Judicial Merit Selection Commission

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Erin B. Crawford, Chief Counsel
Emma Dean, Counsel

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M E D I A   R E L E A S E
AMENDED
June 26, 2020

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

The term of office currently held by the Honorable James E. Lockemy, Judge of the Court of Appeals, Seat 5, will expire June 30, 2021.

The term of office currently held by the Honorable Aphrodite K. Konduros, Judge of the Court of Appeals, Seat 6, will expire June 30, 2021.

A vacancy will exist in the office currently held by the Honorable Thomas E. Huff, Judge of the Court of Appeals, Seat 8, upon his retirement on or before December 31, 2021. The successor will serve the remainder of the unexpired term, which expires June 30, 2024.

A vacancy will exist in the office currently held by the Honorable Roger E. Henderson, Judge of the Circuit Court, Fourth Judicial Circuit, Seat 2, upon his retirement on or before December 31, 2021. The successor will serve the remainder of the unexpired term, which expires June 30, 2024.

The term of office currently held by the Honorable Robert Eldon Hood, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 3, will expire June 30, 2021.

The term of office currently held by the Honorable Roger M. Young, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 3, will expire June 30, 2021.

A vacancy will exist in the office currently held by the Honorable Robin B. Stilwell, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 3, upon his retirement on or before June 30, 2021. The successor will serve a new term of that office, which will expire June 30, 2027.

A vacancy will exist in the office currently held by the Honorable Perry M. Buckner III, Judge of the Circuit Court, Fourteenth Judicial Circuit, Seat 1, upon his retirement on or before

August 15, 2020. The successor will serve the remainder of the unexpired term, which expires June 30, 2024.

The term of office currently held by the Honorable Carmen Tevis Mullen, Judge of the Circuit Court, Fourteenth Judicial Circuit, Seat 2, will expire June 30, 2021.

The term of office currently held by the Honorable Benjamin H. Culbertson, Judge of the Circuit Court, Fifteenth Judicial Circuit, Seat 2, will expire June 30, 2021.

The term of office currently held by the Honorable George Marion McFaddin Jr., Judge of the Circuit Court, At-Large, Seat 1, will expire June 30, 2021.

The term of office currently held by the Honorable Ryan Kirk Griffin, Judge of the Circuit Court, At-Large, Seat 2, will expire June 30, 2021.

The term of office currently held by the Honorable Clifton Newman, Judge of the Circuit Court, At-Large, Seat 3, will expire June 30, 2021.

The term of office currently held by the Edward W. (Ned) Miller, Judge of the Circuit Court, At-Large, Seat 4, will expire June 30, 2021.

The term of office currently held by the Honorable J. Mark Hayes II, Judge of the Circuit Court, At-Large, Seat 5, will expire June 30, 2021.

The term of office currently held by the Honorable William H. Seals Jr., Judge of the Circuit Court, At-Large, Seat 6, will expire June 30, 2021.

The term of office currently held by the Honorable J. Cordell Maddox Jr., Judge of the Circuit Court, At-Large, Seat 7, will expire June 30, 2021.

The term of office currently held by the Honorable David Craig Brown, Judge of the Circuit Court, At-Large, Seat 8, will expire June 30, 2021.

The term of office currently held by the Honorable Jennifer Blanchard McCoy, Judge of the Circuit Court, At-Large, Seat 9, will expire June 30, 2021.

The term of office currently held by the Honorable Jocelyn Newman, Judge of the Circuit Court, At-Large, Seat 10, will expire June 30, 2021.

A vacancy will exist in the office currently held by the Honorable Thomas A. Russo, Judge of the Circuit Court, At-Large, Seat 12. The successor will serve the remainder of the unexpired term, which expires June 30, 2026.

A vacancy will exist in the office currently held by the Honorable Phillip K. Sinclair, Judge of the Family Court, Seventh Judicial Circuit, Seat 1, upon his retirement on or before July 31, 2020. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

A vacancy will exist in the office currently held by the Honorable Harold W. (Bill) Funderburk Jr., Judge of the Administrative Law Court, Seat 3, upon his retirement on or before December 31, 2021. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

The term of office currently held by the Sebastian Phillip Lenski, Judge of the Administrative Law Court, Seat 6, will expire June 30, 2021.

The term of office currently held by the Honorable Marvin H. Dukes III, Master-in-Equity, Beaufort County, will expire June 30, 2021.

The term of office currently held by the Honorable Martin R. Banks, Master-in-Equity, Calhoun County, will expire August 14, 2021.

The term of office currently held by the Honorable Charles B. Simmons Jr., Master-in-Equity, Greenville County, will expire December 31, 2021.

The term of office currently held by the Honorable James B. Jackson Jr., Master-in-Equity, Orangeburg County, will expire August 14, 2021.

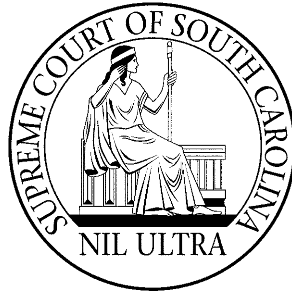
The term of office currently held by the Honorable Joseph M. Strickland, Master-in-Equity, Richland County, will expire April 30, 2021.

A vacancy will exist in the office currently held by the Honorable Gordon G. Cooper, Master-in-Equity, Spartanburg County. The successor will serve a new term of that office, which will expire June 30, 2027.

The term of office currently held by the Honorable Teasa Kay Weaver, Master-in-Equity, York County, will expire June 30, 2021.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Note that an email will suffice for written notification. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 1, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Robin Renee Herndon, Petitioner.

Appellate Case No. 2019-000467

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 27986
Heard February 12, 2020 – Filed July 1, 2020

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General William F. Schumacher IV, both of Columbia; and Eleventh Circuit Solicitor Samuel R. Hubbard III, of Lexington, for Respondent.

JUSTICE KITTREDGE: In 2013, this Court held that in a criminal prosecution that includes circumstantial evidence:

> [T]rial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:
>
> > There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
> >
> > Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, . . . the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.[1] If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
> >
> > The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

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[1] Originally, this sentence stated that "*all of* the circumstances must be consistent with each other," but we hereby modify the *Logan* charge by deleting the two italicized words. We make this change because we are concerned the phrase "all of the circumstances" could be construed to invade the fact-finding role of the jury. It should be left to the jury—aided by arguments of the lawyers—to determine whether a conflict between circumstances is sufficiently significant to give rise to reasonable doubt.

State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013).

Following the *Logan* decision, Petitioner Robin Herndon, who was then a law enforcement officer, shot and killed her live-in boyfriend, Christopher Rowley (the victim), allegedly in self-defense. Petitioner was tried for murder; the case against Petitioner was largely circumstantial. Petitioner requested the *Logan* circumstantial evidence charge, but the trial court refused, opting instead for the pre-*Logan* circumstantial evidence charge.

Petitioner was convicted of voluntary manslaughter. On appeal, there has been no contention that the trial court properly refused to give the *Logan* charge. Instead, the State contends the erroneous failure to give the *Logan* charge was harmless, for the jury instructions as a whole were substantially correct. The court of appeals summarily accepted the State's argument and affirmed. *State v. Herndon*, Op. No. 2018-UP-458 (S.C. Ct. App. filed Dec. 12, 2018). We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision. We now reverse and remand for a new trial.

I.

The victim was prone to severe mood swings, aggression, and uncontrolled anger, and he admitted to his physician that he physically abused Petitioner.[2] He was diagnosed with bipolar disorder and placed on medication.

On the day of the incident, the victim was not taking his medication and was behaving in an aggressive manner, which led to an argument between Petitioner and the victim. Several neighbors witnessed the beginning of the argument, when the victim confronted Petitioner in their front yard. The argument moved inside

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[2] The record contains compelling evidence of the victim's physical abuse of Petitioner aside from his own admission. As a law enforcement officer, Petitioner worked in the domestic violence unit, dealing extensively with battered women. According to her testimony at trial, her work history caused her to become deeply ashamed when she became a domestic violence victim herself. As a result, despite the contemporaneous physical evidence of abuse that was apparent to others, Petitioner refused to confirm she was in an abusive relationship until after the victim's death.

the residence out of view of the neighbors. According to Petitioner, after they retreated into the residence, the victim repeatedly punched her, and she drew her service weapon and warned the victim to leave. Petitioner testified the victim then charged at her, swatting at the gun. The gun discharged,[3] striking and killing the victim.

An autopsy of the victim did not definitively determine how the fatal injury occurred. The pathologist concluded the trajectory of the bullet was equally consistent with at least two scenarios: (1) Petitioner shooting the victim as he walked up the steps of the house, or (2) the victim charging toward Petitioner when he was shot. The State elected to charge Petitioner with murder based on the first possible scenario.

At trial, the State theorized Petitioner had fabricated the victim's chronic physical abuse toward her, placing emphasis on Petitioner's failure to report the abuse prior to the shooting and her habit of hiding any contemporaneous injuries. As a result, the State argued Petitioner was not entitled to an acquittal. Nevertheless, the trial court charged the jury on both self-defense and accident.

As noted, because the State's case was circumstantial, Petitioner specifically requested the charge set forth in *Logan*. The trial court denied the request, stating "I'll go with the charge that's in the desk book. It seems very similar, so I will not charge [the *Logan* charge]." After the jury returned its verdict, the trial court sentenced Petitioner to nineteen years' imprisonment for manslaughter.[4]

II.

When requested, the *Logan* charge must be given in cases based in whole or part on circumstantial evidence. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452.

[3] Petitioner's theory of the case was that she acted in self-defense, or, in the alternative, the gun fired by accident after the victim hit it.

[4] It is significant to note that—despite the State denigrating Petitioner's claims of physical abuse at the hands of the victim—the trial court found by a preponderance of the evidence that Petitioner was eligible for early parole based on the fact she was a victim of domestic violence. *See* S.C. Code Ann. § 16-25-90 (2015) (stating a victim of domestic violence convicted of an offense against a household member is eligible for parole after serving one-fourth of his or her prison term).

Notwithstanding the mandatory language in *Logan*, erroneous jury instructions remain subject to an appellate court's authority to "consider[] the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *Id.* at 90, 747 S.E.2d at 448. "To warrant reversal, a trial [court's] refusal to give a requested jury charge must be both erroneous and prejudicial . . . ." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) (citation omitted). "However, if the trial [court] refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (citation omitted).

III.

We agree with Petitioner that the "charge as a whole" approach cannot rescue this conviction. Over the years, the circumstantial evidence charge in South Carolina has evolved significantly. *See Logan*, 405 S.C. at 95–97, 747 S.E.2d at 450–51 (setting forth the full history of the evolution). In relevant part, it was initially required that circumstantial evidence point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. *See, e.g.*, *State v. Kimbrell*, 191 S.C. 238, 242, 4 S.E.2d 121, 122 (1939) (citing *State v. Langford*, 74 S.C. 460, 55 S.E. 120 (1906); *State v. Hudson*, 66 S.C. 394, 44 S.E. 968 (1903); *State v. Aughtry*, 49 S.C. 285, 26 S.E. 619 (1897)). Subsequently, in response to guidance from the Supreme Court of the United States,[5] the Court removed this requirement, instead ordering trial courts to instruct juries that circumstantial evidence must be given the same weight and treatment as direct evidence (the *Grippon* charge). *See State v. Grippon*, 327 S.C. 79, 83–84, 489 S.E.2d 462, 464 (1997); *see also State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004) (holding the *Grippon* charge was to be the "sole and exclusive" one to be given in circumstantial evidence cases from that time forward).

However, in *Logan*, the Court posited that there are different approaches used to analyze direct and circumstantial evidence. *Logan*, 405 S.C. at 97, 747 S.E.2d at 451. The Court reasoned that "evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in

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[5] *See Holland v. United States*, 348 U.S. 121, 139–40 (1954) (holding if a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt).

order to prove the proposition propounded—a process not required when evaluating direct evidence." *Id.* The Court found that "defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction." *Id*. at 99, 747 S.E.2d at 452. Therefore, we held the trial court "should" give the specific charge provided in the *Logan* decision, quoted in the introduction of this opinion, when requested. *See id.* (explaining the Court's "holding does not prevent the trial court from issuing the [*Grippon* charge]. *However, trial courts may not exclusively rely on that charge over a defendant's objection.*" (emphasis added)).

We acknowledge there may be a case in which a trial court's failure to give the *Logan* charge might be harmless error, but this is not such a case. The State's case against Petitioner was almost exclusively circumstantial. The State relied on (1) eyewitness testimony prior to the shooting to suggest Petitioner was angry, and (2) testimony from the pathologist explaining the pathway of the bullet *could* have been caused by Petitioner shooting the victim as he walked up the stairs to the house. In urging this Court to find the error was harmless, the State entirely disregards the testimony of its own witness that it was plausible the fatal wound could have been caused by the victim charging Petitioner, exactly as Petitioner testified.[6]

The competing inferences involved in this circumstantial evidence case illustrate well the need for the *Logan* charge. Because the failure to provide the *Logan* circumstantial evidence charge was not harmless and that failure manifestly prejudiced Petitioner, we reverse and remand for a new trial.

REVERSED AND REMANDED.

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

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[6] As an appellate court, we must be careful not to weigh the evidence. In assessing the State's harmless error argument, we recognize that what we refer to as plausible conflicting evidence may not be viewed as such by the jury. Fundamental to a jury's role as fact-finder is making credibility determinations, which lie in the sole province of the jury. Our discussion here is for the limited purpose of explaining why the failure to give the *Logan* charge cannot be considered harmless.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Doe, an adult woman over the age of 18,
Respondent,

v.

TCSC, LLC, d/b/a Hendrick Toyota of North Charleston,
Appellant.

Appellate Case No. 2017-001216

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5733
Heard November 13, 2019 – Filed July 1, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Edward D. Buckley, Jr., Stephen Lynwood Brown, Russell Grainger Hines, and Nicholas James Rivera, all of Young Clement Rivers, of Charleston, for Appellant.

Mark A. Mason and Anthony Edward Forsberg, both of The Mason Law Firm, PA, of Mount Pleasant, for Respondent.

HILL, J.: When Jane Doe bought a new car in 2011 from Appellant TCSC, LLC, d/b/a Hendrick Toyota of North Charleston (Dealer), like most every consumer she

signed a sheaf of documents to close the sale. One of these documents was a one page Arbitration Agreement. Four and one-half years later, Doe returned to the dealership to have the car serviced. She also spoke with a salesman about trading in her 2011 car for a new one. Despite the salesman's persistent pitches, Doe decided to buy elsewhere. The rebuffed salesman, for reasons known only to him, sought revenge by posting an ad posing as Doe on a sexually explicit website, together with Doe's contact information. Minutes later, Doe began receiving strange telephone calls and text messages, some of which were sexually suggestive. An investigation linked the harassment to the ad the salesman had placed. Doe brought this lawsuit against Dealer, alleging an array of torts based on *respondeat superior*.

Dealer moved to compel arbitration of Doe's claims, based on the Agreement, specifically the following sentence:

> Any claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of this vehicle, your purchase, lease agreement, or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The circuit court denied the motion, finding the Agreement unconscionable. Dealer appealed. The question now before us is whether the parties intended for the court or an arbitrator to decide the threshold issue of whether the Agreement is valid and enforceable. Based on the parties' intent and the mandate of the Federal Arbitration Act (FAA) requiring courts to honor parties' valid contractual choices, we conclude the issue is for the court. We further affirm the trial court's finding of unconscionability, but on different grounds and only as to a portion of the Agreement. We sever that portion, and hold the issue of whether Doe's dispute is covered by the revised Agreement is for an arbitrator, as the parties clearly and unmistakably delegated the issue of the interpretation and scope of the Agreement to an arbitrator.

I.

A. The FAA

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability *de novo*, but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016). The parties agree the contract is governed by the FAA, the relevant portion of which states:

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

9 U.S.C. § 2 (2018).

Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (arbitrator rather than court must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced; but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 requires the court to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"). Here, though, the arbitration provision is the entire contract, so we cut to the next question: whether the contract constitutes a valid agreement to arbitrate. Because the FAA does not require parties to arbitrate when they have not agreed to do so, the inquiry at this stage is twofold: whether a valid agreement exists and who the parties have deemed should make the validity determination.

The FAA presumes parties intend that the court, rather than an arbitrator, will decide "gateway" issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The parties may, of course, delegate these gateway issues to an arbitrator as long as there is "clear and unmistakable" evidence of such delegation. *Id.* at 944–45; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). If such a delegation occurred, the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

According to Dealer, the parties clearly and unmistakably agreed to delegate the issue of the validity and enforceability of the arbitration provision to the arbitrator. Therefore, Dealer asserts, the court has no right to rule upon this gateway issue. We disagree. In the delegation clause here, the parties empowered the arbitrator to resolve only the limited gateway issues of "the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute." The parties did not delegate the decision of whether the Agreement was valid and enforceable. After all, one cannot "interpret" an invalid contract. This omission removes the Agreement from the reach of *Rent-A-Center*, which addressed a delegation clause giving the arbitrator the exclusive authority to resolve any dispute relating to the "enforceability" of the agreement "including . . . any claim that all or any part of this [a]greement is void or voidable." The Court held that unless a party focused its unconscionability challenge on the delegation clause itself (rather than the arbitration agreement generally), a court must treat the delegation clause "as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72.

