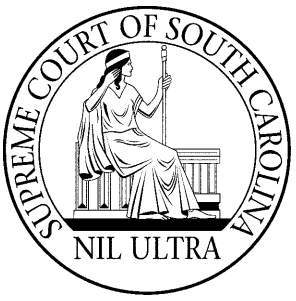


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 27**
**July 6, 2016**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Gregory W. Smith and Stephanie Smith, Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., Defendants,

of whom D.R. Horton, Inc. is the Petitioner.

Appellate Case No. 2013-001345

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

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Opinion No. 27645
Heard March 3, 2015 – Filed July 6, 2016

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**AFFIRMED**

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Matthew Kinard Johnson and W. Kyle Dillard, both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Petitioner.

Phillip Ward Segui, Jr., of Segui Law Firm, of Mt.

Pleasant, John T. Chakeris, of Chakeris Law Firm, and Michael A. Timbes, of Thurmond Kirchner Timbes & Yelverton, PA, both of Charleston, for Respondents.

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**ACTING JUSTICE TOAL:** D.R. Horton, Inc., asks this Court to reverse the court of appeals' decision in *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), affirming the circuit court's refusal to compel arbitration between Gregory and Stephanie Smith (collectively, the Smiths) and D.R. Horton. We affirm.

## FACTS/PROCEDURAL BACKGROUND

D.R. Horton is a corporation specializing in residential construction. In March 2005, the Smiths entered into a home purchase agreement (the Agreement) with D.R. Horton for the design and construction of a new home in Summerville, South Carolina.

The Agreement is organized into numbered paragraphs and lettered subparagraphs, and sets forth the various responsibilities of the parties prior to and immediately following closing.[1] Paragraph 14 of the Agreement is titled "Warranties and Dispute Resolution," and consists of subparagraphs 14(a) through 14(j). Subparagraphs 14(c) and 14(g) contain provisions stating that the parties agree to arbitrate any claim arising out of D.R. Horton's construction of the home, as well as any disputes related to the warranties contained in the Agreement. However, in the majority of the remaining subparagraphs of paragraph 14, D.R. Horton expressly disclaims all warranties for the home—including the implied warranty of habitability—except for a ten-year structural warranty. Moreover, subparagraph 14(i) stipulates that D.R. Horton "shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." (Emphasis in original).

In August 2005, D.R. Horton completed construction of the Smiths' home,

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[1] For example, the Agreement requires the Smiths to obtain suitable financing to purchase the home prior to the start of construction and to deposit a specified amount of earnest money, and requires D.R. Horton to convey marketable title to the Smiths at the closing.

and the Smiths closed on the property and received the deed. Thereafter, the Smiths experienced a myriad of problems with the home that resulted in severe water damage to the property. D.R. Horton attempted to repair the alleged construction defects on "numerous occasions" during the next five years, but was ultimately unsuccessful.

In 2010, the Smiths filed a construction defect case against D.R. Horton and seven subcontractors. In response, D.R. Horton filed a motion to compel arbitration. The Smiths opposed the motion, arguing, *inter alia*, that the arbitration agreement was unconscionable and therefore unenforceable.

The circuit court denied D.R. Horton's motion to compel arbitration, finding that the arbitration agreement was unconscionable. The court based its ruling on "a number of oppressive and one-sided provisions," including D.R. Horton's attempted waiver of the implied warranty of habitability, as well as subparagraph 14(i)'s prohibition on awarding money damages of any kind against D.R. Horton. D.R. Horton made a motion to reconsider pursuant to Rule 59(e), SCACR, but the circuit court again denied the motion to compel.[2]

D.R. Horton appealed, and the court of appeals affirmed the circuit court's order. *See Smith*, 403 S.C. at 10, 742 S.E.2d at 37. The court of appeals found the arbitration agreement was unconscionable, citing subparagraph 14(i) and its prohibition on awarding money damages against D.R. Horton. *Id.* at 15, 742 S.E.2d at 40–41. Further, the court of appeals *sua sponte* conducted a severability analysis to determine whether subparagraph 14(i) could be severed from the remaining provisions of the arbitration agreement. *Id.* at 17, 742 S.E.2d at 41. The court of appeals ultimately concluded that severing the subparagraph would be inappropriate. *Id.*

D.R. Horton petitioned the court of appeals for rehearing, asserting that the court of appeals made two fundamental errors. First, D.R. Horton argued that the court of appeals' unconscionability analysis was flawed because it did not discuss whether the Smiths lacked a meaningful choice in entering the arbitration

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[2] In the second order denying D.R. Horton's motion to compel arbitration, the court elaborated on its previous finding of unconscionability, finding that the Agreement was a contract of adhesion, and that the Smiths had significantly less bargaining power than D.R. Horton.

agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (stating that an unconscionability analysis has two prongs, one of which is whether one of the parties to the contract lacked a meaningful choice in agreeing to arbitrate (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); S.C. Code Ann. § 36-2-302(1) (1976))).

