well as the public, that no horse stalls would be located in Unit B on the north end of the building within 100 feet of a residential district. We disagree, however, because the circuit court specifically mentioned the HPR in holding the Board erred in measuring the separation distance from the access easement instead of the stabling use. The court also acknowledged the proposed restrictive covenant for Unit B—which could only be accomplished through the proposed HPR—would prohibit horses from being kept in Unit B.

[4] S.C. Code Ann. §§ 27-31-10 through -440 (2007 & Supp. 2015).

merely grants a share of his ownership interest in these areas to purchasers"). Unit B, the easement, the tack rooms, the restrooms, and the customer areas would all be underneath the roof of the building, and the building is within 100 feet of a residentially zoned district. Therefore, we find the court erred in considering Arkay's proposed HPR for 45 Pinckney Street in reaching its decision.

CONCLUSION

Based on the foregoing, because we find Arkay's proposed stable at 45 Pinckney Street failed to meet the separation requirement of subsection 54-206(p)(1), we hold the circuit court erred in reversing the Board's denial of Arkay's application for a special use exception to operate a carriage horse stable. Accordingly, the circuit court's order is

REVERSED.

HUFF, J., concurs.

THOMAS, J., dissenting: I respectfully dissent. I agree with the circuit court that the City of Charleston Board of Zoning Appeals erred in denying Arkay a special exception use permit.

This appeal involves the interpretation of section 54-206(p) of the City of Charleston Code of Ordinances (2015). The majority holds the circuit court erred in reversing the Board's denial of Arkay's application for a special use exception and bases this holding on (1) a deferential standard of review in deciding how to apply subsection 54-206(p)(1), under which a stable may operate as a special exception use in certain zoning districts if, among other criteria, "[t]he stable is not located within 100 feet of any residential zone district"; and (2) an examination of ordinances from the City of Charleston Tourism Ordinances. In reaching its decision, the majority finds the City Council intended to apply the 100-foot separation requirement to the building at 45 Pinckney Street, which, as the circuit court observed, is built on the "zero lot line" with its northern façade constructed flush with the sidewalk, rather than to the specific part of the building that would be used for Arkay's stable.

I agree with the majority that, as appellate tribunals, this court and the circuit court must "give great deference to the decisions of those charged with interpreting and

applying local zoning ordinances." *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). However, "[i]ssues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015); *see also Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) ("Although great deference is accorded the decisions of those charged with interpreting and applying zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" (quoting *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008))).

I would interpret section 54-206(p) solely through common sense scrutiny of its plain language and would not resort to subordinate rules concerning the construction of statutes. *See McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 584 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *Rabon v. S.C. State Highway Dep't*, 258 S.C. 154, 157, 187 S.E.2d 652, 654 (1972) (stating the rule that statutes are to be construed in pari materia "may be applied where there is an ambiguity to be resolved and not where . . . the meaning of the statute is clear and unambiguous").

Although buildings where horses are kept are commonly referred to as stables, a stable is different from other buildings because of the activities that take place within it, namely, the feeding, sheltering, and care of domestic animals. To include other uses such office space, restrooms, or a customer waiting area as part of a stable merely because they are housed within the same physical structure is not supported by any grammatical analysis or by any construction of any provision of the Charleston City Code.

Particularly significant in the present case is the final requirement in section 54-206(p) to obtain special exception approval for a stable. This requirement reads as

follows: "*Buildings* are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." Charleston, S.C. Code of Ordinances § 54-206(p)(7) (2015) (emphasis added). As the circuit court observed, the City Council, in using the word "building" when referring to a physical structure, "envisioned a physical circumstance such as is presented in this case, where the use of the property as a 'stable' is but one of several uses contained in a larger 'building.'" *See Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this [S]tate without the intention of thereby conveying some meaning."); *Nexsen v. Ward*, 96 S.C. 313, 321, 80 S.E. 599, 601 (1914) ("The rule sustained by all the courts requires that every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." (*quoted in Breeden v. TCW, Inc./Tenn. Express*, 355 S.C. 112, 120 n.7, 584 S.E.2d 379, 383 n.7 (2003))).

Furthermore, the specific requirement in subsection 54-206(p)(7) that "[b]uildings [be] designed using appropriate ventilation to prevent objectionable odors from being emitted" shows a recognition that stables are likely to be located in buildings that are also used for other purposes. To impose such sanitation measures on an entire building in which a stable is located shows prudent consideration of the need to avoid undesirable consequences that could not be avoided if such measures were required only within the stable itself.