Consistent with *Rent-A-Center*, because it is clear and unmistakable the delegation clause committed disputes over the "interpretation and scope" of the Arbitration Agreement and issues of "arbitrability of the claim or dispute" to the arbitrator, the FAA requires us to honor that agreement and leave resolution of these discrete gateway issues to the arbitrator. But because the parties' delegation clause did not mention who decides the gateway validity and enforceability issues, we must honor the parties' choice to leave these to the court. Without an express delegation of these

issues to the arbitrator, there is no delegation of them that § 2 requires the court to carry out. Instead, it remains for the court to decide whether the Agreement is valid. *See Schein*, 139 S. Ct. at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126, 713 S.E.2d 799, 804 (Ct. App. 2011) (where arbitration clause did not expressly submit issues relating to validity, existence, and scope of arbitration agreement to arbitrator, FAA reserved such gateway issues to court), *aff'd in part, vacated in part on other grounds*, Op. No. 27386 (S.C. Sup. Ct. filed Jan. 29, 2014) (Shearouse Adv. Sh. No. 19 at 18). This is consistent with § 4 of the FAA that a court may only order arbitration to proceed if it is satisfied the "making" of the arbitration agreement is not "in issue."

Arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. *Rent-A-Center* classified delegation clauses as simply miniature arbitration agreements, "and the FAA operates on this additional arbitration agreement just as it does on any other." 561 U.S. at 70; *see also Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Put another way, the FAA does not allow a court to make parties delegate issues they have not agreed to delegate. To read *Rent-A-Center* as Dealer does would mean an arbitration agreement containing any type of delegation clause invariably means the issue of the validity of the arbitration agreement is exclusively for the arbitrator to decide. Such a reading mocks not only §§ 2 and 4, but the choice of the parties to *not* refer that gateway decision to an arbitrator.

Likewise, we cannot accept Dealer's argument that the appearance of the word "arbitrability" in the delegation clause is clear and unmistakable evidence that the parties intended the arbitrator determine the validity of the Agreement. Had the delegation clause stated the arbitrator was to determine the "arbitrability" of the Agreement (rather than the dispute), we might agree the parties had agreed to delegate the issue of the validity and enforceability of the Agreement to the arbitrator. But we would still not be able to find the delegation "clear and unmistakable," in part because the Court has assigned multiple meanings to the term "arbitrability," rendering its meaning ambiguous at best. The term is not defined in the Agreement, nor does it even appear in the FAA. It was defined, in a roundabout manner, in *Howsam v. Dean Witter Reynolds, Inc.*, which identified two gateway questions of "arbitrability" that courts must decide unless the parties have clearly

and unmistakably agreed otherwise: whether the parties are bound by a given arbitration clause, and "whether an arbitration clause *in a concededly binding contract* applies to a particular type of controversy." 537 U.S. 79 (2002) (emphasis added); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (noting courts assume parties intend that courts rather than arbitrator will decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."). As we have held, the delegation clause here clearly and unmistakably referred this second arbitrability question to an arbitrator. To conclude the mere presence of the word "arbitrability" referred both questions to the arbitrator would require applying some type of implied delegation principle, rather than the controlling "clear and unmistakable" standard. *Rent-A-Center* did not hold a delegation clause that does not delegate the validity issue removes the court's ability to rule upon validity challenges to the arbitration agreement. 561 U.S. at 71 ("But that agreements to arbitrate are severable does not mean they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.").

Because we hold the parties did not expressly delegate the gateway issue of the validity of the Agreement to the arbitrator, we will now consider whether the Agreement is valid.

II.

A. Validity of the Agreement under South Carolina contract law

In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, we apply general principles of state contract law. *First Options*, 514 U.S. at 944. In South Carolina, a "valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). We find the parties here had a meeting of the minds as to the essential and material terms of the Arbitration Agreement. Although the Agreement is silent as to the material element of its duration, that merely made the contract terminable at will by either party upon reasonable notice to the other, and Doe gave no notice of termination. *See Childs v. City of Columbia*, 87 S.C. 566, 572, 70 S.E.2d 296, 298 (1911).

i. Unconscionability

But finding the parties minds met does not end our review because a contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). To prove the arbitration provision unconscionable, Doe must show that (1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). While we analyze both prongs, they invite similar proof and often overlap, and "if more of one [prong] is present, then less of the other is required." *Farnsworth on Contracts* § 29.4 at 4-212 (2020-1 Supp.); *see Corbin on Contracts* § 29.4 at 388 (2002 ed.) (noting "most cases do not fall neatly" into categorical boxes). Unconscionability is gauged at the time the contract was made.

a. Meaningful choice of accepting contract terms

Determining whether Doe meaningfully chose to arbitrate involves sizing up "the fundamental fairness of the bargaining process." *Smith v. D.R. Horton, Inc*., 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Accordingly,

> courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson, 373 S.C. at 25, 644 S.E.2d at 669. We also consider whether the parties were represented by independent counsel. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4. The distinguished circuit judge made factual findings related to these factors, which we may only upset if they lack reasonable factual support. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393–94, 498 S.E.2d 898, 901 (Ct. App. 1998).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). The *Hooters* decision struck down an arbitration clause because it incorporated rules so "warped" and void of due process that any arbitration under them would have been a "sham." *Simpson* cannot be interpreted, however, to mean an arbitration clause can never be unconscionable as long as it points to a neutral forum. To do so would be to apply South Carolina general unconscionability law differently in the arbitration context than in others. Such discrimination would run afoul of one of the prime directives of the FAA: that courts must place arbitration contracts on par with all other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (noting § 2 is "the FAA's substantive command that arbitration agreements be treated like all other contracts"); *Prima Paint*, 388 U.S. at 404 n.12 (FAA was passed "to make arbitration agreements as enforceable as other contracts, but not more so").

The circuit court found the Agreement unconscionable based on several aspects: it was an adhesion contract, it was foisted on Doe "hastily" on a "take it or leave it basis" amidst a transaction by a single consumer with an international automotive concern. Doe had no counsel and the injuries she alleges are far removed in time and space from the 2011 car sale. These findings of the circuit court are well anchored by the record. Our supreme court has recognized car sales contracts warrant not just acute scrutiny but "considerable skepticism," given the bargaining disadvantage a consumer faces once he sets foot on the lot, and the reality that car ownership is often a necessity in modern society (unless one wishes to remain on foot). *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. We are mindful *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011), may have tempered *Simpson's* treatment of car sales contracts, but the non-negotiable Agreement here—while conspicuous—was still sprung on Doe along with a flurry of other closing documents. We therefore affirm the circuit court's conclusion that Doe had no meaningful choice in accepting the Agreement.

b. <u>Unreasonable, oppressive, and one-sided terms</u>

We next look at the terms of the Agreement to see if they are so harsh and oppressive no reasonable person would offer or accept them. We find the portion of the contract purporting to require Doe to arbitrate "any claim or dispute" arising out of or relating

to "any resulting transaction or relationship (including any such relationship with third parties)" is so overbearing as to be unconscionable. In essence, because the contract deems any future encounter between Doe and Dealer would be a result of their "relationship" created by the 2011 transaction, the Agreement bars each from suing the other in court for anything. Ever. The Agreement does not just memorialize the parties' promise to resolve disputes about the 2011 purchase transaction by arbitration but seeks to resolve all future disputes between them, regardless of its type or description, as well as any disputes with unknown "third parties." This lopsided provision places Doe at a stunning disadvantage—she is now one against many, for an objective reading of the Agreement means it forever immunizes not just Dealer, but Dealer's salesmen, employees, agents, suppliers, wholesalers, and any third party throughout the universe from being brought into the public judicial system by Doe.

This is corroborated by a later clause of the contract that declares "[t]his Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract." This signals Doe's "relationship" with Dealer was inextricable and infinite. The use of the expansive term "relationship" alerts us as to how far the Agreement has wandered outside the bounds of the FAA. Congress passed the FAA to ensure enforcement of provisions contained in "maritime transaction[s]" or "contract[s] evidencing a transaction involving commerce" to arbitrate controversies that arise out of the "contract or transaction." 9 U.S.C.A. § 2. Attempts to stuff every conceivable dispute the parties may ever have into the FAA on the notion that the initial transaction created a permanent "relationship"—regardless of whether the current dispute has any connection to the initial, underlying transaction—runs the risk of a court declaring the contract's reach exceeds the grasp conscionability allows.

We conclude the following language of the Agreement—"or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract)"—is unconscionable. An unconscionable contract is not a valid contract in the eyes of § 2. *See Kindred Nursing Ctrs.*, 137 S. Ct. at 1426; *see also Doctor's Assoc.'s, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (arbitration agreements may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability"). Courts have discretion though to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive. Once again, we are guided by the parties' intent.

Columbia Architectural Grp., Inc. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) ("The entirety or severability of a contract depends primarily upon the intent of the parties . . . ."); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."). The Agreement here contains a severability clause, reflecting that if any part of the contract is found "unenforceable for any reason, the remainder shall remain enforceable." Given this intent and our belief that removing the unconscionable clause does not disrupt the core of the parties' bargain, we disagree with the circuit court that the entire Agreement must fall.

That brings us back to our earlier ruling that the delegation clause requires the arbitrator to rule on the "interpretation and scope" of the now revised Agreement, to see if it requires arbitration of Doe's claims. Therefore, the arbitrator must decide whether Doe's claims against Dealer based on its employee's 2015 theft of Doe's identity and the posting of Doe's private contact information on a sexually explicit website arise out of or relate to Doe's "credit application, purchase . . . or condition of" the car she bought from Dealer in 2011. We express no opinion on whether the 2011 arbitration contract covers Doe's claims, or, if so, whether the claims are still subject to arbitration due to the "outrageous and unforeseen torts" exception. *See generally Parsons*, 418 S.C. 1, 791 S.E.2d 128. The dissent argues this exception does apply, but whether the exception applies is a question the parties delegated to the arbitrator, not the court. Because the outrageous and unforeseen torts exception relates to the interpretation and scope of the arbitration contract and the arbitrability of the dispute—rather than whether the arbitration contract was formed or is valid—precedent requires that we honor the parties' choice to leave the issue of the exception to the arbitrator. *See Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007) (treating outrageous and unforeseen torts exception as a question of arbitrability of claim and noting, "*[u]nless the parties provide otherwise*, the question of the arbitrability of a claim is an issue for judicial determination" (emphasis added)). The Supreme Court clarified this point just last term. *Henry Schein, Inc.*, 139 S. Ct. at 527–28 ("Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' The question presented in this case is whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act. We conclude that it is not."). The

dissent's approach makes good sense and would likely streamline many motions to compel, but the United States Supreme Court has made clear that considerations of common sense and efficiency in this context are incompatible with their interpretations of the FAA.

Accordingly, we remand this matter to the circuit court so the motion to compel arbitration may be granted and the arbitrator can rule upon whether Doe's claims are subject to her 2011 arbitration contract with Dealer.

* * *

The FAA became law in 1925, passed primarily to safeguard the rights of merchants to use arbitration to resolve disputes arising over interstate commercial transactions by reversing the judicial hostility against arbitration. *See generally Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018); Bookman, *The Arbitration-Litigation Paradox*, 72 Vand. L. Rev. 1119, 1134 (2019). The FAA's early use was limited by the then narrow reach of the commerce clause, and the reality that the typical arbitration agreement of the time was between merchants of equal sophistication and bargaining power. *Id.*; *see also* Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 377–78 (2018). Today, arbitration agreements pop up in almost every imaginable transaction, many for basic consumer goods. As more and more transactions are conducted online, arbitration agreements are not presented face to face but digitally, in such forms as "browsewrap," "clickwrap," "scrollwrap," and "sign-on wrap." As lawyers know, the progression of arbitration decisions from the United States Supreme Court has been a march towards greater and greater abstraction, steadily away from the concrete. This has undermined arbitration's laudable goals: to streamline dispute resolution by offering a simpler, faster, and cheaper forum. Some Justices have complained the Supreme Court's interpretations of the FAA are unfaithful to its original intent. *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."). It might also be contended the Supreme Court's arbitration jurisprudence is so removed from everyday understanding and contracting realities that it has created more litigation than it has diverted. Lawyers and businesses have to draft arbitration provisions around complex analytical mazes. Motions to compel arbitration—once simple and straightforward—now require lawyers and judges to navigate one of the most nettlesome thickets of the law. *Rent-*

A-Center's strict insistence on pinpoint pleadings revives the stifling formalism of the early 20th century that the FAA was created to avoid. The dissent in *Rent-A-Center* (a 5-4 decision) noted the counter-intuitive approach, begun by *Prima Paint*, that requires courts to sever arbitration provisions from the rest of an allegedly invalid contract is so artificial that it "may be difficult for any lawyer—or any person—to accept." 561 U.S. at 87 (Stevens, J., dissenting). The dissent likened the majority's extension of *Prima Paint*'s severability doctrine to delegation clauses embedded in the arbitration provision to "Russian nesting dolls." *Id.* at 85.

We wonder whether interpretations of the FAA could be made simpler and clearer, so courts can help rather than hinder the FAA's mission of providing a simpler, faster, and cheaper alternative to litigation. Otherwise, the skirmishing that marks arbitration motion practice will undoubtedly intensify, and parties will be stranded longer and longer in the costly purgatory between the domains of arbitration and court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS, J., concurs.

LOCKEMY, C.J., dissenting: I respectfully dissent and would find, as the circuit court did, that the outrageous and unforeseeable torts exception applies to Doe's claims, and I would therefore affirm the denial of the motion to compel arbitration.

In my view, it is unnecessary for an arbitrator to interpret the Agreement or determine whether the dispute falls within its scope because Doe did not agree to submit outrageous tort claims to arbitration. In *Aiken*, our supreme court held the plaintiff's "claims for unanticipated and unforeseeable tortious conduct by [the defendant's] employees [were] not within the scope of the arbitration agreement with [the defendant]." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). There, the court opined the theft of the plaintiff's personal information by the defendant's employees was "outrageous conduct" the plaintiff could not possibly have foreseen when he agreed to do business with the defendant. *Id.* The court therefore held that "in signing the agreement to arbitrate, [the plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct." *Id.* The court stated that to "interpret an arbitration agreement to apply to actions completely outside the

expectations of the parties would be inconsistent with th[e] goal" of promoting "the procurement of arbitration in a commercially reasonable manner." *Id.* at 152, 644 S.E.2d at 710.

The case at hand is analogous to that presented in *Aiken*. Here, an employee of the dealership misappropriated Doe's personal information for the employee's own, vengeful purpose. I do not believe a person signing a contract for the purchase of a vehicle from a dealership could have anticipated that the dealership's employee would later use her personal information to solicit unwanted sexual encounters on her behalf. I believe that under general contract principles requiring Doe to arbitrate the question of whether her claims fall within the scope of the Agreement when they plainly do not would be contrary to the effectuation of the parties' contractual expectations. *See id.* at 151, 644 S.E.2d at 709 ("Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."); *cf. Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13–14, 791 S.E.2d 128, 134–35 (2016) (plurality opinion) (Hearn, J., concurring in part and dissenting in part) (stating "the outrageous and unforeseeable torts exception . . . embodies a generally applicable contract principle: effectuating the intent of the parties" and noting that "forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement" would constitute an absurd result).

For the foregoing reasons, I respectfully dissent and would affirm the circuit court's denial of the motion to compel arbitration.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Darris Hassell, Respondent,

v.

The City of Columbia, Appellant.

Appellate Case No. 2017-001750

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5734
Submitted May 1, 2020 – Filed July 1, 2020

AFFIRMED

Chad Nicholas Johnston, of Columbia, and Robert Walker Humphrey, II, of Charleston, both of Willoughby & Hoefer, PA, and Teresa A. Knox, of Columbia, all for Appellant.

Paul L. Reeves, of Reeves and Lyle, LLC, of Columbia, for Respondent.

THOMAS, J.: The City of Columbia appeals a jury verdict awarding Darris Hassell $200,075 in his action against the City for false imprisonment, malicious prosecution, and negligent supervision. The City argues the circuit court erred in (1) refusing to order a new trial based on a juror's failure to disclose a prior arrest

during voir dire and (2) denying its motion for a new trial *nisi remittitur*. We affirm.

FACTS

Hassell, a professor at the University of South Carolina (USC)-Lancaster, was stopped while driving by City of Columbia police officer Cameron Duecker on the night of February 18, 2014, in downtown Columbia. Although Hassell stated he was not a drinker, Duecker reported he smelled alcohol and required Hassell to perform sobriety tests in front of people gathered nearby. The stop was video recorded, but the video was lost.

Duecker next transported Hassell to the police station, handcuffed him to a wall, and gave him the breathalyzer test. This test was also video recorded, and it indicated a blood alcohol concentration of 0.00.[1] Duecker transported Hassell to the detention center and then to a hospital for a urine sample, which was also lost. Hassell was returned to the detention center and moved into a cell with nine to ten people. He was released on bond at 6:00 p.m. on February 19 and ticketed with making an improper turn and driving under the influence (DUI). The charges were eventually dropped.

Hassell testified he missed work, was embarrassed and humiliated, felt helpless, had to call his aunt from jail and hear her cry, knew his mother would find out, and had to explain the incident to the USC-Lancaster administration. He also testified he missed three doses of his prescription medication. Finally, he testified his car was towed and he had to pay $75 to retrieve it. Christopher Harris, Hassell's student assistant, testified that at the time of the incident, he looked for Hassell for two days, not knowing where he was and reaching a full voice mailbox each time he called. When Hassell told Harris about the arrest, Hassell was very embarrassed.

At the end of the trial, by verdict form filed May 19, 2017, the jury found for Hassell on all three causes of action and awarded him $200,075 in damages. On May 31, 2017, the City filed a motion for a new trial, and/or new trial *nisi remittitur*, arguing, *inter alia*, the verdict was punitive despite statutory prohibition

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[1] The video recording taken at the station about thirty minutes after the stop depicted Hassell as calm and polite, and he does not appear intoxicated.

of such and the damages were grossly excessive. After a hearing, the circuit court denied all motions by order filed June 27, 2017.