Second, D.R. Horton asserted that the court of appeals' decision violated the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* *See* 388 U.S. 395, 406 (1967) (holding that courts may only consider the threshold question of whether the *arbitration agreement* is fraudulently induced and thus invalid, not whether the *contract as a whole* is invalid); *see also S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (adopting a broad interpretation of *Prima Paint* in South Carolina, and holding that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause" (the *Prima Paint* doctrine)). In D.R. Horton's view, the arbitration agreement was contained exclusively in subparagraph 14(g), and therefore, the court of appeals' consideration of the allegedly one-sided terms in subparagraph 14(i) was inappropriate.[3]

Ultimately, the court of appeals denied the petition for rehearing, and we granted D.R. Horton's petition for a writ of certiorari to review the court of appeals' decision.

## ISSUE

Whether the arbitration agreement is unconscionable?

## STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However,

[3] In conjunction with this argument, D.R. Horton also asserted that a severability analysis was inappropriate because the portions of the Agreement that the court of appeals considered severing were not actually part of the arbitration agreement, i.e., were not part of subparagraph 14(g).

a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.* at 453, 730 S.E.2d at 315.

## ANALYSIS

### *I.* *The* Prima Paint *Doctrine*

As an initial matter, we address D.R. Horton's argument regarding the court of appeals' alleged failure to heed the *Prima Paint* doctrine.[4]

In *Prima Paint*, the Supreme Court held that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole. *See* 388 U.S. at 406. Thus, for example, a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable. *See S.C. Pub. Serv. Auth.*, 312 S.C. at 562–63, 437 S.E.2d at 24. Similarly, in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.

Here, the parties fundamentally disagree on the application of the *Prima Paint* doctrine to the Agreement. D.R. Horton asserts that the arbitration agreement is wholly contained in subparagraph 14(g). Therefore, according to D.R. Horton, the Court may not consider any of the remaining subparagraphs of paragraph 14—such as subparagraph 14(i)'s damages limitation—in determining whether the arbitration agreement is unconscionable. We disagree.

Like the lower courts, we construe the entirety of paragraph 14, entitled "Warranties and Dispute Resolution," as the arbitration agreement. As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

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[4] As will be explained further, *infra*, we must address this issue first because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis.

Thus, in accordance with the *Prima Paint* doctrine, we find that in determining whether the arbitration agreement is unconscionable, we may properly consider the entirety of paragraph 14.

## *II. Unconscionability*

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668 (citations omitted)).[5]

Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). Thus, parties frequently allege they lacked a meaningful choice when the dispute involves an adhesion contract. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (defining adhesion contracts as "standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable"). While adhesion contracts are not unconscionable per se, courts tend to look upon them with "considerable skepticism" because they give rise to "considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted). In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether "'the plaintiff is a substantial business concern.'" *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

"We have [] taken judicial cognizance of the fact that a modern buyer of new

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[5] We note that the court of appeals addressed only the allegedly oppressive nature of the terms found in the arbitration agreement, but appears not to have considered whether the Smiths lacked a meaningful choice in agreeing to arbitrate. We caution courts and parties in the future to analyze both prongs of unconscionability.

residential housing is normally in an unequal bargaining position as against the seller." *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989); *cf. Sapp v. Ford Motor Co.*, 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina's "courts have shifted from following the doctrine of *caveat emptor* ('let the buyer beware') to the doctrine of *caveat venditor* ('let the seller beware')"). There is no indication in the record that the Smiths enjoyed a substantially stronger bargaining position against D.R. Horton than the average homebuyer, or that they were represented by independent counsel. Moreover, the Smiths were a single client to a corporation that constructs houses in twenty-seven states. Thus, the Smiths were also not a substantial business concern of D.R. Horton, as they did not comprise a large portion of D.R. Horton's clientele.

Accordingly, we find that the Smiths lacked a meaningful choice in their ability to negotiate the arbitration clause in the Agreement.