The majority correctly notes that subsection 29-212(b)(12) of the City of Charleston Code of Ordinances (2015) defines "stable" as "the barn where the animals are kept." As I have previously noted, it is not necessary to construe this ordinance together with section 54-206(p) with the objective of producing "a single, harmonious result." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 470, 636 S.E.2d 598, 607 (2006). Nevertheless, in response to the majority's reliance on parts of the City of Charleston Tourism Ordinances to support its holding, I note the definitions provided in section 29-212(b) apply only "as used in this section" and, even within this limitation, do not apply "where the context clearly indicates otherwise." Charleston, S.C. Code of Ordinances § 29-212(b) (2015).

Finally, notwithstanding the reference in the appealed order to the proposed horizontal property regime and the finding based on the regime plot plan that the

100-foot separation requirement was satisfied, I agree with the respondents that there was no need to create a horizontal property regime in order to obtain a special exception use permit. Rather, the purpose of the regime is to provide assurance to the City and the public that the physical space where the horses would be kept, i.e., the stable in Unit A, will be at least 100 feet from the nearest residential district and in compliance with section 54-206(p).

I would therefore affirm the appealed order.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Darryl Frierson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-211091

ON WRIT OF CERTIORARI

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge
Clifton Newman, Post-Conviction Relief Judge

Opinion No. 5420
Heard September 8, 2015 – Filed June 29, 2016

AFFIRMED

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

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

MCDONALD, J.: Darryl Frierson (Petitioner) pled guilty to kidnapping, armed robbery, assault and battery of a high and aggravated nature (ABHAN), and criminal conspiracy. He appeals from the denial of his application for post-conviction relief (PCR), arguing the PCR court erred in not finding his guilty plea was involuntary due to counsel's failure to advise him he could move to suppress evidence stemming from the placement of a mobile tracking device on his car. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 10, 2007, Petitioner and his co-conspirators stole approximately 9.8 million dollars from an Express Tellers Services (ETS) armored truck. ETS employees David Jones (Jones) and Petitioner drove the truck from Charleston to Columbia, where two co-conspirators—Jeremy McPhail (McPhail) and Dominic Lyde (Lyde)—attacked Jones while he refueled, pushed him into the truck, and restrained him. The co-conspirators drove the truck away and stopped in a field, where two other co-conspirators—Domonique Blakney (Domonique) and Kelby Blakney (Kelby)—transferred money from the truck into a different car, left Jones and Petitioner in the truck, and fled.

Despite suffering substantial injuries, Jones was able to free himself and walk to a nightclub to call the police. Officers responding to the scene found Petitioner still inside the armored truck. Petitioner self-reported injuries and was transported to the hospital, where a team of investigators came to interview him.

Petitioner provided a fictitious account of the incident that immediately alerted investigators to the possibility of dishonesty. For example, although it was dark outside at the time of the heist and Petitioner alleged he was too injured to escape the abandoned armored car, he provided a very detailed account of the surrounding crime scene. During a follow-up interview at the police station, officers became more suspicious when they saw Petitioner through the two-way mirror freely moving his arm, despite his claims of injury to his arm and shoulder. Petitioner failed a polygraph test and had no duct tape residue or significant injuries such as those suffered by Jones. At this point, the investigative team at the police station determined Petitioner was a suspect, not a victim, and placed a Global Positioning System (GPS) tracking device on Petitioner's car—without a warrant or court order—before he left the police department.

Although the Richland County Sheriff's Department's led the detectives working on the case, dozens of additional law enforcement officers from across the state took part in the investigation. While Petitioner was being interviewed at the station, a separate team of officers was examining the armored truck. They collected a blue latex glove from inside the truck that was identical to a glove found in the trash abandoned on the street outside Petitioner's house. In addition, officers interviewing other ETS employees learned that Paul Whitaker (Whitaker), another co-conspirator,[1] and Petitioner were friends. When police questioned Whitaker, he became upset, started crying, and immediately confessed to his role in the scheme. According to Whitaker's statement, Petitioner had been planning to rob the armored truck for several months. Police searched Whitaker's house, where they discovered a large amount of cash and receipts from Petitioner's recent purchases. Based on Whitaker's confession and the evidence gathered at his home, police obtained a warrant for Petitioner's arrest.

Monitoring the tracking device on Petitioner's car, police located him driving with Domonique and found several thousand dollars in cash in the car. Police arrested Petitioner and interviewed Petitioner and Domonique in separate rooms at the police department. On Domonique's cell phone, officers found pictures of large bags of money. Domonique subsequently gave a statement admitting his role in the robbery and implicating Petitioner as the "mastermind." After police told Petitioner about Domonique's statement, Petitioner waived his rights and confessed to his involvement in the heist.