On June 30, 2017, the City filed another motion for a new trial based on newly-discovered evidence of juror misconduct. During voir dire, the court had asked, "[H]ave you or a close family member ever been arrested by a City of Columbia police officer?" One juror had responded, indicating his or her son had been arrested. The juror who became the foreperson did not respond. The City alleged it had contacted jurors after the verdict was returned and during efforts to locate the foreperson, it learned he had been arrested by an officer of the City one year prior to the trial.

During a hearing on the motion, the City, represented by new counsel, relied on *Long v. Norris & Associates*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000), arguing it was entitled to a new trial based on juror concealment. Hassell argued *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), applied, which mandated a denial of the motion for a new trial because the City had the opportunity to find the information and chose not to do it despite the information being in two different places in the City's own files and in the public record. In addition, Hassell argued "everybody got a fair trial." Hassell finally argued there was no evidence of intentional concealment by the juror, who could merely not have heard the question.

The circuit court noted,

> Forget the venire. They give you a list every Monday, and it has whether or not a juror has been arrested. . . . And whatever judge qualified the panel that day, he would have known that somebody had an arrest for anything from trespassing to shoplifting or even a speeding ticket almost. So, the information was available, should have been available, on this jury the Monday morning when the venire was qualified. That's how it works around here. . . .
>
> I'm telling you what the courthouse standard practice is. I don't know what the [C]ity does, but every Monday when you qualify the jury, . . . the clerk . . . has a list of

> everybody with a prior record for anything above a speeding ticket, okay? So, that information on this jury should have been available to the [C]ity Monday morning on the week of that trial. That's how it works here in Richland County.

By order filed July 27, 2018, the court denied the City's motion for a new trial based on juror concealment.[2] Hassell moved for sanctions and attorney's fees, arguing the City's trial counsel did not appear at the posttrial motions; thus, no information was available regarding what actions the City took or failed to take regarding the allegation of juror misconduct. Hassell also argued the City made no effort to introduce evidence at the hearing to support its position on juror concealment. This appeal followed, and this court granted the City's motion to enforce the automatic stay; thus, Hassell's motion for sanctions and attorney's fees remains pending in the circuit court.[3]

STANDARD OF REVIEW

"A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion." *State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004). In addition, a trial court's denial of a motion based upon a juror's misleading or incomplete answers during voir dire will be affirmed absent a prejudicial abuse of discretion. *Id.*; *Long*, 342 at 568, 538 S.E.2d at 9 ("The granting of a new trial based on a juror's failure to honestly respond to the court's voir dire remains within the sound discretion of the trial court.").

"When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). "If the amount of the verdict is **grossly** inadequate or

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[2] An amended order was filed August 22, 2018, because page nine of the original order was missing.

[3] *See* Rule 241(a), SCACR ("[T]he service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order . . . . This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court . . . .").

excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (quoting *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). "The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal." *Elam*, 361 S.C. at 27, 602 S.E.2d at 781.

LAW/ANALYSIS

A. Juror Concealment/Misconduct[4]

The City argues the circuit court erred in denying its motion for a new trial based on juror misconduct. We disagree.

The jury rendered its verdict on May 18, 2017, the City's first motion for a new trial was denied on June 27, 2017, and the City filed its second motion for a new trial, based on newly discovered evidence of juror misconduct, on June 30, 2017. Like the circuit court, we begin our analysis reviewing Rules 59 and 60(b), SCRCP. Rule 59 does not apply because the motion was filed after the ten-day limitation of Rule 59. As to Rule 60(b), we rely on *Gray*.

In *Gray*, a juror failed to respond to a voir dire question asking whether any jurors had been treated by the defendant doctor in a malpractice action. 298 S.C. at 286, 379 S.E.2d at 895. The appellant filed an amended motion for a new trial more than ten days after the verdict, but shortly after the juror's letter "lauding physicians and criticizing people who sue doctors" was published in a newspaper. *Id.* In addressing the timeliness of the motion, our supreme court stated,

> It is our view that Rules 59 and 60(b) must be read together. Rule 60(b), [SCRCP], reads in pertinent part:
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

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[4] The parties alternately discuss the issue as juror concealment and juror misconduct. Intentional juror concealment is a type of juror misconduct. 6 Wayne R. LaFave, et al., *Criminal Procedure* § 24.9 (f) (4th ed. Dec. 2019 update).

> judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . .

Id. at 287, 379 S.E.2d at 895. The court in *Gray* further noted as follows:

> This issue was addressed in *Smith v. Quattlebaum*, 223 S.C. 384, 76 S.E.2d 154 (1953). In *Smith*, defendant moved for a new trial because of an after-discovered relationship of juror to plaintiff. [Our supreme court] ruled that the trial court had jurisdiction to hear a motion for a new trial because of the after or newly-discovered evidence exception. The Court stated further:
>
>> It is the duty of the trial [court] to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to [its] attention, even after sine die adjournment of court, by the granting of a new trial, if in its discretion, necessary. *Smith*, 76 S.E.2d at 157.
>
> While the *Smith* case relied on S.C. Code Ann. § 10-1215 (1952), the same principle applies under Rule 60(b). In the instant case, the newly discovered evidence, [the juror's] predisposition, was not discernible until [the juror's] letter was published. Even with due diligence this evidence could not have been discovered in time to move for a new trial under Rule 59(b). We find that appellant moved to amend his motion within a reasonable time after discovery of evidence of [the juror's] bias and prejudice and, in fact, before the trial court had ruled on the original motion. We hold that appellant was entitled

> to amend his motion for a new trial to include the allegations of [the juror's] disqualification.
>
> We now address whether the trial court properly exercised its discretion in denying a motion for a new trial. Granting or refusal of a new trial is directed to the trial [court's] discretion. *Jenkins v. Dixie Specialty Co.*, 284 S.C. 425, 326 S.E.2d 658 (1985). **A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict.** *Thompson v. O'Rourke*, 288 S.C. 13, 339 S.E.2d 505 (1986). *Thompson* further enunciated the standard for granting a new trial when it is discovered that a seated juror fails to fully respond to voir dire questioning:
>
>> **[R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.** *Thompson*, *supra*, 339 S.E.2d at 506.

Id. at 287−88, 379 S.E.2d at 895−96 (emphases added).

After finding the delay in filing the motion for a new trial justified under the first test, the court in *Gray* then applied the second test and found the trial court erred in denying the "motion for a new trial because these facts could have supported a challenge for cause or could have been a material factor in the use of the appellant's peremptory challenges." *Id.* at 288, 379 S.E.2d at 896.

In this case, the circuit court found the delay in filing the motion for a new trial was not justified under the first test in *Gray*. The circuit court initially found the

foreman was not disqualified "simply because of his prior arrest." The court found the City failed to produce any evidence the juror was disqualified; trial counsel did not appear at the motions hearing; the City failed to produce any evidence surrounding why the juror did not respond; and the City "provided insufficient evidence to show this juror was or would have been disqualified."

As to the second and third requirements of the first test, the circuit court found "[t]he grounds for the City's objection to the juror were known or could have been known to the City." The information, a screen shot from an internet source, appeared to have been created on or about May 21, 2016, which was at or near the time of the juror's arrest. The City offered no evidence as to how the information was found, who found the information, or when it was found. The City did not provide any affidavits or other evidence to show it did not or could not have known of the information prior to the verdict or within the time frame for posttrial motions. The court distinguished this case from *Gray*, in which the appellant could not have known about the information within the ten-day filing period for posttrial motions. The court noted at least "two file repositories" with the information about the juror were accessible to the City. The court found the City failed to address whether searches of the repositories would have been burdensome, whether the records were accessed by trial counsel, or why she could not have accessed them if they were not accessed. The court concluded, "If the City found these records for purposes of this motion, then it follows that with due diligence, the same information was available prior to the verdict. . . . [The Rules] require[] that any 'after discovered evidence' must [be] newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ." The court concluded the City was negligent in failing to learn of the alleged misconduct prior to or within ten days after the verdict. The court distinguished *Long*, 342 S.C. at 570–71, 538 S.E.2d at 10−11, which found the defendant presented sufficient evidence of the three elements necessary for the court to grant a new trial. Thus, the court denied the City's second motion for a new trial.

Relying on *Thompson*, the City argues the trial court did not apply the proper test for intentional concealment because the first element of the first test, whether the juror is disqualified, is met if the concealed information would have supported a challenge for cause *or* if the concealed information would have been a material factor in the use of peremptory strikes.

In *Thompson*, two jurors failed to inform the court during voir dire that they had been represented by the respondent's attorney. *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506. The Thompsons moved for a new trial when they discovered by searching courthouse records that the attorney or his firm had handled real estate transactions for the respondent. *Id.* The trial court applied the three-part test and found as to the first element that the jurors were not disqualified because the jurors' relationship with the attorney was not sufficient to disqualify the jurors. *Id.* The court in *Thompson* did not address the remaining two elements of the first test. *Id.*

The court in *Thompson* distinguished *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982), as follows:

> In *Gulledge*, we held a new trial was warranted where a juror failed to respond to *voir dire* questioning concerning relationships with law enforcement personnel. The juror was related by marriage to a police officer who had custody of the defendant during trial and who had viewed the crime scene.
>
> The Thompsons argue *Gulledge* requires a new trial whenever it is discovered that a seated juror failed to respond to *voir dire* questioning. *Gulledge* is not a *per se* rule. Rather, relief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.

Thompson, 288 S.C. at 15, 339 S.E.2d at 506.

As to the second test, the court in *Thompson* found counsel did not argue at the trial level that the use of their preemptory challenges would have been altered by disclosure of the information; thus, that issue was not preserved. *Id.* at 15, 339 S.E.2d at 506-07. The court in *Thompson* affirmed the trial court's denial of the motion for a new trial. *Id.* at 15, 339 S.E.2d at 507.

The City also relies on *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), for the second test, arguing the circuit court erred in never citing *Woods*. The City argues the circuit court erred in never applying the second test.

In *Woods*, a juror failed to properly respond to a voir dire question despite having worked as a victims' advocate in the solicitor's office. *Id.* at 585, 550 S.E.2d at 283. The defendant's counsel discovered the information after the verdict but prior to sentencing and moved for a new trial. *Id.* During a hearing on the motion, the juror testified she had worked as a volunteer victims' advocate for three years but did not have significant interaction with the solicitor. *Id.* at 585-86, 550 S.E.2d at 283. The trial court denied the motion, this court reversed, and our supreme court granted a writ of certiorari. *Id.* at 586, 550 S.E.2d at 283.

Our supreme court stated,

> When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.
>
> [T]he first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information during *voir dire.* However, . . . we [have] not precisely define[d] what constitutes an intentional concealment.
>
> We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is

> ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.
>
> * * *
>
> [W]here a juror's response to *voir dire* amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference of bias can be drawn.

Id. at 587, 550 S.E.2d at 284-85 (citations omitted). The court found the juror's concealment was intentional and her relationship with the solicitor's office would support a challenge for cause because her concealment prevented the defendant's intelligent use of his preemptory challenges. *Id.* at 590, 550 S.E.2d at 285. The court in *Woods* did not address the first test. *Id.* We note, however, that the motion for a new trial was made prior to sentencing in *Woods*. *Id.* at 585, 550 S.E.2d at 283.

Even if we were to agree with the City that the circuit court erred in finding the juror was not disqualified, we find the City must also show error in the circuit court's findings as to the second and third elements of the test: the grounds for disqualification were unknown prior to verdict and the movant was not negligent in failing to learn of the disqualification before verdict. *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506. On these elements, the City again relies on *Long*.

In *Long*, the plaintiff filed an action alleging injury arising from the repossession of her vehicle. *Long*, 342 S.C at 565, 538 S.E.2d at 7. The jury awarded damages, and the judgment was entered on May 12, 1998. *Id.* at 566, 538 S.E.2d at 8. On June 1, 1998, the defendant moved for relief under Rule 60(b), SCRCP, alleging a juror failed to reveal his vehicle was repossessed in 1996 despite a voir dire question on the matter. *Id.* The defendant indicated it investigated the juror due to

a seeming preference for the plaintiff during the trial. *Id.* The defendant supplemented the motion with an affidavit concerning the repossession by the defendant's financial services manager and an affidavit of admission by the juror stating in part, "I was selected as a juror because I did not admit that my car had been repossessed." *Id.* at 567, 538 S.E.2d at 8. The plaintiff submitted a second affidavit by the juror, which indicated he did not hear or understand the voir dire question, and he could be impartial. *Id.* The trial court set aside the verdict. *Id.*

On appeal, this court first employed the three-part test from *Gray*, stating "a party must demonstrate: 1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." *Id.* at 570, 538 S.E.2d at 10. The court found the juror was disqualified because the question was specifically aimed at potential jurors who had lost vehicles due to a creditor and the judge had disqualified two similarly situated jurors who responded to the voir dire question. *Id.* at 570–71, 538 S.E.2d at 10.

The court also found the defendant met the second element, the ground for disqualification was unknown prior to verdict, noting that in a posttrial hearing, the defendant maintained "it had no knowledge of [the juror's] past vehicle repossession." *Id.* at 571, 538 S.E.2d at 10.

Finally, the court found the defendant was not negligent in failing to identify the disqualification before the verdict. *Id.* The court found between two hundred and three hundred persons were summoned for jury service for the relevant term and due diligence did not require a defendant to "incur the significant expenses related to assembling information on every jury pool member's finances and credit history." *Id.* at 571, 538 S.E.2d at 11. After finding the defendant met all of the elements of the first test, the court next found the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *Id.* at 572–73, 538 S.E.2d at 11.

Unlike in *Long*, the circuit court in this case found the City failed to meet all of the elements of the first test. We affirm, finding no abuse of discretion by the circuit court in finding the City failed to meet the second and third elements. *See Thompson*, 288 S.C. at 14, 339 S.E.2d at 506 ("A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving

party was not negligent in failing to learn of the disqualification before verdict."); *Long*, 342 S.C. at 568, 538 S.E.2d at 9 (stating the grant "of a new trial based on a juror's failure to honestly respond to the court's voir dire remains within the sound discretion of the trial court"); *id*. (explaining an appellate court will not reverse a circuit court's decision to deny a new trial motion absent an abuse of discretion); *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing."); *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) ("In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias."). The circuit court in this case afforded the City a hearing; however, the City presented little evidence to explain its delay in filing its motion for a new trial. Because we affirm the circuit court's findings on the first test, we need not reach the second test.

B. New Trial *Nisi Remittitur*

The City also argues the circuit court erred in denying its motion for new trial *nisi remittitur*. We disagree.

During pretrial motions, Hassell consented to requesting no jury charges indicating punishment because punitive damages were not allowed against the City. During closing argument, Hassell suggested damages of Hassell's "salary of $48,000 a year . . . multipl[ied] . . . by about four [$192,000]. . . . You . . . may want to go higher. . . . But you can use that as a benchmark . . . . " During the City's closing argument, the City conceded a verdict in Hassell's favor would be appropriate if the jury found no probable cause for the arrest and suggested the jury should compensate Hassell by approximately $6,475, calculated at $400 per hour while Hassell was at the jail, plus the cost of towing his vehicle. After the City's closing argument, Hassell's counsel asked the jury to award five times Hassell's annual salary because the City was still hurting Hassell by stating in its closing argument that he got what he deserved. The City did not object to the closing arguments.

"A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* "The trial [court] must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to

shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Id.* "Alternatively, the trial court may grant a new trial *nisi additur* or *remittitur* when it finds the verdict is merely inadequate or excessive." *Id.* "The granting of a motion for new trial *nisi additur* or *remittitur* rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages." *Id.* at 155, 654 S.E.2d at 883. "Compelling reasons must be given to justify invading the jury's province in this manner." *Id.*

"The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 319−20, 628 S.E.2d 496, 518 (Ct. App. 2006). "Great deference is given to the trial [court, which] 'heard the evidence and is more familiar with the evidentiary atmosphere at trial,' and . . . thus 'possesses a better-informed view of the damages than this [c]ourt.'" *Id.* at 320, 628 S.E.2d at 518 (quoting *Vinson v. Hartley*, 324 S.C. 389, 405-06, 477 S.E.2d 715, 723 (Ct. App. 1996)).

The City cites to cases it asserts had less egregious facts with smaller verdicts. *See Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 241, 763 S.E.2d 615, 621 (Ct. App. 2014) (addressing only the punitive damages award, but affirming an award of $50,000 in actual damages and $225,000 in punitive damages where the plaintiff spent six nights in jail after being negligently arrested); *Swicegood v. Lott*, 379 S.C. 346, 356, 665 S.E.2d 211, 216 (Ct. App. 2008) (affirming an award of $150,000 on an abuse of process claim as neither "so excessive as to shock the conscience, nor the result of passion, caprice, prejudice, partiality, corruption or some other improper motives" where the plaintiff lost his job and was subjected to extensive humiliation). Hassell counters, citing cases with less egregious facts and similar damages, particularly if compared to the rate per hour of false arrest. *See, e.g.*, *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 32−33, 410 S.E.2d 21, 24−25 (Ct. App. 1991) (affirming an award of $75,000 for false imprisonment for fifteen minutes when the plaintiff sought damages for humiliation, embarrassment, mental distress, mental anguish, and human indignity).

We find the circuit court did not err by denying the City's motion for a new trial *nisi remittitur*. First, the jury's award of $200,075 was within the range suggested to the jury. *See Burke v. AnMed Health*, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct.