Moreover, in considering the actual provisions of the arbitration agreement, we find that D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive. Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate. We therefore affirm the court of appeals and hold the arbitration provision is unconscionable and thus unenforceable.[6]

[6] Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions. *See Simpson*, 373 S.C. at 34, 644 S.E.2d at 673.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

**AFFIRMED.**

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

**JUSTICE KITTREDGE:** The underlying contract involves interstate commerce and, as a result, the Federal Arbitration Act (FAA) controls. Because I believe the majority has not followed controlling precedent of the United States Supreme Court, I respectfully dissent. In my judgment, state law does not provide a valid basis to avoid enforcing this particular agreement to arbitrate, and the court of appeals erred in upholding the circuit court's refusal to compel arbitration. I would reverse.

## I.

This arbitration agreement is subject to the FAA, a fact conspicuously absent in the majority opinion. "'Generally, any arbitration agreement affecting interstate commerce is subject to the FAA.'" *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121–22, 747 S.E.2d 461, 464 (2013) (quoting *Landers v. Federal Deposit Ins. Co.,* 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013)). "The United States Supreme Court 'has previously described the [FAA]'s reach expansively as coinciding with that of the Commerce Clause.'" *Id*. at 122, 747 S.E.2d at 464 (quoting *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 274 (1995)). "Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce." *Id*. (citing *Episcopal Housing Corp. v. Fed. Ins. Co.,* 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977)).

In support of its motion to compel arbitration, D.R. Horton submitted affidavits from several executives indicating that D.R. Horton is a Delaware corporation with its principal place of business in Texas. These affidavits further establish D.R. Horton is engaged in the residential construction business in twenty-seven states and that many of the building materials and supplies used in constructing the Smiths' home in Summerville were obtained from suppliers outside South Carolina.[7] Because the arbitration clause at issue here is included in a contract that evidences a transaction involving interstate commerce, the FAA governs the enforceability of the arbitration provision. *See Cape Romain*, 405 S.C. at 123–24, 747 S.E.2d at 465 (citing *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 594–95,

[7] These materials include rebar, framing materials, wall sheathing, windows, gypsum drywall, shingles, cabinets, carpet, vinyl flooring, plumbing fixtures, lighting hardware, and appliances.

553 S.E.2d 110, 117–18 (2001); *Episcopal Housing,* 269 S.C. at 640, 239 S.E.2d 647 S.E.3d at 652) (observing that out-of-state materials used in construction were instrumentalities of interstate commerce); *see also Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 (relying upon affidavits in determining whether a transaction involves interstate commerce).

**II.**

The FAA requires that an arbitration agreement "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. The United States Supreme Court has construed section 2 of the FAA as permitting "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). However, this provision of the FAA has been narrowly construed.

Moreover, "[a] recurring question under § 2 [of the FAA] is who should decide whether grounds exist at law or in equity to invalidate an arbitration agreement." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (internal quotations omitted). The United States Supreme Court has determined that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Indeed, absent a "discreet challenge to the validity of the arbitration clause," federal law establishes that challenges to the validity of contractual provisions "are within the arbitrator's ken." *Preston*, 552 U.S. at 353–54.

"[W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the [FAA]'s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance . . . ." *Nitro-Lift Techs., LLC, v. Howard*, 133 S.Ct. 500, 503 (2012) (internal quotation marks omitted) (citing *Preston*, 552 U.S. at 349; *Prima Paint*, 388 U.S. at 403–04). The permissible scope of the initial judicial inquiry is "highly circumscribed" and must relate "specifically to the arbitration clause." *Hooters of America, Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999). If the arbitration provision is found to be valid (or is not challenged),

then the validity of the remainder of the contract is for the arbitrator to decide. *Nitro-Lift*, 133 S.Ct. at 503. Moreover, "this arbitration law applies in state as well as federal courts." *Buckeye*, 546 U.S. at 446. Simply put, courts—state or federal—may decide only the question of whether the parties validly agreed to arbitrate the dispute that has arisen; controversies as to the enforceability of any other contractual provision(s)—including those which may be so objectionable as to undermine the contract in its entirety—are to be resolved by the arbitrator.