In September 2007, a grand jury indicted Petitioner for kidnapping, armed robbery, ABHAN, and criminal conspiracy. Domonique, Kelby, McPhail, Lyde, and Whitaker were also indicted for their involvement in the conspiracy.

On December 3, 2008, Petitioner pled guilty to all charges. At the plea hearing, Petitioner acknowledged he understood that by pleading guilty he was waiving his constitutional rights, including his right to challenge the State's evidence at trial. Petitioner also stated he was satisfied with plea counsel's representation. He

[1] Whitaker's role was to field phone calls from the armored truck at ETS headquarters to delay detection of the robbery and provide the co-conspirators time to flee.

testified plea counsel reviewed with him and explained his charges, his potential sentences, and his constitutional rights, allowing him to make an informed and intelligent decision about whether to plead guilty or proceed to trial. The plea court accepted Petitioner's guilty plea but deferred sentencing until a later proceeding.

On August 24, 2009, the plea court sentenced Petitioner to concurrent sentences of thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, and ten years' imprisonment for ABHAN, as well as a consecutive sentence of five years' imprisonment for criminal conspiracy.

Petitioner filed a PCR application, alleging ineffective assistance of counsel. At the PCR hearing, Petitioner testified that plea counsel's lack of confidence about the outcome of a trial prompted Petitioner to plead guilty despite his desire to go to trial. Petitioner also stated plea counsel influenced him to plead guilty by telling him his co-defendants would testify against him at trial.

Petitioner further testified he asked plea counsel to research the legality of the placement of the GPS tracking device because damaging evidence stemmed from the use of the device. According to Petitioner, plea counsel did not discover section 17-30-140 of the South Carolina Code (2014), which requires a warrant or court order for the placement of tracking devices. Plea counsel told Petitioner the placement of the tracking device on the outside of the vehicle was legal based on his research. However, Petitioner testified he would not have pled guilty and would have proceeded to trial if plea counsel had advised him of section 17-30-140 and his ability to challenge the search and use of the resulting evidence.

Plea counsel testified he advised Petitioner to plead guilty because he believed Petitioner's chances of succeeding at trial were "very slim" based on his statement confessing to his involvement in the plan and the likelihood his co-conspirators would have testified against him. Plea counsel explained he researched the constitutionality of the tracking device after learning it was installed without a warrant or court order, however, he was unable to find any South Carolina case law addressing the issue. Plea counsel explained that in light of *United States v.*

Knotts[2] and the placement of the tracking device on the outside of Petitioner's vehicle, he believed Petitioner's Fourth Amendment rights were not implicated.

Plea counsel admitted he was unaware of section 17-30-140 at the time of Petitioner's plea, did not find it in his research, and did not discuss it with Petitioner. He further testified, however, that he believed the statute was applicable to Petitioner's case and could have been used in an attempt to suppress some of the incriminating evidence. Plea counsel asserted that if he had been aware of section 17-30-140, he would have filed a motion to suppress Petitioner's confession and his co-defendants' confessions, arguing they were the fruit of the poisonous tree stemming from the warrantless use of the tracking device. Plea counsel contended Petitioner's confession was the most damaging evidence against him, and he believed Petitioner would have had a "fighting chance" at trial if a motion to suppress the confession had succeeded.

The PCR court denied Petitioner's PCR application, finding he failed to prove deficient performance or resulting prejudice. It found plea counsel's testimony was credible while Petitioner's testimony was "wholly incredible." Analyzing the deficiency prong set forth in *Strickland v. Washington*,[3] the PCR court found plea counsel "performed extensive investigation into the GPS monitoring issue" and reasonably relied on Supreme Court case law in determining there was no Fourth Amendment violation "based on the status of the law at the time." It found plea counsel fully advised Petitioner about the ability to challenge the evidence based on his research.

Analyzing the prejudice prong, the PCR court found Petitioner failed to demonstrate he would have proceeded to trial but for counsel's failure to discover the statute and challenge the placement of the tracking device. Moreover, the PCR

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[2] 460 U.S. 276 (1983) (holding police's placement and monitoring of a tracking beeper in a container of chemicals that the defendant later placed in his car was neither a search nor a seizure under the Fourth Amendment because the device only exposed information about the defendant's movements on public roads, for which there was no reasonable expectation of privacy).