App. 2011) ("[A]s an appellate court, we sit neither to determine whether we agree with the verdict nor to decide whether we agree with the trial [court]'s decision not to disturb it. . . . [W]e employ a highly deferential standard of review when considering the trial [court]'s ruling on each of the grounds for a new trial. In exercising this deference, we recognize the unique position of the trial [court] to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the plaintiff in terms of damages."); *Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (refusing to disturb the trial court's denial of motions for a new trial absolute and *nisi remittitur* although the jury awarded the plaintiff $450,000 in actual damages, the plaintiff only claimed $4,530.98 in medical bills and $2,615.76 in lost wages, and the plaintiff's doctors believed he had recovered from his pain). Furthermore, the award was not "grossly . . . excessive so as to shock the conscience of the court and clearly indicate[] the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Howard*, 376 S.C. at 154, 654 S.E.2d at 883. Accordingly, we find the circuit court did not err by denying the City's motion for a new trial *nisi remittitur*.

As to the City's argument that Hassell inappropriately argued to the jury to consider the City needed to "pay attention" and "care," we find the issue is not preserved for appellate review. The City failed to object to Hassell's closing argument and cannot raise the issue for the first time in its motion for a new trial or on appeal. *See Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial."); *Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) ("Ordinarily, if an appellant fails to object the first time a statement is made, he or she waives the right to raise the issue on appeal.").

CONCLUSION

Based on the foregoing, the circuit court's denials of the City's motion for a new trial based on juror misconduct and motion for a new trial *nisi remittitur* are

AFFIRMED.[5]

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

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cathy J. Swicegood, Appellant,

v.

Polly A. Thompson, Respondent.

State Ex Rel Alan Wilson, Attorney General, Intervenor.

Appellate Case No. 2018-000008

Appeal From Greenville County
W. Marsh Robertson, Family Court Judge

Opinion No. 5735
Heard September 18, 2019 – Filed July 1, 2020

AFFIRMED

John G. Reckenbeil, of Law Office of John G. Reckenbeil, L.L.C., of Mauldin, and J. Falkner Wilkes, of Greenville, for Appellant.

Margaret A. Chamberlain, of Chamberlain Law Firm, LLC, of Greenville, and Melissa Hope Moore, of Law Office of Melissa H. Moore, LLC, of Fountain Inn, for Respondent.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J.

Emory Smith, Jr., and Assistant Attorney General Ian Parks Weschler, all of Columbia, for Intervenor.

LOCKEMY, C.J.: In this appeal from the family court's dismissal of Cathy Swicegood's complaint alleging the existence of a common-law marriage with her same-sex partner, Polly Thompson, Swicegood argues the family court erred by dismissing the case for lack of subject matter jurisdiction. We affirm.

FACTS

In March 2014, Swicegood filed an action in family court seeking an order recognizing the existence of a common-law marriage, a decree of separate support and maintenance, alimony, equitable division of marital property, and related relief. Swicegood alleged she and Thompson cohabited as sole domestic partners for over thirteen years until December 10, 2013, agreed to be married, and held themselves out publicly as a married couple. She alleged the couple exchanged and wore wedding rings, co-owned property as joint tenants with the right of survivorship, included each other as devisees in their respective wills, and shared a joint bank account. Swicegood further alleged Thompson listed her as a "domestic partner/qualified beneficiary" on Thompson's health insurance and as a beneficiary on her retirement account.

Thompson moved under Rule 12(b)(1) of the South Carolina Rules of Civil Procedure to dismiss the action, alleging the family court lacked subject matter jurisdiction over Swicegood's complaint because the parties were not married and lacked the capacity to marry. In response, Swicegood filed a memorandum and several affidavits. In her own affidavit, she attested Thompson proposed marriage to her on September 16, 2008, and the parties were declared married approximately two and a half years later during a ceremony in Las Vegas, Nevada on February 12, 2011.[1] In addition, Swicegood submitted the affidavits of two individuals who each attested they witnessed a wedding ceremony between Swicegood and Thompson in Las Vegas on February 12, 2011. Finally, Swicegood included the

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[1] Until 2014, Nevada law prohibited same-sex marriage. *See Latta v. Otter*, 771 F.3d 456, 464 (9th Cir. 2014) (holding Nevada's statute and constitutional amendment "preventing same-sex couples from marrying and refusing to recognize same-sex marriages validly performed elsewhere" to be unconstitutional).

affidavit of a person who stated she spoke to Thompson a few weeks after the couple separated and Thompson said, "If our marriage was legal in South Carolina, I would be in a world of s--t."

Thompson likewise submitted a memorandum and several exhibits in support of her motion to dismiss. She argued that in August 2012 and September 2013, she and Swicegood signed affidavits of domestic partnership in which they acknowledged they had "a close personal relationship in lieu of a lawful marriage," were "unmarried" and "not married to anyone." Thompson contended these documents indicated the parties did not hold themselves out as a married couple. In her affidavit, Thompson attested Swicegood knew they were not married. She stated she and Swicegood participated in a "commitment ceremony" in Las Vegas "on a lark," but they knew it was not a wedding and that they could not legally marry in Nevada. Thompson attested she gave Swicegood several rings during their relationship, but she intended none of these to signify they were married. She stated she was not and never had been married to Swicegood: "We both knew that if we wanted to get married, we could go to a state that allowed same-sex marriage. It was not our intent to enter into marriage, and we did not." Thompson also stated she witnessed Swicegood marry another woman in a ceremony in 1995.

Thompson submitted the affidavits of several individuals. One affiant stated she was present at the ceremony in Las Vegas but characterized it as a commitment ceremony, not a wedding, and stated she never heard Thompson refer to Swicegood as her spouse. Two other affiants also attested Thompson never referred to Swicegood as her spouse or described their relationship as a marriage. Finally, a reverend attested he performed a "holy union" between Swicegood and another woman in 1995.

The family court dismissed Swicegood's complaint on May 7, 2014, concluding it lacked subject matter jurisdiction to adjudicate the issues because a common-law marriage was not legally possible pursuant to section 20-1-15 of the South Carolina Code (2014),[2] which was still in force at the time. Swicegood appealed.

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[2] ("A marriage between persons of the same sex is void ab initio and against the public policy of this State."); *see also* S.C. Const. art. XVII, § 15 ("A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State"); S.C. Code Ann. § 20-1-10 (2014) (stating "[a]ll persons, except . . . persons whose marriage is prohibited by this section, may

While Swicegood's appeal was pending, the Supreme Court of the United States decided *Obergefell v. Hodges*, in which it held "same-sex couples may exercise the fundamental right to marry," and the state laws challenged in that case were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[3] 135 S. Ct. 2584, 2604-05 (2015). Consequently, this court issued an unpublished opinion remanding the case to the family court with instructions to "consider the implications of *Obergefell* on its subject matter jurisdiction." *See Swicegood v. Thompson*, 2016-UP-013 (S.C. Ct. App. filed Jan. 13, 2016).

Upon remand, the family court directed the parties to brief the following questions: (1) whether *Obergefell* applied to common-law marriages and (2) whether *Obergefell* applied retroactively.[4] After hearing argument on these questions, the family court again concluded it lacked subject matter jurisdiction over the matters raised in Swicegood's complaint, finding that although *Obergefell* applied to common-law marriages, it could not retroactively create a common-law marriage between Swicegood and Thompson. The court concluded *Obergefell* could not "logically be read to exclude common-law marriages," and so long as South Carolina continued to recognize the validity of common-law marriages for opposite-sex couples, it had "a constitutionally mandated duty to recognize the validity of common-law marriages for same-sex couples." The court did not expressly resolve the question of whether *Obergefell* applied retroactively, but it concluded the couple could not have formed a common-law marriage because section 20-1-15 was in place throughout the couple's thirteen-year period of cohabitation, and they believed they lacked the legal right to be a married couple

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lawfully contract matrimony"); *id.* (stating "[n]o man shall marry . . . another man" and "[n]o woman shall marry . . . another woman").

[3] Earlier, on November 20, 2014, the U.S. District Court struck down South Carolina's ban on same-sex marriage as unconstitutional. *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014) (holding "to the extent they seek to prohibit the marriage of same[-]sex couples who otherwise meet all other legal requirements for marriage in South Carolina," South Carolina's statutory and constitutional provisions prohibiting same-sex marriage "unconstitutionally infringe on the rights of [the p]laintiffs under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and are invalid as a matter of law").

[4] The family court also approved a consent order allowing the State to intervene.

during that time. The court, therefore, concluded the couple could not have formed the requisite intention and mutual agreement to be married. Additionally, the family court concluded that even assuming Swicegood and Thompson cohabited with an actual intent and mutual agreement to be married, section 20-1-15 acted as a legal impediment to the creation of a common-law marriage between them. The court therefore concluded the couple could not have formed such marriage unless they renewed their intention and agreement to be married after the *Obergefell* decision triggered the removal of the impediment. Accordingly, the family court reaffirmed its dismissal based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP. This appeal followed.

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). Likewise, "[w]hether a common-law marriage exists is a question of law." *Callen v. Callen*, 365 S.C. 618, 623, 620 S.E.2d 59, 62 (2005). "This Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999) ("[T]his Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence."). "[A]ffidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction." *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

LAW/ANALYSIS

I. Impediment

Swicegood acknowledges that when she and Thompson formed an intent and mutual agreement to treat each other as spouses, section 20-1-15 was considered to present an impediment to marriage and this "perceived impediment" continued to exist throughout the relationship until they separated. She contends, however, section 20-1-15 could not have functioned as an impediment because *Obergefell* removed the impediment as a matter of constitutional law and the removal of the impediment acted retroactively. Swicegood asserts the prohibition of same-sex marriage could not have precluded the parties from forming a common-law

marriage as a matter of law because unconstitutional laws are void ab initio, which requires our courts to treat such laws as if they never existed. She argues that if the parties formed intent and mutual agreement to treat each other as spouses under the common law, their marriage would be valid notwithstanding it occurred prior to *Obergefell* and in light of *Obergefell*, the existence of a valid common-law marriage would not be precluded as a matter of law. We disagree.

"Subject-matter jurisdiction is the 'power to hear and determine cases of the general class to which the proceedings in question belong.'" *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (quoting *Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). The family court has jurisdiction to hear and determine matters relating to common-law marriage. *See* S.C. Code Ann. § 63-3-530(B) (2010) (stating "the family court and the probate court have concurrent jurisdiction to hear and determine matters relating to . . . common-law marriage . . . except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust, and guardianship and conservatorship actions before the probate court"); *see also Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 582 n.9, 757 S.E.2d 399, 407 n.9 (2014) (noting the family court has exclusive jurisdiction to determine the existence of a common-law marriage when the ultimate issue is the existence of a common-law marriage rather than heirship). If no common-law marriage existed between the parties, the family court lacked subject matter jurisdiction to hear any other matters Swicegood raised in her complaint. *See* S.C. Code Ann. § 63-3-530(A)(2) (2010) ("The family court has exclusive jurisdiction . . . to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage . . . ."). Thus, it was necessary for the court to first determine whether a common-law marriage existed.

"A common-law marriage is formed when two parties contract to be married." *Callen*, 365 S.C. at 624, 620 S.E.2d at 62. "A valid common[-]law marriage requires that the facts and circumstances show an intention on the part of both parties to enter into a marriage contract, usually evidenced by a public and unequivocal declaration by the parties." *Owens v. Owens*, 320 S.C. 543, 545, 466 S.E.2d 373, 375 (Ct. App. 1996). "The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent." *Callen*, 365 S.C. at 624, 620 S.E.2d at 62.

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital.

Id. "[F]or a common[-]law marriage to arise, the parties must agree to enter into a common[-]law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties." *Yarbrough v. Yarbrough*, 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct. App. 1984). Although much of our decisional law regarding impediments involves bigamous relationships, in *Callen*, our supreme court held an impediment to common-law marriage existed due to the couple's residency in jurisdictions that did not recognize common-law marriage. *Id.* at 624-25, 620 S.E.2d at 63. Our supreme court held that due to the couple's residency in such jurisdictions until the couple moved to South Carolina, there was an impediment to the marriage, and "no common-law marriage could have been formed, if at all, until after the move." *Id.* Thus, our courts have recognized an impediment to marriage outside of the context of a bigamous relationship.

In *Obergefell*, the United States Supreme Court held,

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson*[5] must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples

[5] 409 U.S. 810 (1972) (holding, in a summary decision, the exclusion of same-sex couples from marriage did not present a substantial federal question).

> from civil marriage on the same terms and conditions as opposite-sex couples.

135 S. Ct. at 2604-05.[6] *Obergefell* did not expressly instruct state courts in whether to apply its holding prospectively or retrospectively. However, the United States Supreme Court applies a general rule of retroactivity. *See Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("As a rule, judicial decisions apply 'retroactively.'" (quoting *Robinson v. Neil*, 409 U.S. 505, 507-08 (1973))); *see also Ranolls v. Dewling*, 223 F. Supp. 3d 613, 619 (E.D. Tex. 2016) ("Generally, in both civil and criminal cases, unconstitutional laws and rules are void *ab initio*, or void from inception, as if they never existed."); *id.* (noting that "[o]ver the years, the Supreme Court has issued a series of decisions addressing retroactivity and its limitations").

In *Harper v. Virginia Department of Taxation*, the Court expressly repudiated selective application of new rules based on the equities of a particular case. 509 U.S. 86, 95-97 (1993). The Court first acknowledged it previously "permitted the denial of retroactive effect to 'a new principle of law'" in civil cases "if such a limitation would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule." *Id.* at 94-95 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. at 106-07 (1971))). The Court then announced,

> We now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at 97 (alterations in original) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (acknowledging *Harper* overruled *Chevron Oil* "insofar as the case (selectively) permitted the prospective-only application of a new rule of law"). The Court adopted the following rule in *Harper*:

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[6] As we noted, the U.S. District Court for the District of South Carolina struck down South Carolina's statutory and constitutional provisions prohibiting same-sex marriage on November 20, 2014. *See Condon*, 21 F. Supp. 3d at 587.

> When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97; *see also Reynoldsville Casket Co.*, 514 U.S. at 752 (acknowledging the Court's holding in *Harper* that "when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events").

Several jurisdictions that have recognized informal or common-law marriages have applied *Obergefell* retroactively to find litigants were entitled to establish common-law marriages even when such marriages were created and ended—either by death or separation—before *Obergefell* was decided. *See In re Marriage of Hogsett & Neale*, 2018 COA 176, ¶ 24 ("In states like Colorado that recognize common[-]law marriage, retroactive application of *Obergefell* means that same-sex couples must be accorded the same right as opposite-sex couples to prove a common[-]law marriage even when the alleged conduct establishing the marriage pre-dates *Obergefell*."), *cert. granted in part,* 2019 WL 4751467 (Colo. 2019) (granting certiorari in part to consider whether the court of appeals erred in affirming the trial court's finding that no common-law marriage existed); *Gill v. Nostrand*, 206 A.3d 869, 874-75 (D.C. 2019) ("We now expressly recognize . . . that a same-sex couple may enter into common-law marriage in the District of Columbia and that this rule applies retroactively. Thus, the trial court was correct in ruling that 'a party in a same-sex relationship must be given the opportunity to prove a common[-]law marriage, even at a time when same-sex marriage was not legal . . . .'"); *Ranolls*, 223 F. Supp. 3d 613 (holding *Obergefell* applied retroactively to allow the partner of the decedent in a wrongful death case to assert a claim as an alleged common-law spouse even though the decedent died prior to the *Obergefell* decision and there was a genuine issue of material fact as to the couple's marital status at the time of the decedent's death, making summary judgment inappropriate); *In re Estate of Carter*, 159 A.3d 970, 972 (Pa. Super. Ct. 2017) (holding "the United States Constitution mandates that same-sex couples

have the same right to prove a common[-]law marriage as do opposite-sex couples" notwithstanding the alleged spouse died before *Obergefell* was decided).

Our review of United States Supreme Court decisional law compels the conclusion *Obergefell* must be applied retroactively. *See Harper*, 509 U.S. at 100 ("The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law."); *see also Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990) (plurality opinion) ("The determination whether a constitutional decision of [the United States Supreme] Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").

Nevertheless, the Supreme Court has noted, "[A]s courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." *Reynoldsville Casket Co.*, 514 U.S. at 758-59. Because we found federal law requires us to apply *Obergefell* retroactively, the question we now consider is whether the family court's finding that the prohibition on same-sex marriage acted as an impediment is an appropriate independent legal basis under South Carolina law to affirm its decision. *See id.* at 76 (noting such well-established legal reasons may include "a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity").

Swicegood urges us to apply the reasoning the Superior Court of Pennsylvania applied in *Carter*, 159 A.3d 970. We decline to do so. There, the court reversed the trial court's holding that it was legally impossible for a same-sex couple to have entered into a common-law marriage before common-law marriages were abolished in Pennsylvania because, at the time, it was not legal for same-sex couples to enter into a common-law marriage. *Id.* at 977. Pennsylvania's legislature abolished common-law marriage effective January 1, 2005, but its marriage laws permitted "the legal recognition of common-law marriages contracted before January 1, 2005." *Id.* at 974. In *Carter*, the appellant alleged he and his same-sex partner, who died before *Obergefell* was decided, had previously entered into a common-law marriage. *Id.* at 972-73. The superior court held

because state laws prohibiting same-sex couples from marrying had been declared unconstitutional, such laws could not preclude a same-sex couple from establishing the existence of a pre-2005 common-law marriage. *Id.* at 977-78. Although the court applied *Obergefell* retroactively, it did not consider the question of whether the statute prohibiting same-sex marriage acted as an impediment prior to its invalidation. Thus, we find *Carter* does not assist us in deciding the matter at issue in this case.