Here, the majority acknowledges this point of law, as it must. However, the majority nevertheless adopts the findings of the trial court, which circumvent the application of these legal principles by expanding the relevant scope of the contractual language at issue to include matters beyond the arbitration provision. This is accomplished by the fiction that the arbitration provision is the entirety of Paragraph 14, which contains more than 1,800 words. Indeed, the following is the portion of the parties' contract the majority finds to constitute the "arbitration provision":

> **14. WARRANTIES AND DISPUTE RESOLUTION**
>
> **a. Structural Warranty.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation ("RWC") or such other national warranty provider as Seller may reasonably elect (the "RWC Warranty"). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. *The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law.* In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any product installed in the home built on the Property.
>
> **b. RWC Warranty.** Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty, which is administered by the Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon the Seller's compliance with all RWC's enrollment procedures and upon Seller remaining in good standing in the RWC Program.

**c.** ***The RWC Warranty is provided by Seller to Purchaser in lieu of all other warranties, verbal agreements, or representations and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law.*** **Particularly, Purchaser understands and agrees that any and all complaints of any nature in regard to the property that arise more than 365 days after closing must be submitted to RWC.** Purchaser understands and agrees that the warranties of all appliances and other consumer products installed in the home are those of the manufacturer or supplier and same are assigned to Purchaser, effective on the date of Closing. In any event, Seller shall not be liable for any personal injury or other consequential or secondary damages and/or losses, which may arise from or out of any and all defects. **Except for purchasers of FHA or VA financed homes, Purchaser acknowledges and understands that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration.** Purchaser has been, or will be given prior to Closing, provided with a copy of the D.R. Horton Warranty manual, "Foundations." Purchaser understands and agrees to all warranties to their extent as outlined in said manual. Purchaser shall execute an acknowledgement that Seller makes no warranties express or implied, as to fitness for a particular purpose, merchantability, and habitability as set forth above at Closing, which statement shall be affixed to Purchaser's deed.

Purchaser Initial(s): s/GS s/SM

**d. Exclusions.** The following are excluded from all warranties provided by Seller: (i) those matters excluded in the RWC Warranty documents; (ii) those matters excluded in sub-paragraph (f) below, and (iii) the following matters:

Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty. All grading, fill, landscaping, disposition of trees and control of water flow shall be constructed and maintained at the sole discretion of Seller prior to Closing. Grading and drainage

are not covered by any warranty nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision of the South Carolina Residential Construction Standards. Many areas will be left in their natural state and will not be landscaped in any way. As of the date and time of Closing, Seller shall have no further responsibility for soil erosion, the growth of grass, death of trees, grass or shrubbery, or soil conditions. Seller is not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees, which will exist on the property after construction. Seller will plant grass seeds or install sod, as the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is." Because prevention of erosion is dependent on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list." Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose, or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include sheetrock dings, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list," Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer warranties to Purchaser at Closing).

Purchaser Initial(s): s/GS s/SM

**e. Existing Trees:** D.R. Horton will make every effort to save as many

existing trees as possible during the construction process. Those trees that must be removed will be removed at the sole discretion of the Area Manager and their Field Manager. D.R. Horton reserves the right to remove any trees, which in their judgment may have roots damaged by construction to the extent that the tree would not be expected to live. Those trees that are in or within close vicinity of the home's footprint or concrete flatwork area will be removed. Additionally, trees that impede the drainage of the site, or overall community drainage plan will be removed. D.R. Horton does not guarantee the health, survival or growth of any tree after closing. Repairs to living trees and removal or replacement of dead trees at any time after closing is the responsibility of the buyer unless requested before closing, agreed upon, and noted in writing at the "Pre-settlement Orientation Inspection."

Purchaser Initial(s): s/GS s/SM

**f. Landscaping**. D.R. Horton does not guarantee the continued health, growth or life of any landscape components after closing. Survival of landscaping components (trees, bushes, plants, sod, seed etc.) after closing is the buyer's responsibility. No landscaping items will be replaced or repaired after closing unless noted in writing and agreed upon at the "Pre-settlement Orientation Inspection." Landscaping requires a continuous maintenance program, which includes proper watering, fertilization, mowing and weed control. Deficiencies, other than those noted prior to closing, will not be warranted by D.R. Horton. Upon closing, all maintenance is the responsibility of the buyer. The buyer is responsible for any damage due to neglect or inadequate maintenance. Wetland, wetland buffers and wooded natural areas throughout the Community will be left "as is." Buyer understands that "standing water" beyond 40'-0" of the home may occur in wetland, wetland buffers and wooded natural areas. Maintenance and repair of the aforementioned areas are the sole responsibility of the Buyer after closing. Clearing and disturbance of natural areas in order to provide underground utility services to the home may be necessary. These areas will be left un-landscaped and allowed to return to their natural state. The remaining undisturbed area will be left in its natural state.