[3] 466 U.S. 668, 687 (1984) (setting forth the two-pronged test of deficient performance and prejudice that a PCR applicant must satisfy to establish ineffective assistance of counsel).

court found that even if plea counsel had successfully achieved the suppression of the evidence stemming from the tracking device, the outcome of Petitioner's case would not have been different because there was overwhelming evidence of his guilt.

Petitioner sought a writ of certiorari, which this court granted on February 22, 2014.

STANDARD OF REVIEW

In a PCR proceeding, the applicant has the burden of establishing he is entitled to relief. *Terry v. State*, 383 S.C. 361, 370, 680 S.E.2d 277, 282 (2009). An appellate court gives great deference to a PCR court's findings of fact and conclusions of law. *Id.* at 371, 680 S.E.2d at 282. "[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* "[An appellate court] gives great deference to a PCR [court's] findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

LAW AND ANALYSIS

Petitioner argues plea counsel was deficient in failing to locate section 17-30-140 and failing to advise Petitioner of his ability to challenge the admissibility of his confession and other critical evidence. Petitioner further argues the PCR court erred in finding he was not prejudiced because the evidence established a reasonable probability that he would have not have pled guilty and would have proceeded to trial but for counsel's deficiency. We disagree.

Clearly, a defendant entering a guilty plea is entitled to the effective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). To establish a claim of ineffective assistance, however, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have

pled guilty, but would have insisted on going to trial." *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

In the context of a guilty plea, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Ordinarily, a PCR applicant must show some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). "In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59.

Like the PCR court, in conducting the prejudice analysis, we must consider the evolution of our Fourth Amendment jurisprudence applicable to the use of tracking devices on public roadways. Our supreme court recently considered this history in *State v. Adams*, explaining,

> In *Knotts*, law enforcement, with the owner's consent, concealed a beeper in a container of chloroform that was eventually loaded onto a target vehicle. Law enforcement then monitored the beeper and maintained surveillance on the target vehicle, ultimately arresting Knotts several days after he took possession of the container. The Supreme Court found no Fourth Amendment violation, upholding the warrantless use of the beeper because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."
>
> One year later, in *Karo*,[4] the Supreme Court "addressed the question left open by *Knotts*, whether the installation

[4] *United States v. Karo*, 468 U.S. 705 (1984).

> of a beeper in a container amounted to a search or seizure." In *Karo*, law enforcement officers installed a beeper inside a container of chemicals prior to the container being transferred to the buyer. "As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later." The Court held that, because the beeper was installed with the consent of the owner of the container, no search or seizure occurred because "[t]he mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest."

409 S.C. 641, 651–52, 763 S.E.2d 341, 347 (2014) (citations omitted) (footnote omitted).

In 2002, as part of the South Carolina Homeland Security Act,[5] the legislature enacted a statute outlining the requirements for obtaining authorization for the placement of a GPS tracking device. S.C. Code Ann. § 17-30-140 (2014). Pursuant to the statute, "[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State." § 17-30-140(A). "Upon application made as provided under subsection (B), the court, upon finding that the certification and statements required by subsection (B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device." § 17-30-140(C). "The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section." § 17-30-140(E).

In 2012, the United States Supreme Court decided *United States v. Jones*, which upheld the reversal of a defendant's conviction on drug trafficking conspiracy charges. 132 S. Ct. 945 (2012). There, the Court found the government's

[5] Act No. 339, 2002 S.C. Acts 3619.

warrantless installation of a GPS tracking device on defendant's vehicle and its use of the device to monitor the vehicle's movements constituted a Fourth Amendment search. *Id.* at 949. Rejecting the government's argument that portions of the tracking of the Jeep Grand Cherokee's movement occurred upon public streets—on which defendant would have no reasonable expectation of privacy under the tracking device analysis of *Knotts*—the Supreme Court held the government's intrusion on an "effect" (the Cherokee) for the purpose of obtaining tracking information constituted a search. *Id.*; *see also* U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

Thereafter, our supreme court decided *Adams*, *supra*, which considered a motion to suppress drug evidence stemming from the placement of a GPS tracking device on the defendant's car without a warrant or court order. 409 S.C. 641, 763 S.E.2d 341. Concluding *Knotts* was not binding precedent[6] authorizing the officers' warrantless placement of the GPS tracking device, the supreme court held, "Because the only binding law in this case was a statute that *forbade* law enforcement officers from installing a GPS device on [the defendant's] car without court authorization, there is no support for the State's invocation of the good-faith reliance exception as an additional sustaining ground to uphold the conviction." *Id.* at 653, 763 S.E.2d at 348. An "intervening acts" argument was likewise rejected because "Adams' traffic violations provide[d] an insufficient attenuation from the taint of the illegal search. The traffic stop was entirely predicated on the information obtained from the GPS device and law enforcement's desire to search Adams and his vehicle for drugs." *Id*. at 648, 763 S.E.2d at 345.