Conversely, Thompson argues *In re Estate of Leyton*, 22 N.Y.S.3d 422 (N.Y. App. Div. 2016), supports her argument *Obergefell* does not require this court to "reach back in time and find a legal marriage existed" when South Carolina did not recognize such marriages. In *Leyton*, a decedent's family member filed a petition to disqualify his same-sex partner, Hunter, as the executor and beneficiary under his will, arguing Hunter was a "former spouse" under the former spouse provisions of New York's probate law. *Id.* at 423. Hunter and the decedent participated in a "Commitment Ceremony" in 2002 and informally separated in 2010 without undergoing any kind of "dissolution ceremony analogous to the commitment ceremony." *Id.* New York did not recognize same-sex marriage until 2011. *Id.* The appellate court affirmed the trial court's denial of the petition and stated *Obergefell* "d[id] not compel a retroactive declaration that the 'Commitment Ceremony' entered into by decedent and Hunter in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage for purposes of the 'former spouse' provisions." *Id.* It further opined, "Even assuming that [their] . . . union should be retroactively recognized as having constituted a legal marriage, in order for [the statute's] 'former spouse' provisions to apply, the end of the marital relationship must have been effected by a formal judicial 'decree or judgment.'" *Id.* The court concluded Hunter should not be disqualified as the executor or beneficiary because there was no formal judicial divorce decree and he was therefore not a former spouse. *Id.* *Leyton* is distinguishable and of little guidance here. New York does not recognize common-law marriages. *See In re Mott v. Duncan Petroleum Transp.*, 414 N.E.2d 657, 658 (N.Y. 1980) (noting New York state law did not recognize common-law marriages unless the marriage was validly contracted in another state that sanctioned common-law marriage). Thus, there was no basis for the appellate court to validate the couple's commitment ceremony.

We find the family court did not err by determining section 20-1-15 constituted an impediment to the formation of a common-law marriage between Swicegood and

Thompson. Here, for the duration of the parties' relationship, South Carolina prohibited same-sex marriage. *See* § 20-1-15 ("A marriage between persons of the same sex is void ab initio and against the public policy of this State."). Both parties acknowledged this fact in their pleadings. Pursuant to the Court's holding in *Obergefell*, section 20-1-15 is unconstitutional and no longer valid law. *See Obergefell*, 135 S. Ct. at 2604-05 (holding the state laws at issue in that case were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples"). Nevertheless, because the statute was in effect during the time Swicegood alleges the parties formed a common-law marriage, it acted as an impediment, which prevented them from creating a valid marriage. *See Callen*, 365 S.C. at 624, 620 S.E.2d at 62 ("When . . . there is an impediment to marriage . . . no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital."); *Yarbrough*, 280 S.C. at 551, 314 S.E.2d at 19 ("In order for a common[-]law marriage to arise, the parties must agree to enter into a common[-]law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties.").

Although we must apply *Obergefell* retroactively, retroactive application of the decision does not require us to ignore the fact the law operated as an impediment to the formation of a common-law marriage between same-sex couples when it was still in force. Our state law concerning impediments to marriage is "a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity," which formed an "independent legal basis" for the family court's dismissal of Swicegood's complaint. *See Reynoldsville Casket Co.*, 514 U.S. at 757-59 (noting a court may find "a previously existing, independent legal basis . . . for denying relief" such that the new rule, despite retroactivity, does not determine the outcome of the case). Our state laws prohibiting same-sex marriage constituted an impediment to the formation of a common-law marriage until the impediment was removed. As with any impediment to marriage, Swicegood and Thompson were required to enter into a new agreement to be married *after* the removal of the impediment, either by way of participating in a civil ceremony or by renewing their agreement to assume a marital relationship.

To determine whether the impediment prevented Swicegood and Thompson from forming a common-law marriage as a matter of law, we must first determine when

the removal of the impediment occurred. The family court found the impediment remained in place until the *Obergefell* decision and declined to consider whether the date of the *Condon* decision was relevant to its analysis. Although the parties do not directly address this point on appeal, Thompson acknowledges South Carolina began recognizing same-sex marriages on November 20, 2014—the date *Condon* went into effect. Because the impediment to the marriage was the existence of South Carolina's laws prohibiting same-sex marriage, we find the earliest date upon which the removal of the impediment could have occurred was November 20, 2014, when the U.S. District Court struck down those laws. *See Condon*, 21 F. Supp. 3d at 587. Here, it is undisputed the parties' relationship ended and they ceased cohabiting in 2013. Under these circumstances, the parties could not have formed a common-law marriage because they did not renew their agreement to be married after the removal of the impediment. Accordingly, we find the family court did not err by dismissing the matter for lack of subject matter jurisdiction.

We emphasize our decision is limited to only those circumstances under which neither party disputes the alleged marital relationship ended prior to November 20, 2014. When a purported spouse brings an action in family court to establish the existence of a common-law marriage with a person of the same sex and neither party disputes the relationship ended before November 20, 2014, the couple could not have formed a common-law marriage as a matter of law.

II. Intent

Swicegood contends the family court erred by finding the parties lacked intent as a matter of law because the question of intent and mutual agreement is a question of fact distinct from the issue of whether an impediment prevented the marriage from having legal effect. We disagree.

"Whether a common-law marriage exists is a question of law." *Callen*, 365 S.C. at 624, 620 S.E.2d at 62. "A common-law marriage is formed when two parties contract to be married." *Id.* "A valid common[-]law marriage requires that the facts and circumstances show an intention on the part of both parties to enter into a marriage contract, usually evidenced by a public and unequivocal declaration by the parties." *Owens*, 320 S.C. at 545, 466 S.E.2d at 375.

> The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent. Consideration is the participation in the marriage. If these factual elements are present, then the court should find as a matter of law that a common-law marriage exists.

Callen, 365 S.C. at 624, 620 S.E.2d at 62. "A party . . . must at least know that his actions will render him married as that word is commonly understood." *Id.* at 626, 620 S.E.2d at 63. "If a party does not comprehend that his 'intentions and actions' will bind him in a 'legally binding marital relationship,' then he lacks intent to be married." *Id.* "The proponent of the alleged marriage has the burden of proving the elements by a preponderance of the evidence." *Id.* at 623, 620 S.E.2d at 62; *but see Stone v. Thompson*, 428 S.C. 79, 89, 833 S.E.2d 266, 271 (2019) (holding the burden of proof is now clear and convincing evidence in cases filed after July 24, 2019).

Although Swicegood asserts she and Thompson agreed to live as a married couple, both parties acknowledged in their pleadings that section 20-1-15 presented a barrier to marriage throughout their relationship. Because they acknowledge their awareness that this law prevented them from marrying in this state during their relationship, we find Swicegood and Thompson could not have formed the intent and mutual agreement to enter a legally binding marital relationship. *See Callen*, 365 S.C. at 626, 620 S.E.2d at 63. Accordingly, we find the family court did not err by concluding Swicegood and Thompson could not have formed the requisite intention and agreement to be married as a matter of law.

CONCLUSION

Consistent with the Supreme Court's opinion in *Obergefell*, we hold section 20-1-15 is unconstitutional and is no longer valid law. We hold the *Obergefell* decision must be applied retroactively. Nevertheless, the law acted as an impediment to marriage during the time it was still in effect. Therefore, the parties were required to renew their agreement to marry after the removal of the impediment. Because the parties' relationship ended before South Carolina's prohibition of same-sex marriage was struck down, they could not have formed a common-law marriage as a matter of law. Moreover, because the parties acknowledge they knew they could not legally marry in this state during the

entirety of their relationship, they could not have formed the intent and mutual agreement to enter a legally binding marital relationship. Based on the foregoing, the family court's dismissal of Swicegood's complaint for lack of subject matter jurisdiction is

AFFIRMED.

HUFF, J., concurs.

HILL, J., concurring in result:

I agree with the majority that federal law requires *Obergefell* to be applied retroactively. I also agree we are bound by *Callen*, which holds that "[i]f a party does not comprehend that his intentions and actions will bind him in a legally binding marital relationship, then he lacks intent to be married." *Callen*, 365 S.C. at 626, 620 S.E.2d at 63 (quotations removed). I therefore concur in the result the majority reaches.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Polly Thompson, Respondent,

v.

Cathy Swicegood, Appellant.

Appellate Case No. 2015-001860

Appeal From Oconee County
Diane Schafer Goodstein, Circuit Court Judge
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 5736
Heard September 18, 2019 – Filed July 1, 2020

AFFIRMED AS MODIFIED

John G. Reckenbeil, of Law Office of John G. Reckenbeil, L.L.C., of Mauldin, and J. Falkner Wilkes, of Greenville, for Appellant.

Margaret A. Chamberlain, of Chamberlain Law Firm, LLC, of Greenville, and Melissa Hope Moore, of Law Office of Melissa H. Moore, LLC, of Fountain Inn, for Respondent.

LOCKEMY, C.J.: Cathy Swicegood appeals the master-in-equity's order of partition, arguing the master erred by (1) refusing to consider the issue of the parties' alleged common-law marriage and stay the action pending a resolution of

that issue in family court, (2) excluding evidence proving her contributions to jointly owned real property, (3) determining her contribution to such property, and (4) failing to apply the correct analysis when determining the parties' interests in the property. We affirm as modified.

FACTS

Polly Thompson filed this action in circuit court for partition and ouster in March 2014. She alleged she and Swicegood held title to two properties—a home in Westminster, South Carolina (the Lake Hartwell home) and a condominium in Hilton Head, South Carolina (the Hilton Head condo)—as joint tenants. Thompson alleged she was entitled to sole ownership and title as to both properties.

Swicegood then filed a summons and complaint in family court alleging a common-law marriage existed between the parties and seeking, among other things, recognition of the separation of the parties, an award of separate support and maintenance, and equitable division of marital property.[1] Swicegood moved to dismiss or, alternatively, stay the partition action, arguing she sought an order from the family court declaring she and Thompson were married by common law. Thereafter, the family court dismissed Swicegood's complaint for lack of subject matter jurisdiction, finding that pursuant to the then-existing laws banning same-sex marriage in this state, no common-law marriage existed as a matter of law. Swicegood appealed the family court's order.[2] Meanwhile, in October 2014, the circuit court denied Swicegood's motion to dismiss or stay the partition action, finding there was no just cause for granting a stay. The court reasoned in part that Thompson filed her petition in circuit court first and Swicegood's subsequent filing in family court did not remove jurisdiction from the circuit court.

The partition action proceeded to a hearing before the master-in-equity in March 2015. At the outset of the hearing, Thompson moved to exclude any evidence or argument concerning whether the parties were married and any evidence regarding "sweat equity" in any property other than the two properties at issue in the partition

[1] The couple's primary residence was not a property at issue in the partition action.
[2] We decided this appeal in *Swicegood v. Thompson*, Op. No. 5735 (S.C. Ct. App. filed July 1, 2020), which includes a complete procedural history of the family court matter.

action. Swicegood again moved to stay the proceeding, arguing that after the family court dismissed the case for lack of subject matter jurisdiction and the circuit court denied her previous motion to stay, the United States District Court had overturned South Carolina's statutory prohibition of same-sex marriage.[3] The master denied Swicegood's motion to stay and granted Thompson's motion to exclude evidence of the alleged marriage, reasoning he expressed no opinion as to whether there was a marriage, and even if there were, the matter was "still a partition action" according to the pleadings. Swicegood argued she was entitled to sweat equity because during the thirteen-year relationship, a significant amount of assets and sweat equity culminated into the purchase of these properties and she "and others" took actions to bring value to these properties. However, the master granted Thompson's motion to exclude evidence of any sweat equity Swicegood may have had in any property other than the Lake Hartwell home or Hilton Head condo.

Thompson purchased the Hilton Head condo in June 2013 for $372,500. The deed listed both parties as owners. Thompson paid the down payment with an inheritance she received from her parents, and Swicegood contributed no funds. The mortgage on the Hilton Head condo was in Thompson's name only, and she paid all of the mortgage payments on the property as well as all regime fees, insurance premiums, utility bills, and fitness club fees. According to Thompson, the Hilton Head condo required some improvements, such as wallpaper removal, painting, plumbing repair, and replacing light fixtures, switches, and the washer and dryer. She stated she paid for all of the labor and construction associated with these improvements, and although she acknowledged Swicegood performed some of this labor, she stated she paid Swicegood for her work. Thompson explained she rented out the Hilton Head condo when possible and had earned $22,000 in rental income since purchasing the home. Thompson testified she contributed $142,477.01, less the rental income, to the Hilton Head condo.

The Lake Hartwell home consisted of two lots: Lot 58 and Lot 59. Thompson purchased the first lot, Lot 59, in May 2010 for $38,500; she paid a down payment of $10,209.98 and obtained a mortgage for the balance of the purchase price. Thompson purchased the second lot, Lot 58, in July 2012 for $35,000 and paid the full purchase price with her inheritance. Thompson then had a home constructed

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[3] *See Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014) (striking down South Carolina's ban on same-sex marriage as unconstitutional).

on the lots. Swicegood contributed $22,000 of the total $28,678.43 down payment on the construction of the home, and Thompson contributed the remaining $6,678.43. Thompson obtained a mortgage for the remaining $151,500 of the purchase price. She testified the $10,209.98 and $6,678.43 she paid for the purchase and construction of the Lake Hartwell home came from her checking account, and none of those funds came from Swicegood. Additionally, Thompson paid all mortgage payments, homeowners' association fees, taxes, and insurance premiums on the property. She explained she hired a builder to build the home and paid for other construction and improvements to the property. Thompson stated she paid $42,735.41 for the construction and improvements, including $7,000 paid on Swicegood's Lowe's credit card and several checks for Swicegood's labor. Thompson again acknowledged Swicegood performed some labor and agreed she was often present during the building of the Lake Hartwell home but insisted she paid Swicegood for this work.

Swicegood moved into the Lake Hartwell home in December 2013 after the couple separated. Thompson alleged Swicegood changed the locks and denied her entry to the home thereafter. During this time, Thompson continued to pay the mortgage, homeowner's association fees, insurance, and taxes on the home. She claimed $14,143.77 in damages due to Swicegood's ouster but later stipulated she sent Swicegood a letter in December 2013 giving her permission to live there.

Thompson stated that in exchange for Swicegood's work on the Hilton Head condo, she gave her a 2009 Buick and paid her with checks. She conceded Swicegood paid her $9,500 for the Buick but stated it was worth "at least $18,000." Thompson acknowledged she previously owned a villa in Hilton Head, which she purchased in 2003 with proceeds from the sale of stock she owned. She stated she sold this property in December 2013, it was titled in her name only, and no funds from its sale were applied to any other purchase. Thompson admitted Swicegood transferred title in property she owned to Thompson by quitclaim deed in 2010. Although the master refused to admit evidence concerning this transfer, Thompson acknowledged the $22,000 Swicegood contributed to the purchase of the Lake Hartwell home came from the sale of that property.

Swicegood testified she operated a business that provided landscaping and interior design services. She stated she and Thompson continually tried to "flip" properties in order to have "nice places" to live in upon retirement. Swicegood attempted to explain she contributed labor to the villa that Thompson previously owned, and

Thompson objected. Swicegood conceded, acknowledging the master's earlier ruling. Swicegood explained she removed carpet, painted, changed outlets and switches, created window treatments, covered cornice boards, and replaced new toilets, faucets, and towel racks in the Hilton Head condo. She stated she had furniture reupholstered, purchased bedding, and decorated. Swicegood testified it took seven days to flip the condo. She stated she paid someone $1,300 to complete plumbing and electrical work. Swicegood testified she also touched up paint and replaced light bulbs when she stayed at the Hilton Head condo. She provided an "invoice," consisting of a summary of the work she completed at the Hilton Head condo, which totaled $17,490. Of this amount, Swicegood estimated she was owed $5,910.91. However, she admitted the invoice was not created at the time the work was done; rather, she "rewrote" all of her invoices for use at the hearing. Swicegood confirmed she had no documentation showing her payment for any of the materials listed on the invoice. She averred the refurbishing of the Hilton Head condo allowed the parties to earn higher rental income on the property. Swicegood testified she "drew the plans" for the Lake Hartwell home and was present at the home "every single day" during its construction. She agreed Thompson had paid her for work on the Lake Hartwell home and the Hilton Head condo, but she denied she had been paid for all of her work. Swicegood identified several checks she received from Thompson. She agreed the checks ranged from $1,000 and $5,000 but stated some checks were for materials. She acknowledged Thompson paid her "to handle the affairs" during the building of the Lake Hartwell home in Thompson's place. Swicegood admitted she changed the locks at the Lake Hartwell home after she moved in because Thompson continued to come to the home even though their attorneys had asked her not to.

Swicegood also presented the testimony of Stephanie Computaro, who testified Swicegood did "the majority of the work" during the refurbishing of the Hilton Head condo, and "as far as the hands on construction" and "the vision, buying of the materials to do those jobs, that was a hundred percent [Swicegood]."

Following the partition hearing, the parties made their offers to purchase the properties. They agreed the mortgage balance for the Lake Hartwell property was $143,407.75, with equity of $67,742, and the mortgage balance for the Hilton Head condo was $269,100.57, with equity of $120,599. Thompson offered to purchase the Hilton Head condo for $275,100.57, and the Lake Hartwell home for $188,407.75, while Swicegood offered to transfer title of the Hilton Head condo to Thompson in exchange for Thompson transferring title of the Lake Hartwell

property to Swicegood. The master found Thompson made the greater offer to purchase. Because the remaining balance on mortgage for the Hilton Head condo was $269,100.57, the master determined there was $6,000 in proceeds from the Hilton Head condo to be divided between the parties. Likewise, because the remaining balance on the Lake Hartwell home was $143,407.75, the master determined there was $45,000 in proceeds from the Lake Hartwell home to be divided between the parties.