Purchaser Initial(s): s/GS s/SM

**g. MANDATORY BINDING ARBITRATION.** Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

**i.** If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.

**ii.** If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitrations shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

Purchaser Initial(s): s/GS s/SM

**h.** In addition to the rights and obligations of each party specified in subparagraphs (a)–(d) above, in the event that a bona fide dispute, as determined by the Seller, should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the

right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.

**i. Limitation of liability. EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, *SELLER MAKES NO OTHER WARRANTY OF ANY KIND, ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED.* THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THE WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. *SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.***

**j.** Requests for warranty service within the first 365 days after closing, must be in writing and faxed, mailed, or delivered to Seller at Seller's address as indicated below Seller's signature on this Agreement. Verbal requests to Seller's staff are not acceptable. Such requests must comply with all applicable law and must state the nature of the problem with particularity. Seller has 30 days to determine whether such request will be fulfilled.

(italicization added).

In seeking to avoid arbitration on the basis of unconscionability, the Smiths claimed the italicized language in the above excerpt represents D.R. Horton's

attempt to disclaim certain implied warranties and to eliminate liability for monetary damages, the terms of which are unfairly oppressive and one-sided. However, in opposing arbitration, the Smiths do not challenge any provision of subparagraph (g) titled "MANDATORY BINDING ARBITRATION." More to the point, the Smiths do not contend the specific agreement to arbitrate was unconscionable.

As noted, federal law requires that unless the claim of unconscionability goes to the arbitration clause itself, the issue of enforceability must be resolved by the arbitrator, not by the courts. Thus, courts can consider unconscionability challenges only when they relate to the issue of whether the parties agreed to arbitrate disputes in the first place. *See Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) ("Principles of equity may counsel for invalidation of an arbitration agreement if the grounds for revocation relate specifically to the arbitration clause. . . . However, when claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement." (citing *Hooters of America*, 173 F.3d at 938; *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986))).

Here, the majority circumvents controlling federal law by construing the entirety of paragraph fourteen—i.e. all ten separately denominated subparagraphs—as comprising the arbitration agreement. In attempting to justify such a construction, the majority cites no supporting authority, instead reasoning that the contract groups warranties and dispute resolution together under a single heading "Warranties and Dispute Resolution" and that "[t]he subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the paragraphs so as to constitute a single provision." Indeed, it is only by treating paragraph fourteen as a single, indivisible provision that the majority is able to transform the Smiths' objection to certain warranty and liability disclaimers into a challenge to the arbitration provision, only the latter being proper for judicial rather than arbitral determination.

I reject the majority's construction that the arbitration provision is the entirety of paragraph fourteen. In my judgment, under well-established state law, paragraph fourteen is comprised of numerous severable provisions, which include not only the parties' mutual promise to settle any disputes through arbitration, but also

various other distinct provisions, including D.R. Horton's promise to provide a ten-year structural warranty, D.R. Horton's promise to assign appliance manufacturer warranties to the Smiths, mutual promises regarding which party is responsible for landscaping maintenance at various points in time, and the Smiths' promise to give written notice of any warranty claims in accordance with specified procedures, among many other things.

Specifically, I believe the challenged warranty disclaimers and liability limitations are separate and distinct from the agreement to arbitrate, in terms of both formatting and subject matter. Indeed, not only does the parties' chosen paragraph structure and subparagraph denomination spatially delineate these provisions as separate from the agreement to arbitrate, but also the gravamen of each of these terms is distinct and independently operative. Consequently, as a matter of South Carolina law, these provisions are properly viewed as discrete terms rather than as a cohesive contractual provision. *See Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (explaining that a "severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be," and finding a lump-sum contract for services involved severable provisions despite interdependence of material terms); *Packard & Field v. Byrd*, 73 S.C. 1, 51 S.E. 678, 680 (1905) (finding contract terms relating to the seller's promise to deliver shoes and the buyer's promise to purchase shoes were distinct and severable, and therefore enforceable, despite the presence of other contractual provisions which were deemed unenforceable as against public policy); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 867 (Ct. App. 2002) (finding a single subparagraph was comprised of three discrete provisions because "separate and distinct rights" were implicated in each provision).