Relying upon *Jones* and *Adams*, Petitioner argues counsel was ineffective in failing to locate section 17-30-140 and advise Petitioner of the possibility of moving to suppress based upon officers' failure to comply with its statutory warrant requirement. However, even if plea counsel was deficient in failing to advise Petitioner of section 17-30-140 in conjunction with their discussions of moving to suppress and attempting to challenge the legality of the GPS monitoring at trial, we find probative evidence supports the PCR court's finding that Petitioner failed to prove the prejudice necessary to support the granting of post-conviction relief. *See*

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[6] The United States Supreme Court decided *United States v. Jones* during the pendency of Adams' appeal.

Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Although Petitioner asserted he would have proceeded to trial had plea counsel advised him of the statute, the PCR court found Petitioner's testimony "wholly incredible." *See Simuel*, 390 S.C. at 270, 701 S.E.2d at 739 ("[An appellate court] gives great deference to a PCR [court's] findings where matters of credibility are involved."); *Stalk*, 383 S.C. at 563, 681 S.E.2d at 595 ("[The] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial."); *Hill*, 474 U.S. at 59 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). At the time of Petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was an unsettled question of law; the United States Supreme Court had not decided *Jones*, and our supreme court had not decided *Adams*.

Instead, *Knotts* provided authority suggesting the placement of a GPS tracking device on the outside of a vehicle might not have been a constitutional violation, and other South Carolina courts considering the question before *Jones* found no constitutional violation under such circumstances. *See United States v. Narrl*, 789 F. Supp. 2d 645, 652 (D.S.C. 2011) ("*Knotts* is clear that the use of a tracking device to track a person's movements on public roads is not a violation of that person's Fourth Amendment rights."). As no clear authority concluded that the placement of a tracking device on a vehicle without a court order was a Fourth Amendment violation at the time of Petitioner's plea, we find Petitioner failed to establish a reasonable probability that he would have prevailed at a suppression hearing despite the violation of the statute. *See Hutto v. State*, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010) (stating the exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations); *Rollison v. State*, 346 S.C. 506, 509–10, 552 S.E.2d 290, 292 (2001) (holding counsel's failure to investigate the circumstances surrounding the legality of a weapons frisk and advising applicant to plead guilty did not prejudice him). Because probative evidence supports the PCR court's finding that Petitioner failed to prove prejudice because he did not establish a reasonable probability he would have proceeded to trial instead of pleading guilty but for counsel's errors, we uphold the decision of

the PCR court. *See Terry*, 383 S.C. at 371, 680 S.E.2d at 282 ("[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.").

Moreover, we find probative evidence supports the PCR court's finding that even if counsel had been successful in suppressing the evidence found as a result of the GPS tracking device, due to the overwhelming evidence of Petitioner's guilt, the outcome of Petitioner's case would have been no different had he chosen to proceed to trial. *See Hutto*, 387 S.C. at 249, 692 S.E.2d at 198 ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt.").[7] Although police used the GPS tracking device to locate Petitioner to execute the arrest warrant, police obtained the arrest warrant through other aspects of the investigation independent of the tracking device. Police considered Petitioner a suspect because of his suspicious behavior and lack of injuries after the robbery, they located a glove outside Petitioner's house matching a glove from the armored truck, and Whitaker broke down and told police that Petitioner had been planning the heist for several months. Even if counsel had been successful in having Petitioner's own confession suppressed, Petitioner would likely have lacked standing to challenge the pictures of money from Domonique's phone, and the co-defendants' statements would have been admissible against him. These independent aspects of the investigation, as well as the other evidence unrelated to the GPS tracker that police developed against Petitioner, provide further probative

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[7] We resolve this matter in reliance upon the "prejudice" prong of the *Strickland* analysis. However, like the PCR court, we recognize the clarification of our Fourth Amendment jurisprudence with respect to the warrantless placement of tracking devices in *United States v. Jones* and *State v. Adams* occurred some years after Petitioner's guilty plea. Our courts have "never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 456 (1994) *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *see also Robinson v. State*, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense).

evidence supporting the PCR court's finding that Petitioner failed to establish prejudice. *See Terry*, 383 S.C. at 371, 680 S.E.2d at 282 ("[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.").

CONCLUSION

We conclude probative evidence supports the PCR court's finding that Petitioner failed to establish ineffective assistance of counsel. Accordingly, the decision of the PCR court is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.