The master concluded that with respect to the Hilton Head condo, Thompson paid the entire down payment on the property, every mortgage payment, all regime fees, all homeowner's insurance premiums, all taxes, and all fitness club dues and cable fees. He found Thompson's contribution totaled $129,838.70, and though Swicegood contributed sweat equity in the form of interior decorating, the amount of work she performed was disputed, and Thompson presented evidence she paid Swicegood for her labor and materials. The master found the equity in the condo was $120,325, and Swicegood contributed nothing financially to the property and was entitled to no right, title, or interest in that property. With respect to the Lake Hartwell home, the master concluded Swicegood paid $22,000 of the down payment on the home and Thompson paid $45,679.21 for the two lots and $6,678.43 of the down payment on the home. The master determined Thompson paid every mortgage payment, all property owners' association dues, all homeowner's insurance premiums and all taxes. He found Swicegood contributed sweat equity in the form of interior decorating and design, but the amount of work she performed was disputed and Thompson presented evidence she paid Swicegood for her labor and materials. He concluded Thompson contributed $129,838.70 and Swicegood contributed $22,000 towards the Lake Hartwell home, and the equity in the home was $67,742.25. The master found Thompson's contributions far exceeded both Swicegood's contributions and the equity in the property. The master found there was a tremendous disparity between the parties' contributions to the property and Swicegood had no right, title, or interest in the Lake Hartwell property.

As to both properties, the master found the disparities between the parties' contributions to the acquisition and maintenance of the properties was in favor of Thompson and awarding Swicegood any interest in the property would be unjust and inequitable. Thus, the master awarded Thompson full right, title, and ownership of both properties, and awarded the remaining $6,000 and $45,000 to Thompson. The master denied Thompson's claim for ouster, finding although

Swicegood committed ouster Thompson failed to establish damages. Swicegood filed a motion to reconsider, which the master denied. This appeal followed.

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). "This Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). "A partition action is an equitable action and, as such, we may review the evidence to determine facts in accordance with our own view of the preponderance of the evidence." *Zimmerman v. Marsh*, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004). On the other hand, "evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion." *Brown v. Odom*, 425 S.C. 420, 429, 823 S.E.2d 183, 187 (Ct. App. 2019). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

LAW/ANALYSIS

I. Denial of Motion to Stay

Swicegood argues the circuit court erred by refusing to consider the issue of marriage and stay the partition action pending a resolution of the marriage issue. She contends that if the courts were to determine she and Thompson were married, the order of partition would be void for lack of subject matter jurisdiction because the family court would have exclusive jurisdiction to determine their respective interests in the properties. Swicegood further asserts the court's refusal to stay the matter prejudiced her because the family court would have applied a different analysis in determining the parties' interests in the properties. We disagree.

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *City of Spartanburg v. Belk's Dep't Store of Clinton*,

199 S.C. 458, 20 S.E.2d 157, 167 (1942). Section 63-3-530(A)(2) of the South Carolina Code (2010 & Supp. 2019) provides,

> The *family court has exclusive jurisdiction* . . . to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage . . . .

(emphasis added). "[M]arital property" is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code Ann. § 20-3-630(A) (2014). "The [family] court does not have jurisdiction or authority to apportion nonmarital property." S.C. Code Ann. § 20-3-630(B) (2014); *see also Tipton v. Tipton*, 351 S.C. 456, 459, 570 S.E.2d 195, 196 (Ct. App. 2002) (holding the family court "lacked subject matter jurisdiction to determine the parties' property rights in any way" when the family court found no common-law marriage existed between the parties and the appellant did not appeal that finding).

"Under South Carolina law, the Court of Common Pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment." *Eichor v. Eichor*, 290 S.C. 484, 487, 351 S.E.2d 353, 354 (Ct. App. 1986). "[P]roperty held in joint tenancy is subject to partition." *Smith v. Cutler*, 366 S.C. 546, 551, 623 S.E.2d 644, 647 (2005). "An action for partition of undivided interests is not marital litigation, and thus is not within the jurisdiction of the family court." *Gilley v. Gilley*, 327 S.C. 8, 10, 488 S.E.2d 310, 312 (1997) (quoting *Eichor*, 290 S.C. at 487, 351 S.E.2d at 355).

As a threshold matter, we find the circuit court had subject matter jurisdiction to hear the partition action. *See Eichor*, 290 S.C. at 487, 351 S.E.2d at 354 ("Under South Carolina law, the Court of Common Pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment."). In *Swicegood*, Op. No. 5735, we concluded no common-law marriage existed between the parties as a matter of law and affirmed the family court's dismissal of Swicegood's complaint based on lack of subject matter

jurisdiction. Absent a marriage, there can be no marital property. The family court therefore lacked subject matter jurisdiction to divide the parties' property. Thus, the circuit court had subject matter jurisdiction over the partition action.

Next, we find the master was not obligated to grant a stay of the partition action under the circumstances of this case. *See City of Spartanburg*, 199 S.C. 458, 20 S.E.2d 157 ("The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]."). The parties' marital status in and of itself does not affect the circuit court's subject matter jurisdiction over a partition action between such parties. *See Gilley*, 327 S.C. at 10, 488 S.E.2d at 312 ("An action for partition of undivided interests is not marital litigation, and thus is not within the jurisdiction of the family court." (quoting *Eichor*, 290 S.C. at 487, 351 S.E.2d at 355)). Here, the family court dismissed the complaint for lack of subject matter jurisdiction, finding the parties had no common-law marriage as a matter of law pursuant to state laws prohibiting same-sex marriage, which were still in effect at the time. *See* S.C. Code Ann. § 20-1-15 (2014) ("A marriage between persons of the same sex is void ab initio and against the public policy of this State."); *see also* S.C. Const. art. XVII, § 15 ("A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State"); S.C. Code Ann. § 20-1-10 (2014) (stating "[a]ll persons, except . . . persons whose marriage is prohibited by this section, may lawfully contract matrimony"); *id.* (stating "[n]o man shall marry . . . another man" and "[n]o woman shall marry . . . another woman"). Thus, at the time the circuit court and master ruled upon Swicegood's motion to stay, the family court lacked subject matter jurisdiction to determine the parties' property rights. Under these circumstances, we find the master did not err by refusing to stay the partition action pending resolution of the family court matter.

II. Partition

Swicegood argues the master erred in determining the value of each party's contribution to the properties. She asserts the master erred by excluding evidence of the value she contributed to each property, including evidence relating to properties other than the Lake Hartwell home and Hilton Head condo. Swicegood contends she and Thompson purchased and "flipped" multiple properties, culminating in the purchase of the Hilton Head condo. She asserts her efforts in renovating properties the couple formerly owned attributed to the appreciation realized from the sale of those properties, and the "net gain" therefrom was

"funneled into" the funds Thompson used to purchase the Hilton Head condo and Lake Hartwell home. Swicegood argues the master excluded evidence of the chain of sales that would have demonstrated such accumulation of equity. Further, she contends the master erred by failing to "adequately consider" her contribution of "sweat equity" of $20,000 in the Lake Hartwell home. Thus, she argues the master's decision should be reversed and remanded for a determination of the full value of her contributions to and interest in the properties based on all of the relevant evidence. We disagree.

A. Exclusion of Evidence

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke*, 421 S.C. at 558, 808 S.E.2d at 628 (quoting *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "The general rule is that a joint tenant who, at his own expense, places permanent improvements *upon the common property*, is entitled in a partition suit to compensation for the improvements whether the co-tenants assented thereto or not." *Shumaker v. Shumaker*, 234 S.C. 421, 425-26, 108 S.E.2d 682, 685 (1959) (emphasis added) (quoting *Dalgarno v. Baum*, 30 S.E.2d 559 (Va. 1944)). "In the absence of consent . . . the amount of compensation is estimated by and *limited to* the amount by which the value of the common property has been enhanced." *Ackerman v. Heard*, 287 S.C. 626, 629, 340 S.E.2d 560, 562 (Ct. App. 1986).

First, we find the master did not abuse his discretion in excluding evidence of Swicegood's contributions to former properties. *See Shumaker*, 234 S.C. at 425-26, 108 S.E.2d at 685 ("The general rule is that a joint tenant who, at his own expense, places permanent improvements *upon the common property*, is entitled in a partition suit to compensation for the improvements whether the co-tenants assented thereto or not." (emphasis added) (quoting *Dalgarno*, 30 S.E.2d 559)). Here, the only properties at issue in the partition action were the Lake Hartwell home and the Hilton Head condo. Swicegood testified she and Thompson "flipped" several properties and ultimately purchased the Lake Hartwell home and Hilton Head condo; however, she proffered no evidence as to any specific value

realized from her work on previous properties. Neither did she proffer evidence that Thompson used proceeds from any prior sale of such properties to purchase the Lake Hartwell home or the Hilton Head condo. Rather, Thompson testified she paid the entire down payment on the Hilton Head condo and the entire purchase price for Lot 58 with the inheritance she received from her parents. She stated the $10,209.98 and $6,678.43 she paid on the Lake Hartwell home came from her checking account. Thus, we find the master did not err by excluding evidence of any indirect contributions Swicegood made to properties other than the two properties at issue in this case.[4]

Further, as evidenced by the master's order, the master admitted and considered evidence of Swicegood's direct contributions to the Lake Hartwell Home and the Hilton Head condo, which consisted of testimony as well as exhibits documenting her contributions of labor and materials.

B. Swicegood's Contributions[5]

Although we review actions in equity de novo, we are not required to disregard the findings of the circuit court or its superior position to assess witnesses' credibility. *See Zimmerman*, 365 S.C. at 386, 618 S.E.2d at 900 ("A partition action is an equitable action and, as such, we may review the evidence to determine facts in accordance with our own view of the preponderance of the evidence."); *Laughon*, 360 S.C. at 524-25, 602 S.E.2d at 110 ("However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses.").

> The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case

[4] We note Thompson admitted Swicegood's direct contribution of $22,000 for the purchase of the Lake Hartwell home came from the sale of property Swicegood owned. However, the master considered this direct contribution in reaching its conclusion, and we likewise consider this contribution in our review of the master's findings.
[5] We have combined Swicegood's third and fourth issues under this heading.

> partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

S.C. Code Ann. § 15-61-50 (2005). "The general rule is that a joint tenant who, at his own expense, places permanent improvements upon the common property, is entitled in a partition suit to compensation for the improvements whether the co-tenants assented thereto or not." *Shumaker*, 234 S.C. at 425-26, 108 S.E.2d at 685 (quoting *Dalgarno*, 30 S.E.2d 559)).

We find the master did not err in determining Swicegood was not entitled to any interest in the subject properties based upon her indirect contributions. Here, Thompson admitted Swicegood purchased some materials and contributed some labor to the improvement of the properties; however, Thompson also presented evidence she paid Swicegood several thousand dollars for this labor and material. Additionally, Thompson testified she paid $42,735.41 for construction and improvements to the Lake Hartwell home. Swicegood admitted Thompson paid her but denied she completely reimbursed her for her work. Swicegood did not dispute Thompson paid all of the mortgage payments, utilities, insurance premiums, taxes and other dues on both properties. We find the evidence supports the master's findings that Thompson's contributions to both properties significantly outweighed Swicegood's. Although Swicegood performed some labor at both properties, we find the evidence shows Thompson reimbursed her for her contributions.

However, we find the master erred by concluding Swicegood was not entitled to a portion of the $45,000 remaining on the Lake Hartwell home. The master correctly concluded Thompson made the greater offer to purchase the properties and determined the remaining amounts to be divided between the parties was $6,000 in the Hilton Head condo and $45,000 in the Lake Hartwell home. The evidence shows Swicegood contributed nothing financially to the Hilton Head condo and therefore the master did not err by concluding Swicegood was not entitled to a portion of the $6,000 remaining therein. As to the Lake Hartwell home, the master concluded Thompson contributed $129,838.70, Swicegood contributed $22,000, and the equity in the home was $67,742.25. We acknowledge Thompson's contributions exceeded Swicegood's. Nevertheless, because Swicegood contributed $22,000 to the purchase of the home, we find the master

erred in failing to apportion any of the $45,000 remaining in the Lake Hartwell home to Swicegood. Swicegood is entitled to a percentage of the $45,000 proportionate to her financial contribution of $22,000 to the purchase of the property and Thompson's contribution of $129,838.70. Swicegood's contribution of $22,000 was 14.49 percent[6] of the parties' total contributions of $151,838.70 toward the purchase price. Thus, we find she is entitled to 14.49 percent of the $45,000 remaining in the Lake Hartwell home for a total of $6,520.50.[7]

Accordingly, we affirm the master's finding Thompson was entitled to sole ownership, title, and interest in both properties and to the $6,000 remaining in the Hilton Head condo. We modify the master's order by awarding Swicegood a portion of the $45,000 remaining in the Lake Hartwell home. According to our calculations, Swicegood is entitled to $6,520.50, which is equal to 14.49 percent of $45,000.

CONCLUSION

For the foregoing reasons, the master's order of partition is

AFFIRMED AS MODIFIED.

HUFF and HILL, JJ., concur.

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[6] The actual figure was 14.489, which we rounded to two figures for simplicity.

[7] Thompson argues we should affirm the master's findings as to this issue because he found Swicegood committed ouster. However, the master denied Thompson's claim for ouster—a ruling Thompson did not appeal. Therefore, we decline to affirm the master's findings on this basis.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Braxton, #119081, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2017-001964

Appeal From The Administrative Law Court
The Honorable Harold W. Funderburk, Jr.,
Administrative Law Judge

Opinion No. 5737
Submitted December 2, 2019 – Filed July 1, 2020

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Michael Braxton, pro se.

Christina Catoe Bigelow, Salley W. Elliott, and Annie Laurie Rumler, all of the South Carolina Department of Corrections, of Columbia, for Respondent.

WILLIAMS, J.: Michael Todd Braxton appeals the order of the administrative law court (ALC) affirming the South Carolina Department of Corrections's (SCDC) final decision regarding his sentence. On appeal, Braxton argues the ALC erred in affirming SCDC's calculation of his sentence because SCDC did not award him credit for time served while he was (1) on parole, (2) incarcerated in

Tennessee, and (3) awaiting extradition to South Carolina. We affirm in part and reverse and remand in part.

FACTS/PROCEDURAL HISTORY

On November 17, 1983, Braxton was sentenced to thirty years' incarceration after pleading guilty to first degree criminal sexual conduct (CSC). Braxton served ten years and four months of his sentence, and on March 31, 1994, he was conditionally released to the state of Tennessee on parole. On April 16, 1996, while on parole in Tennessee, Braxton was arrested for two counts of aggravated rape. On May 28, 1996, while he was in custody for those arrests, South Carolina issued a parole violation warrant, and a parole violation hold was placed on Braxton. Braxton was held in pretrial detention until he was sentenced to twenty-three years' imprisonment in the custody of the Tennessee Department of Corrections (TDOC),[1] and he was transferred to TDOC on June 1, 1998. On June 8, 1998, South Carolina issued a second parole violation warrant on Braxton. Braxton completed his sentence in Tennessee on November 2, 2015. Thus, from the time of his arrest in 1996 until he finished serving his sentence in 2015, Braxton served approximately nineteen years and five months in Tennessee. Following his release, beginning November 8, 2015, Braxton was incarcerated in Anderson County, South Carolina.[2] Following an appearance before the Full Board of the South Carolina Board of Pardons and Parole on January 20, 2016, Braxton was transferred back into the custody of SCDC with a release date of June 22, 2022.

Braxton timely filed a Step 1 grievance with SCDC, claiming SCDC failed to give him credit towards his remaining CSC sentence for the time he spent on successful parole supervision and for the time he spent incarcerated in Tennessee. Braxton's Step 1 grievance was denied. Braxton then filed a Step 2 grievance with SCDC, restating the allegations set forth in his Step 1 grievance and also arguing he should be credited for time served "incarcerated in Tennessee . . . (which includes the time served during the extradition process)." His Step 2 grievance was subsequently denied.

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[1] Braxton was sentenced on May 1, 1998.

[2] It is not clear from our review of the record where Braxton was housed between the completion of his sentence in Tennessee on November 2, 2015, and his transfer to Anderson County.

Braxton then appealed SCDC's denial of his grievances to the ALC. He argued SCDC erred in refusing to give him credit (1) for the time he spent on parole, (2) for the time he spent in pretrial detention and incarcerated for unrelated charges in Tennessee while there were parole violation warrants from South Carolina in place, and (3) for the time he served for the period he was held in Anderson County before returning to the custody of SCDC. By order dated August 24, 2017, the ALC affirmed SCDC's final decision regarding the calculation of Braxton's sentence. This appeal followed.

ISSUE ON APPEAL

Did the ALC err in affirming SCDC's final decision regarding the calculation of Braxton's sentence as to the time he served while he was (1) on parole, (2) incarcerated in Tennessee, and (3) awaiting extradition to South Carolina?