Further, I emphasize the fact that the Smiths separately initialed subparagraph (g) titled "MANDATORY BINDING ARBITRATION" (and four other subparagraphs within paragraph fourteen), which in my judgment indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented. *See Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (noting "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions" (citation omitted)); *Columbia Architectural Group.*, 274 S.C. at 641, 266 S.E.2d at 429 ("The entirety

or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention." (quoting *Packard & Field*, 73 S.C. at 6, 51 S.E. at 679)); *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986) (finding a party's act of initialing two paragraphs amounted to a signing and an acceptance of a counter offer relating to those two provisions). Thus, it is my view that the majority's decision to ignore the obvious divisibility of the multitude of contractual terms within paragraph fourteen contravenes state law.

Moreover, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445; *see also* 6 C.J.S. Arbitration § 11 ("Agreements for arbitration contained in a contract are treated as separable parts of the contract, so that the illegality of another part of the contract does not nullify an agreement to arbitrate." (citing *Robert Lawrence Co. v. Devonshire Fabrics. Inc*., 271 F.2d 402 (2d Cir. 1959))). The United States Supreme Court has identified an arbitration provision as consisting of the "specific written provision to settle by arbitration a controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (internal quotation marks omitted). Stated differently, as a function of federal law, the relevant arbitration provision consists of only that portion of subparagraph (g) in which the parties agree to arbitrate any controversies. Accordingly, even if state law justified the majority's finding that the entirety of paragraph fourteen constitutes the relevant arbitration provision (which it does not), such a finding would in any event be in conflict with, and therefore preempted by, federal substantive law identifying only a portion of subparagraph (g) as the arbitration agreement. *See Concepcion*, 563 U.S. at 352 (finding state law rules that conflict with or "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]" are preempted and invalidated); *see also DirecTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468–69 (2015) (citing U.S. Const. art. VI, cl. 2) (reaffirming the holding in *Concepcion* that state contract principles which conflict with the FAA are preempted).

Because the Smiths fail to raise *any* challenge to the arbitration provision in subparagraph (g), I would find the Smiths' claims regarding unconscionability must be resolved in an arbitral forum, and I would reverse the court of appeals' decision. *Cf. Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) ("An agreement providing for arbitration does not determine the *remedy* for

a breach of contract but only the *forum* in which the remedy for the breach is determined.").

**PLEICONES, C.J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Coastal Federal Credit Union, Appellant,

v.

Angel Latoria Brown, Respondent.

Appellate Case No. 2014-002079

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

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Opinion No. 5421
Submitted April 1, 2016 – Filed June 30, 2016

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**VACATED IN PART, REVERSED IN PART, AND REMANDED**

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Sarah Dalonzo-Baker, of Kirschbaum Nanney Keenan & Griffin, PA, of Raleigh, North Carolina, for Appellant.

Kirby Rakes Mitchell, of Greenville, and Matthew M. Billingsley, of North Charleston, both of S.C. Legal Services, for Respondent.

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**CURETON, A.J.:** Coastal Federal Credit Union (CFCU) appeals a circuit court order granting summary judgment to Angel Brown and denying summary judgment to CFCU. On appeal, CFCU argues the circuit court erred by (1) ruling the South Carolina Consumer Protection Code (SCCPC) and the Fair Debt

Collections Practices Act (FDCPA) apply to this case, (2) ruling the applicable statute of limitations was three years and granting Brown summary judgment on that basis, and (3) denying its motion for summary judgment. We vacate the circuit court's order as to the first issue, reverse as to the second issue, find the third issue is not appealable, and remand for further proceedings.[1]

## I. FACTS/PROCEDURAL HISTORY

On May 4, 2008, Brown entered into a retail installment sales contract with Johnny's Subaru Isuzu, LLC (the dealership), to purchase a vehicle. Brown financed the purchase, and the contract gave the dealership a security interest in the vehicle. The contract also provided that the financed portion of Brown's purchase would accrue interest at an annual rate of 12.4 percent. The dealership immediately assigned the contract to CFCU, and Brown's certificate of title listed CFCU as first lienholder. Brown failed to make payments as required by the contract,[2] and in October 2009, CFCU repossessed the vehicle. On November 19, 2009, CFCU sold the vehicle at auction, leaving an outstanding balance under the contract. On November 24, 2009, CFCU sent Brown a letter notifying her of the sale and resulting deficiency.

On October 21, 2013, CFCU filed the summons and complaint in the current action seeking to collect Brown's debt. The caption of the complaint stated the action was for "debt collection," and the complaint alleged Brown "defaulted in making the regularly-scheduled monthly payments due under the [c]ontract." The complaint further alleged CFCU repossessed and sold the vehicle "in accordance with the terms of the [c]ontract and applicable law," CFCU applied the proceeds "to the [c]ontract," and Brown owed an outstanding balance including interest and collection costs pursuant to the contract. Brown answered, asserting a statute of limitations defense. CFCU filed a motion for summary judgment, arguing the six-year statute of limitations contained in Article 2 of the South Carolina Uniform Commercial Code (SCUCC) [3] applied to the case, while neither the SCCPC nor the FDCPA were applicable. Brown filed a motion for summary judgment asserting

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

[2] Brown made her last payment in July 2009.

[3] Although the South Carolina Code refers to sections of the SCUCC as "Chapters" rather than "Articles," we use the term "Article" to maintain uniformity with language used in the Uniform Commercial Code and cited authority.

the case was barred by the general three-year statute of limitations contained in section 15-3-530 of the South Carolina Code (2005).

At a hearing on the motion, the circuit court engaged in the following exchange with CFCU:

| | |
|---|---|
| THE COURT: | Did you sell the car? |
| CFCU: | We did Your Honor. |
| COURT: | And then you established a balance owing. |
| CFCU: | Correct, in deficiency only. |
| . . . . | |
| COURT: | You're now suing on the deficiency, and now you've got a situation [in which] you needed to do it sooner. I grant [Brown's] motion for summary judgment. |

In its order disposing of the parties' motions, the circuit court found CFCU's action was one for the collection of a defaulted debt; therefore, the three-year statute of limitations applied and barred the action because it was initiated more than three years after CFCU repossessed the vehicle. It also ruled, "The [SCCPC] and the [FDCPA] apply to this case." The circuit court granted Brown's motion for summary judgment and denied CFCU's motion. This appeal followed.

## II. ISSUES ON APPEAL

1. Did the circuit court err by ruling the SCCPC and FDCPA apply to this case?

2. Did the circuit court err by ruling the applicable statute of limitations was three years and granting Brown summary judgment on that basis?

3. Did the circuit court err by denying CFCU's motion for summary judgment?

## III. STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008). "A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 109-10, 662 S.E.2d at 41. "Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Id.* at 110, 662 S.E.2d at 41.

## IV. SCCPC & FDCPA

CFCU argues the circuit court erred by ruling the SCCPC applies to this case because, as a federally-chartered credit union, it is specifically exempted from the SCCPC. Similarly, CFCU argues it is exempted from the FDCPA because it is attempting to collect money owed directly to it and therefore is not a "debt collector" under that act. Brown argues the circuit court's ruling on this issue was "merely incidental" and was not relied upon in reaching its ruling regarding the appropriate statute of limitations. Brown further argues that because the circuit court granted no relief with respect to the SCCPC or the FDCPA, this court can offer no relief related to the ruling and should dismiss this portion of the appeal. We agree.

The circuit court did not rely on either the SCCPC or the FDCPA in reaching its decisions to grant summary judgment to Brown and deny summary judgment to CFCU. Because the ruling was unnecessary to the circuit court's disposition of the motions, it was improper. We therefore vacate the ruling. *See Brading v. County of Georgetown*, 327 S.C. 107, 112 n.3, 490 S.E.2d 4, 6 n.3 (1997) (vacating a ruling related to an issue because the issue "was not before the referee and was unnecessary to his ruling").

## V. STATUTE OF LIMITATIONS

CFCU argues the circuit court erred by granting Brown summary judgment on statute of limitations grounds because the contract at issue is an SCUCC Article 2 contract for the sale of goods and the action is one for breach of the contract; therefore, the six-year statute of limitations in Article 2 controls. *See* S.C. Code Ann. § 36-2-725(1) (2003) ("An action for breach of any contract for sale must be

commenced within six years after the cause of action has accrued.").[4] Brown, on the other hand, argues CFCU's role in the sale was that of a financing agency and secured lender in a security transaction. She further argues her alleged debt "arose from a deficiency" after CFCU repossessed and sold the vehicle, and CFCU's actions were taken pursuant to SCUCC Article 9 to collect a debt arising out of its security interest in the vehicle. Accordingly, Brown argues this action is not one for breach of a sales contract under Article 2, and because Article 9 does not contain a statute of limitations, CFCU's claim is governed by the general three-year statute of limitations in section 15-3-530. *See* S.C. Code Ann. § 15-3-530(1) (2005) (providing a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied"). CFCU rejects Brown's assertion that the action was transformed into one solely for debt collection because CFCU repossessed and sold the vehicle. Rather, CFCU argues its complaint set forth that Brown breached the contract and CFCU is attempting to enforce the contractual payment obligations through this action.