STANDARD OF REVIEW

"In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the AL[C]'s findings are supported by substantial evidence." *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008). "Although [the appellate] court shall not substitute its judgment for that of the AL[C] as to findings of fact, [it] may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole." *Id*. "In determining whether the AL[C]'s decision was supported by substantial evidence, [the appellate] court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the AL[C] reached." *Id*. This court's review of the ALC's order must be confined to the record provided on appeal. S.C. Code Ann. § 1-23-610(B) (Supp. 2019). "Furthermore, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

LAW/ANALYSIS

Section 24-13-40 of the South Carolina Code (Supp. 2019) provides the following regarding the computation of time served:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, *full credit against the sentence must be given for time served prior to trial and sentencing*, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

(emphasis added).

I. Time Spent on Parole

Braxton argues the ALC erred in affirming SCDC's refusal to grant him credit for time served while he was successfully on parole prior to his Tennessee arrest. We agree.

As an initial matter, we agree with the ALC that section 24-13-40 does not apply to time spent on parole. Based on a plain reading of the statutory language, we find section 24-13-40 applies to credit for time served while incarcerated *prior to trial or sentencing*, and it does not address whether credit should be granted for time spent on parole *after sentencing*. *See Original Blue Ribbon Taxi Corp. v. S.C.*

Dep't of Motor Vehicles, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008) ("Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction."). However, although section 24-13-40 does not address credit for time served while on parole, our supreme court addressed the status of a parolee in *Sanders v. MacDougall*, stating, "A prisoner upon release on parole *continues to serve his sentence* outside the prison walls. The word parole is used in contra-distinction to suspended sentence and means a leave of absence from prison during which the prisoner *remains in legal custody* until the expiration of his sentence." 244 S.C. 160, 163, 135 S.E.2d 836, 837 (1964) (emphases added). The court further provided, "An order revoking parole simply restores a defendant to the status he would have occupied had this form of leniency never been extended to him." *Id*. at 164, 135 S.E.2d at 837.

Following his CSC conviction and imprisonment in South Carolina, Braxton was successfully paroled from March 31, 1994, until he was arrested in Tennessee on April 16, 1996. Because Braxton continued to serve his sentence outside the prison walls and remained in legal custody while he was on parole, we find he should receive credit towards the remainder of his CSC sentence for the time he was on parole. *See id*. at 163, 135 S.E.2d at 837 (providing that a prisoner on parole remains in the legal custody of the South Carolina Probation, Parole, and Pardon Services (DPPP) Board and continues to serve his sentence outside the prison walls). Accordingly, we reverse and remand this issue to the ALC to recalculate Braxton's sentence such that he receives credit for the time he served while on parole.[3]

II. Time Spent Incarcerated in Tennessee

Braxton argues the ALC erred in refusing to award him credit for time served before and after he was sentenced on charges in Tennessee because he was in the constructive custody of South Carolina during those periods as a result of the issued parole violation warrants. We disagree.

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[3] On appeal, Braxton also argues the DPPP policies and SCDC policies mandate that he be given credit for the time he spent on parole. However, we decline to address this argument as our holding is dispositive of this claim. *See Futch v. McAllister Towing of Georgetown, Inc*., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues on appeal when resolution of a prior issue is dispositive).

Initially, we note we disagree with the ALC's reliance on section 24-13-40 to affirm SCDC's refusal to award Braxton credit for the time he was imprisoned in Tennessee because that section applies to credit for time served prior to trial and sentencing and Braxton was imprisoned in Tennessee after his trial and sentencing for his conviction in South Carolina. *See* § 24-13-40 (providing for the computation of time served by prisoners so that full credit against the sentence is given *for time served prior to trial and sentencing*); *see also Blue Ribbon Taxi*, 380 S.C. at 608, 670 S.E.2d at 678 ("Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction.").

Nevertheless, we agree with the ALC that Braxton is not entitled to credit for the time he served following his arrest and conviction in Tennessee. "[A] foreign jurisdiction is without authority to modify or place conditions on a sentence imposed in South Carolina." *Robinson v. State*, 329 S.C. 65, 69, 495 S.E.2d 433, 435 (1998). "Therefore, if a second jurisdiction imposes on a [prisoner] a sentence to run concurrently with the previously imposed sentence from another jurisdiction, it is the responsibility of the second jurisdiction to effectuate its concurrent sentence and thus ensure the [prisoner] receives credit for time served in both jurisdictions." *Id*. "To achieve this result, the second jurisdiction must transfer custody of the [prisoner] to the first jurisdiction." *Id*. "A [prisoner] may also receive credit for time served in another jurisdiction by notifying [SCDC] that he is unable to personally submit to South Carolina custody to commence the service of his sentence." *Id*. at 71, 495 S.E.2d at 436. "Upon such notification, [SCDC] will place a detainer on the [prisoner]." *Id*. "While the [prisoner] is subject to a South Carolina detainer, he is constructively in South Carolina custody." *Id*. at 71, 495 S.E.2d 436–37. "As a result, a [prisoner] will receive credit for time spent in another jurisdiction while subject to a South Carolina detainer." *Id*. at 71, 495 S.E.2d at 437.

In *Robinson*, the prisoner was lawfully released on an appeal bond for a South Carolina conviction. 329 S.C. at 66, 495 S.E.2d at 434. While out on bond, he was convicted and concurrently sentenced for several unrelated federal charges in Illinois. *Id*. at 66–67, 495 S.E.2d at 434. The prisoner's South Carolina conviction was affirmed, and because the federal court imposed a sentence to run concurrently with his South Carolina sentence, he sought to obtain credit in South Carolina for the time he served in federal custody. *Id*. at 67, 70, 495 S.E.2d at 434, 436. Our supreme court found the federal court could not modify or place conditions on his

previously imposed South Carolina sentence and indicated it should have delivered the prisoner into South Carolina custody for the concurrent sentence to be satisfied. *Id*. at 70–71, 495 S.E.2d at 436. In the instant case, there is no indication in the record that Braxton's Tennessee sentence was set to run concurrently with his South Carolina sentence, and Braxton was not transferred back to South Carolina in order to ensure he received credit for time served in both Tennessee and South Carolina. *See Robinson*, 329 S.C. at 69, 495 S.E.2d at 435 ("[A] foreign jurisdiction is without authority to modify or place conditions on a sentence imposed in South Carolina."); *id*. ("Therefore, if a second jurisdiction imposes on a [prisoner] a sentence to run concurrently with the previously imposed sentence from another jurisdiction, it is the responsibility of the second jurisdiction to effectuate its concurrent sentence and thus ensure the [prisoner] receives credit for time served in both jurisdictions.").

Although *Robinson* additionally held that credit for time served may be received for time served in another jurisdiction while a prisoner is subject to a South Carolina detainer, we find *Robinson* distinguishable from Braxton's case even though Braxton was under a South Carolina parole violation warrant. *See id*. at 71, 495 S.E.2d at 436–37. Unlike in Braxton's case, the federal court in *Robinson* intentionally imposed a sentence that was to run concurrently with Robinson's South Carolina sentence. *Id*. at 66–67, 495 S.E.2d at 434. Further, in *Delahoussaye v. State*, our supreme court declined to use *Robinson* to credit a prisoner for time served in another jurisdiction while subject to a South Carolina detainer when the prisoner was an escapee from a South Carolina institution. 369 S.C. 522, 526–28, 633 S.E.2d 158, 160–62. Because a prisoner released on parole has an uncontested conviction, remains in legal custody, and continues to serve his sentence while outside the prison walls, we find a violation of parole places Braxton in a status more akin to an escapee, as in *Delahoussaye*, than a prisoner lawfully released on an appeal bond, as in *Robinson*. Moreover, the court in *Delahoussaye* also highlighted the fact that the prisoner could "not assert that his federal sentence was intended to run concurrently with his South Carolina sentence." *Id*. at 528, 633 S.E.2d at 161–62. Thus, we find it is also relevant for this determination that there is no indication in the record that Braxton's Tennessee sentence was intended to run concurrently with his South Carolina sentence.

Based on the foregoing, we find Braxton is not entitled to credit for time served in Tennessee even though he was under a South Carolina parole violation warrant.[4]

III. Time Spent Awaiting Extradition to South Carolina

Braxton argues the ALC erred in finding unpreserved his argument that SCDC erred in refusing to give him credit for the time period he was held in Anderson County. We disagree.

Braxton argued in his Step 2 grievance that he should receive credit for the time he was incarcerated *in Tennessee*, and, in parenthesis, noted "this includes time served during the extradition process." We agree with the ALC that this language did not specifically bring the issue of the time Braxton was held in Anderson County, South Carolina before the ALC. *See Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) (providing that the appellate court will not consider issues that were not raised to and ruled upon by the administrative agency). Furthermore, we find Braxton failed to produce a sufficient record for this court to review this issue as Braxton did not include his final brief to the ALC in the record. *See Al-Shabazz*, 338 S.C. at 379, 527 S.E.2d at 755 ("[The record] must include all that is necessary to enable the [appellate] court to decide whether the AL[C] made an erroneous or unsubstantiated ruling."); *see also* § 1-23-610(B) ("The review of the [ALC's] order must be confined to the record."). Thus, we affirm as to this issue.

CONCLUSION

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[4] Braxton also argues his due process rights were violated because he did not receive a probable cause or revocation hearing while incarcerated in Tennessee. Based upon our review of the record, we find this issue is not preserved for our review as it was neither raised to nor ruled upon by the ALC. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."); *Al-Shabazz v. State*, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000) ("[The record] must include all that is necessary to enable the [appellate] court to decide whether the AL[C] made an erroneous or unsubstantiated ruling."); *see also* § 1-23-610(B) ("The review of the [ALC's] order must be confined to the record.").

Based on the foregoing, the ALC's order is

AFFIRMED in part and REVERSED and REMANDED in part.[5]

HUFF and MCDONALD, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Kitchen Planners, LLC, Appellant,

v.

Samuel E. Friedman and Jane Breyer Friedman and Branch Banking and Trust, Respondents.

Appellate Case No. 2017-001522

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5738
Heard December 10, 2019 – Filed July 1, 2020

AFFIRMED

Jean Perrin Derrick, of Jean Perrin Derrick, LLC, of Lexington, for Appellant.

Charles A. Krawczyk, of Finkel Law Firm, LLC, of Columbia, for Respondents.

LOCKEMY, C.J.: The Kitchen Planners, LLC (Kitchen Planners) appeals the circuit court's order granting summary judgment in favor of Samuel E. and Jane Breyer Friedman (collectively, the Friedmans) as to Kitchen Planners' action for a mechanic's lien and foreclosure. Kitchen Planners argues the circuit court erred by (1) finding there was no genuine issue of material fact as to its claim for a

mechanic's lien, (2) denying its motion to strike Mr. Friedman's affidavit, and (3) awarding attorney's fees to the Friedmans. We affirm.

FACTS

In 2015, the Friedmans and Kitchen Planners entered into a contract, pursuant to which Kitchen Planners was to provide and install kitchen cabinets in the Friedmans' home in exchange for $49,784.04, plus $2,995 for delivery and installation. The parties agreed the Friedmans would pay the contract price in three installments consisting of one-third at the time of ordering, one-third at the time of shipment, and the final third at the time of delivery. The Friedmans paid two-thirds of the contract price prior to delivery of the cabinets. However, when the cabinets arrived at their home on May 21, 2015, they were dissatisfied with the product and never paid the final one-third of the contract price.

Kitchen Planners filed a mechanic's lien and statement of account on November 12, 2015, pursuant to sections 29-5-10 to -440 of the South Carolina Code (2007 & Supp. 2019). It served the Friedmans on November 17, 2015, and filed its complaint and a lis pendens on January 13, 2015. Kitchen Planners alleged in its complaint that it "furnished materials, supplies, and labor beginning in or around March 16, 2015 and continuing through August 18, 2015." In their answer, the Friedmans asserted several defenses, including failure to properly file a mechanic's lien and violation of section 29-5-100. The Friedmans also asserted counterclaims against Kitchen Planners, including breach of contract, negligent supervision, and negligent misrepresentation. They alleged Kitchen Planners' measurements were incorrect and the cabinets had remained in their garage and were never installed in their home.

Subsequently, on January 19, 2017, the Friedmans filed a motion titled "motion to dismiss mechanic's lien and foreclosure," requesting "dismissal pursuant to [sections] 29-5-10[and] 29-5-100 and South Carolina Rule[] of Civil Procedure 56(a) [sic]." They sought dismissal of the lien and of Kitchen Planners' causes of action with prejudice, arguing the lien was invalid and "there [wa]s no issue of fact to support" Kitchen Planners' claims.

The Friedmans deposed Patricia Comose, the sole member of Kitchen Planners, on April 7, 2017. Comose testified she held a degree in interior design and a retail license that allowed her to purchase items at wholesale and sell them for retail

value. She explained the Friedmans contacted her because they wished to purchase cabinets manufactured by Crystal Cabinets and she was the only dealer for Crystal Cabinets in the Columbia area. Comose stated the Friedmans had incurred water damage in their kitchen and "wanted the kitchen designed" to enable them to replace the cabinets. She recalled some of the elements of the design were the same as the existing designs. Comose stated she visited the Friedmans' home on January 23, 2015, and they signed a "design retainer agreement" and paid a $500 retainer for the planning of the kitchen. The agreement provided that if the Friedmans decided to purchase the cabinets through Kitchen Planners, the $500 fee would be deducted from the purchase price. She stated they discussed the design several times between January 23 and March 16, 2015, and on March 16, Kitchen Planners and the Friedmans entered an agreement "for the ordering of the cabinets." Comose stated she purchased the cabinets for $28,953.58 and her profit margin was thirty-three percent. She acknowledged that prior to delivery of the cabinets, Kitchen Planners had already realized a profit of $4,175 and made additional profit from other items, such as the sink and the cabinet pulls. Comose explained that rather than charging by the hour, she earned profits by purchasing items at wholesale and selling them at retail and did not charge for her time "basically at all."

Comose confirmed that when the cabinets were delivered to the Friedmans' home on May 20, 2015, they had some concerns with the product. Comose stated that when the installer arrived the next day to install the cabinets, Mr. Friedman told her he wanted the cabinets removed from the home and a refund. She recalled she and the installer spent several hours at the home that day, unboxing the cabinets and setting them in place so the Friedmans could see how they would look. Comose stated she offered to reorder any portions of the cabinets they were dissatisfied with. She testified she spent the next two or three days preparing a list of items to reorder. Comose stated that when she began reordering items, the Friedmans removed her from the project. She explained the Friedmans contacted Crystal Cabinets directly and Derrick Tackett, a sales representative, took over the reorder process. Comose stated the Friedmans arranged with Tackett to pay dealer cost for the reorder. Comose stated she did not "have anything more to do with the project" after June 18 when Tackett informed her the Friedmans did not want her to be involved. Comose agreed that on August 18, 2015, she received an email from Tackett informing her the Friedmans had taken him off the job as well. Comose admitted, "I understand that we were not allowed to install [the cabinets]."

When asked about a check for $550.61 paid on September 29, 2015, for "a re-order of boxes" for the kitchen island, she explained she reordered drawer boxes after Mrs. Friedman complained the boxes they received "could have been deeper." However, Comose did not know why she wrote this check in September as opposed to an earlier date, and she commented, "And I have those, by the way."

On April 13, 2017, the Friedmans served a copy of Mr. Friedman's affidavit upon Kitchen Planners by mail. The Friedmans then filed a memorandum titled "memorandum in support of defendant's motion for summary judgment" on April 20, 2017. On April 24, 2017, Kitchen Planners filed a motion to strike the affidavit, arguing it was improper because (1) the Friedmans filed a motion to dismiss and motions to dismiss must be determined by the pleadings only and (2) the affidavit should have been served concurrently with the Friedmans' motion pursuant to Rule 6, SCRCP. It also served and filed Comose's affidavit in opposition, in which she stated she continued to work with Tackett "through November 2015." Comose stated, "For example, on September 29, 2015, I reordered drawer boxes for the island in the kitchen, and paid $550.61." Additionally, she attested another contractor, Viggiano Remodeling, finished the project and "utilized some of the cabinets [she] furnished." In support of this, she attached the contractor's estimate, which stated, "All useable hardware and drawers from the existing Crystal cabinets will be reflected as a credit in final price."

The circuit court heard the Friedmans' motion on April 25, 2017. At the outset of the hearing, Kitchen Planners moved to strike Mr. Friedman's affidavit, relying on its written motion to strike and arguing the document was outside of the pleadings and untimely. The Friedmans argued they timely served the affidavit and their motion was a Rule 56, SCRCP, motion for summary judgment rather than a Rule 12(b)(6), SCRCP, motion to dismiss. The court denied the motion to strike, noting Kitchen Planners had sufficient time to review and submit a response to the affidavit. The court then proceeded with the hearing as a hearing on a motion for summary judgment, and Kitchen Planners did not object.

The circuit court granted the Friedmans' motion, finding there was no question of material fact that Kitchen Planners failed to timely file and serve the lien according to section 29-5-90. *See* § 29-5-90 (providing that "within ninety days after he ceases to labor on or furnish labor or materials for such building," a person seeking to enforce a mechanic's lien must "serve[] upon the owner . . . a statement of a just and true account of the amount due him"). It reasoned the face of the lien stated

Kitchen Planners furnished materials and labor from "on or about March 11, 2015 through on or about August 18, 2015," and it served the lien on November 17, 2015—which was a difference of ninety-one days. The court noted "no credible evidence exist[ed] to show [Kitchen Planners] provided any materials or labor" after August 18. Additionally, it concluded the materials furnished were not actually used in the erection, alteration, or repair of a building and that Kitchen Planners knowingly claimed more than it was due in violation of section 29-5-100 and failed to commence the foreclosure action within six months. Kitchen Planners filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by granting the Friedmans' motion for summary judgment?

2. Did the circuit court err by denying Kitchen Planners' motion to strike?

3. Did the circuit court err by awarding attorney's fees to the Friedmans?

STANDARD OF REVIEW

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 36, 637 S.E.2d 560, 561-62 (2006). "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.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354-55, 650 S.E.2d 68, 70 (2007) (quoting Rule 56(c), SCRCP). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor

considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 516, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *M&M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008)). "When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

LAW/ANALYSIS

I. Summary Judgment

Kitchen Planners argues the circuit court erred by granting summary judgment in favor of the Friedmans. We disagree.

A. Mechanic's Lien

"A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006); *see also Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) ("[M]echanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them.").

Sections 29-5-10 to -440 of the South Carolina Code (2007 & Supp. 2019) set forth the requirements for establishing and enforcing a mechanic's lien. "The statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014). "For . . . [the] lien to become valid, the lien must be perfected and enforced in compliance with South Carolina's mechanic's lien statutes." *Id.* at 342, 762 S.E.2d at 566. Section 29-5-10(a) provides,

> A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building . . . by virtue of an agreement with, or by consent of, the owner

> of the building . . . shall have a lien upon the building or structure and upon the interest of the owner of the building . . . to secure the payment of the debt due to him. . . . As used in this section, labor performed or furnished in the erection, alteration, or repair of any building or structure upon any real estate includes the preparation of plans, specifications, and design drawings . . . . As used in this section, materials furnished and actually used include tools, appliances, machinery, or equipment supplied for use on the building or structure to the extent of their reasonable rental value during their actual use. . . . For purposes of this section, the term "materials" includes flooring, floor coverings, and wall coverings.

"[W]hen the labor is performed or material is furnished, the right exists but *the lien has not been perfected*." *Ferguson Fire*, 409 S.C. at 341, 762 S.E.2d at 566 (quoting *Butler Contracting*, 369 S.C. at 128, 631 S.E.2d at 256)). "Any material supplied for improving real estate by the erection of a building or structure ordinarily gives rise to a mechanics' lien. Materials must, of course, be incorporated into the structure or become fixtures." 22 S.C. Jur. *Mechanics' Liens* § 14 (2020) (footnotes omitted).

Section 29-5-90 provides that "within ninety days after he ceases to labor on or furnish labor or materials for such building," a person seeking to enforce a mechanics lien must "serve[] upon the owner . . . a statement of a just and true account of the amount due him." Otherwise, the "lien shall be dissolved." *Id.*; *see also Butler Contracting*, 369 S.C. at 131, 631 S.E.2d at 257 ("The deadline to serve . . . a mechanic's lien begins running from the date the last material was furnished . . . ."). The court in *Butler* explained,

> [W]he[n] a claimant, after a contract is substantially completed, . . . furnishes additional material [that] is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, the period for filing the lien will run from

> the . . . furnishing of such materials, irrespective of the value thereof.

Butler Contracting, 369 S.C. at 130-31, 631 S.E.2d at 257 (first alteration in original) (quoting *Wood v. Hardy*, 235 S.C. 131, 140, 110 S.E.2d 157, 161 (1959)). Thus, as we stated in *Shelley Construction*,

> [T]o perfect and enforce the lien against the property, the person claiming it must: (1) *serve* and record a certificate of lien *within ninety days after he ceases to furnish labor or materials* . . . ; (2) bring suit to foreclose the lien within six months after he ceases to furnish labor or materials . . . ; and (3) file notice of pendency of the action within six months after he ceases to furnish labor or materials . . . .

287 S.C. at 27, 336 S.E.2d at 490 (emphases added). If the person claiming the lien "fails to take any one of these steps, the lien against the property is dissolved." *Id.*[1]

Section 29-5-100 provides "[n]o inaccuracy in [the] statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, unless it appear that the person filing the certificate has wil[l]fully and knowingly claimed more than is his due." *See also Zepsa Constr. Inc. v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 31-32 (Ct. App. 2004) (holding overhead and profit are recoverable under the mechanic's lien statute only "in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract").

"Minor imperfections and mistakes in the complaint or petition to foreclose a lien do not affect its validity." 22 S.C. Jur. *Mechanics' Liens* § 19 (2020). "The court may at any time allow either party to amend his pleadings as in other civil actions."

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[1] We also noted dissolution of the lien would not preclude a claimant from maintaining an action on the debt. *See id.*; § 29-5-420 ("Nothing in this chapter shall be construed to prevent a creditor in such contract from maintaining an action thereon in like manner as if he had no such lien for the security of his debt.").

§ 29-5-180; *see also* 22 S.C. Jur. *Mechanics' Liens* § 19 ("Allegations in a complaint to foreclose a mechanics' lien may be amended."). However, "[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)); *see also Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Postal*, 308 S.C. at 387, 418 S.E.2d at 323 ("The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.").

1. Timeliness

Kitchen Planners contends it timely served and filed its mechanic's lien pursuant to section 29-5-90, an amendment pursuant to section 29-5-180 could easily cure the "slight discrepancy" between the date alleged in the lien and the actual date of the last work, and any inaccuracy in the statement of account would not invalidate the proceedings pursuant to section 29-5-100. Kitchen Planners argues that although its lien stated it last furnished materials or labor "on or about August 18, 2015," evidence showed its work did not conclude until September 29, 2015, when it reordered drawer boxes and issued a check to Crystal Cabinets for $550.61. It argues it served and filed its lien within ninety days of September 29, 2015. Kitchen Planners asserts that it also timely commenced the suit for foreclosure on January 13, 2016, which was less than six months after the last work it performed. We disagree.

First, we find Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien. A claimant seeking to enforce a mechanic's lien must strictly follow the requirements of the statute. *See Butler Contracting*, 369 S.C. at 130, 631 S.E.2d at 257. To perfect a mechanic's lien, a claimant must "*serve* and record a certificate of lien *within ninety days after he ceases to furnish labor or materials*." *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490 (emphases added); *see also* § 29-5-90. Here, on the face of the lien, Kitchen Planners asserted its lien was for materials and labor furnished "beginning on or about March 11, 2015 through on or about August 18, 2015." In its complaint, Kitchen Planners asserted its lien was for labor and materials furnished beginning "in or around

March 16, 2015 and continuing through August 18, 2015." Thus, we find Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien. *See Johnson*, 413 S.C. at 202, 775 S.E.2d at 700; *see also Postal*, 308 S.C. at 387, 418 S.E.2d at 323. Although Kitchen Planners argues it was entitled to amend its complaint to change the date it last provided materials, it never requested leave of the circuit court to amend its pleadings; rather, it raises this argument for the first time on appeal. Thus, we find this argument is unpreserved. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (citation omitted) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

Second, we find the evidence was not sufficient to contest the Friedmans' assertion that August 18, 2015, was the last date labor or materials were furnished. Neither Comose's testimony nor her statement in her affidavit that she paid for a reorder of drawer boxes on September 29, 2015, created a genuine issue of material fact as to when Kitchen Planners last furnished materials. *See Gecy*, 422 S.C. at 516, 812 S.E.2d at 754 ("[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." (quoting *M&M Grp.*, 379 S.C. at 473, 666 S.E.2d at 264)). Here, Comose testified she provided no materials to the Friedmans after June 18, 2015, and did not know why she did not pay for the drawer boxes until September 29. Although she explained she reordered the drawer boxes because Mrs. Friedman pointed out they could have been deeper, she never stated the Friedmans specifically requested or directed her to reorder them. Comose offered no testimony or other evidence to show these drawer boxes were ever delivered to the Friedmans, and when she testified about this reorder, she stated, "And I have those, by the way." Viewing the evidence in the light most favorable to Kitchen Planners, we find the only inference to be gleaned from this testimony is that these additional items were never delivered to the Friedmans or installed in their home. *See* § 29-5-10 (providing materials must be "*furnished and actually used* in the erection, alteration, or repair of a building" to give rise to a lien (emphasis added)); 22 S.C. Jur. *Mechanics' Liens* § 14 (noting the materials furnished must ordinarily "be incorporated into the structure or become fixtures"); *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490 ("[T]o perfect and enforce the lien against the property, the person claiming it must . . . serve and record a certificate of lien within ninety days after he ceases to furnish labor or materials . . . ."); *Butler*

Contracting, 369 S.C. at 130-31, 631 S.E.2d at 257 ("[W]he[n] a claimant, after a contract is substantially completed, . . . furnishes additional material [that] is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, the period for filing the lien will run from the . . . furnishing of such materials, irrespective of the value thereof." (first alteration in original) (quoting *Wood*, 235 S.C. at 140, 110 S.E.2d at 161)). Accordingly, we find the evidence and the pleadings show there was no genuine issue of material fact as to the date—August 18, 2015—that Kitchen Planners last furnished materials to the Friedmans. Ninety days from August 18, 2015, would have been November 16, 2015; Kitchen Planners served the Friedmans on November 17, 2015, which was ninety-one days after Kitchen Planners last furnished materials to the Friedmans. Therefore, we find the circuit court did not err by concluding Kitchen Planners failed to timely serve the lien. Further, because Kitchen Planners failed to serve the lien within ninety days, it must be dissolved, regardless of whether the foreclosure action was filed within six months.[2] *See Shelby Constr.*, 287 S.C. at 27, 336 S.E.2d at 490 (stating if a person claiming a lien fails to take any one of the three steps required to perfect and enforce the lien, the lien against the property is dissolved). Based on the foregoing, we find the circuit court did not err by granting the Friedmans' motion for summary judgment.

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[2] We note Kitchen Planners argues the circuit court should not have made decisions concerning credibility when, in denying her motion to reconsider, the court stated Comose's affidavit "was not credible as it was a self-serving statement" and contradicted all other evidence, including Comose's deposition. Though we note witness credibility is not a proper consideration in deciding a motion for summary judgment, given our standard of review on appeal, we need not consider this argument. *See David*, 367 S.C. at 247, 626 S.E.2d at 3 ("When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court."); *Gecy*, 422 S.C. at 516, 812 S.E.2d at 754 ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . . ." (quoting *M&M Grp., Inc.*, 379 S.C. at 473, 666 S.E.2d at 264)).

2. Actual Use

Next, Kitchen Planners argues there is a genuine issue of material fact as to whether its labor or materials were installed in the Friedmans' home. It contends Viggiano's estimate demonstrated some of the materials it furnished were installed and argues it satisfied section 29-5-10 because it performed all of the labor required under the contract, which was used in the design of the kitchen. Kitchen Planners concedes it recovered the actual wholesale cost of the cabinets but argues it spent "hundreds of hours" designing and implementing the remodeling of the kitchen and was entitled to the balance of the contract price for its labor and the expense of the cabinets.[3] We disagree.

Viewing the evidence in the light most favorable to Kitchen Planners, we find it failed to show the materials were actually used in the Friedmans' home. *See* § 29-5-10 ("A person to whom a debt is due for . . . materials *furnished and actually used* in the erection, alteration, or repair of a building . . . shall have a lien upon the building . . . to secure the payment of the debt due to him." (emphasis added)); 22 S.C. Jur. *Mechanics' Liens* § 14 (noting the materials furnished must "be incorporated into the structure or become fixtures"). In their answer, the Friedmans asserted the cabinets were never installed. In its responsive pleading, Kitchen Planners admitted those allegations, and Comose acknowledged the cabinets were not installed. Although Kitchen Planners asserts that because the Friedmans refused to allow the cabinets to be installed they should be estopped from avoiding the lien on this basis, it raises this argument for the first time on appeal. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)). Further, the Viggiano estimate does not create a genuine issue of material fact because the statement "[a]ll useable hardware and drawers from the existing Crystal cabinets will be reflected as a credit in final price" is not probative of whether any such items were actually installed. Based on the foregoing, we find the only reasonable inference that can be drawn from the pleadings and evidence is that the materials were never installed in the Friedmans' home. *See Hansson*, 374 S.C. at 354-55, 650 S.E.2d at 70 ("Summary judgment is

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[3] Kitchen Planners asserts Comose's hourly rate was $125 per hour. However, this figure does not appear in the record. Further, the record contains no evidence as to the number of hours Kitchen Planners spent on the project.

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.'" (quoting Rule 56(c), SCRCP)). Accordingly, we find there was no genuine issue of material fact as to whether the materials were installed in the Friedmans' home.

3. Overhead and Profit

Kitchen Planners contends the circuit court erred by concluding it claimed more than it was entitled to under the lien in violation of section 29-5-100. *See* § 29-5-100 (providing an "inaccuracy . . . in stating the amount due for labor or materials shall invalidate the proceedings[if] it appear[s] that the person filing the certificate has wil[l]fully and knowingly claimed more than is his due"); *see also Zepsa Constr. Inc.*, 357 S.C. 32, 591 S.E.2d 29 (holding overhead and profit are recoverable only "in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract"). Because we have concluded Kitchen Planners failed to satisfy the statutory requirements to establish the existence of a valid lien, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its determination of a prior issue is dispositive).

For the foregoing reasons, we find there was no genuine issue of material fact as to Kitchen Planners' claim for a mechanic's lien and foreclosure. Thus, we find the circuit court did not err by granting summary judgment in favor of the Friedmans.

II. Motion to Strike

Kitchen Planners argues the Friedmans failed to serve Mr. Friedman's affidavit with their motion to dismiss and therefore the circuit court erred by denying its motion to strike the affidavit as untimely pursuant to Rule 6(d), SCRCP. Additionally, it contends the circuit court erred by allowing the Friedmans to convert a motion to dismiss into a motion for summary judgment. We disagree.

First, we find unpreserved Kitchen Planners' argument the circuit court improperly treated the motion to dismiss as a motion for summary judgment because it advances this argument for the first time on appeal. *See Herron*, 395 S.C. at 465,

719 S.E.2d at 642 ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)).

Regardless, even assuming the argument is preserved, we find the circuit court did not err by treating the motion as one for summary judgment. Rule 12(b), SCRCP, provides:

> If, on a motion . . . to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the [c]ourt, *the motion shall be treated as one for summary judgment* and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(emphasis added). When the court treats a motion to dismiss as a motion for summary judgment, the "parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See* Rule 12(b), SCRCP. Here, although the Friedman's motion was titled "motion to dismiss," the body of the motion referenced only Rule 56 and did not reference Rule 12(b)(6). Therefore, we find the reference to Rule 56 in the body of motion was sufficient to place Kitchen Planners on notice that the Friedmans intended to proceed with a motion for summary judgment. Kitchen Planners did not argue it had an insufficient opportunity to present evidence in opposition to the Friedmans' motion, and in fact it did present evidence in opposition. Accordingly, even assuming the issue is preserved, we find the circuit court did not err by treating the motion as a motion for summary judgment.

Finally, we find the circuit court did not abuse its discretion by refusing to strike Mr. Friedman's affidavit. *See Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal."). Rule 6(d), SCRCP, provides, "A written motion . . . shall be served not later than ten days before the time specified for the hearing . . . . When a motion is to be supported by affidavit, the affidavit shall be served with the motion . . . ." However, Rule 56, SCRCP, governs motions for summary judgment and does not

require that the moving party support its motion with affidavits. *See* Rule 56(b), SCRCP ("A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, *at any time*, move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof." (emphases added)). Pursuant to Rule 56(c), the party moving for summary judgment must serve the motion at least ten days before the hearing. Rule 56(c), SCRCP. Here, the motion for summary judgment was filed on January 17, 2017. The hearing on the Friedmans' motion was held April 25, 2017. Although they filed their memorandum and exhibits on April 20, 2017, the Friedmans served Kitchen Planners with Mr. Friedman's affidavit on April 13, 2017. Further, Kitchen Planners had an opportunity to—and did submit—an opposing affidavit, which the circuit court accepted. Therefore, we find the circuit court did not abuse its discretion by refusing to exclude the affidavit.

III. Attorney's Fees

Kitchen Planners argues the circuit court erred by awarding attorney's fees because the Friedmans did not properly prove they were entitled to such fees. We disagree.

A party defending against a mechanic's lien may recover a reasonable attorney's fee in defending against the lien. *See* § 29-5-20(a) ("If the party defending against the lien prevails, the defending party must be awarded . . . a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien."). Because we concluded the Friedmans were entitled to summary judgment, we find the circuit court did not err by concluding they were entitled to reasonable attorney's fees as the prevailing party. *See* §§ 29-5-10, -20. When determining a reasonable attorney's fee, courts should consider the six factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Here, the Friedmans set forth their request for $16,594.68 in attorney's fees in the memorandum supporting their motion for summary judgment and an accompanying affidavit, which they filed several days before the hearing. The circuit court granted the request, finding the fees set forth in the affidavit met "the factors necessary to determine reasonable attorney's fees as set out in Rule 407, [SCACR], and *Jackson v. Speed*" but did not specify or analyze these factors. Although Kitchen Planners challenges the amount and reasonableness of the fee, it raised this argument for the first time in its Rule 59, SCRCP, motion. Because Kitchen Planners could have raised this argument at or before the hearing, we find it unpreserved for our review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172,

177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). Accordingly, we find the circuit court did not err by awarding $16,594.68 in attorney's fees.

CONCLUSION

We find Kitchen Planners failed to serve and file its mechanic's lien within ninety days of the last date it supplied materials or labor and no evidence showed the materials were actually used in the home. Therefore, we affirm the circuit court's order granting summary judgment in favor of the Friedmans pursuant to sections 29-5-10 and -90. Further, we find the circuit court did not err by treating the motion as a motion for summary judgment or by refusing to strike Mr. Friedman's affidavit. Finally, we find the circuit court did not err by awarding attorney's fees to the Friedmans. For the foregoing reasons, the ruling of the circuit court is

AFFIRMED.

KONDUROS and HILL, JJ., concur.