This issue—whether Article 2 of the Uniform Commercial Code (UCC) applies to an action for the recovery of a deficiency following the repossession and sale of collateral by a secured creditor who is also a party to the sales contract creating the security interest in the collateral—is one of first impression in South Carolina. Additionally, there is a split of authority on this issue nationally. *See* David J. Marchitelli, Annotation, *Causes of Action Governed by Limitations Period in UCC § 2-725*, 49 A.L.R. 5th 1 (1997) (listing cases applying the UCC statute of limitations in section 15(a) of the annotation, and cases applying a non-UCC statute of limitations in section 15(b)); Sonja A. Soehnel, Annotation, *What Constitutes a Transaction, a Contract for Sale, or a Sale Within the Scope of UCC Article 2*, 4 A.L.R. 4th 85 (1981) (listing cases applying Article 2 to mixed sale-security contract actions in section 19(a) of the annotation, and cases declining to apply Article 2 in section 19(b)).

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[4] Article 2 does exempt from its scope transactions "intended to operate *only* as a security transaction." S.C. Code Ann. § 36-2-102 (2003) (emphasis added). However, the transaction between Brown and the dealership was a mixed transaction involving both a sale of goods and a security agreement. Accordingly, it did not operate only as a security transaction and was not exempted from Article 2's scope.

The majority of jurisdictions applies Article 2 to such actions, reasoning "a deficiency suit is more closely related to the sales aspect of a combination sale and security interest than to the security aspect." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 5 (2008); *id.* at 39 (recognizing "the tally of cases deciding the issue is greatly in favor of applying Article 2"). Conversely, the minority of jurisdictions reasons that an action to recover a deficiency is more closely related to the security aspect of the transaction, which is governed by UCC Article 9, and chooses not to apply Article 2. *See, e.g.*, *N.C. Nat'l Bank v. Holshouser*, 247 S.E.2d 645, 647 (N.C. Ct. App. 1978) (ruling Article 2 "inapplicable to this transaction beyond its pure sales aspects, and that Article 9 is paramount in reference to the security aspects of the transaction"). We believe the majority's reasoning is more persuasive and adopt it here. *See, e.g.*, *Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 471 (Del. 1981) ("We agree . . . that Article 2, the sales article of the Uniform Commercial Code . . . , controlled the contractual rights of the parties . . . ."); *Barnes v. Cmty. Trust Bank*, 121 S.W.3d 520, 524 (Ky. Ct. App. 2003) ("We agree with the courts of the other states . . . that while this case may be viewed as involving a hybrid contract, it deals essentially with a contract for the sale of a good. As such, it falls squarely within Article 2 of the Uniform Commercial Code, and should be governed by the limitations period contained in that article."); *Assocs. Disc. Corp. v. Palmer*, 219 A.2d 858, 861 (N.J. 1966) ("[W]e think [the view that an action for a deficiency is not governed by Article 2 because it is incident to the security arrangement between the parties rather than the sales aspect of the agreement] mistakes the true character of a deficiency suit. Such a suit is nothing but a simple [i]n personam action for that part of the sales price which remains unpaid after the seller has exhausted his rights under Article 9 by selling the collateral; it is an action to enforce the obligation of the buyer to pay the full sale price to the seller, an obligation which is an essential element of all sales and which exists whether or not the sale is accompanied by a security arrangement."); *First Nat'l Bank in Albuquerque v. Chase*, 887 P.2d 1250, 1252 (N.M. 1994) ("a deficiency action is essentially an action for the price and is, therefore, part of the general sales aspect of the agreement").

Admittedly, CFCU exercised its right to repossess the vehicle under SCUCC Article 9. *See* S.C. Code Ann. § 36-9-609 (2003) (allowing repossession of collateral after default); S.C. Code Ann. § 36-9-610(a) (2003) (allowing the sale of collateral after default); S.C. Code Ann. § 36-9-615(d) (2003) (holding the obligor

liable for any deficiency following sale). However, as assignee to the sales contract, CFCU gained the dealership's rights thereunder, including the right to sue Brown for a breach of the contract. *See* S.C. Code Ann. § 36-2-210 (2) (2003) ("Unless otherwise agreed[,] all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance."); *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999) ("In South Carolina, it is well established that an 'assignee . . . stands in the shoes of its assignor . . . .'" (quoting *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)); *id.* at 640, 518 S.E.2d at 46 ("When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor."); *First Nat'l Bank in Albuquerque*, 887 P.2d at 1252 ("The fact that the [automobile installment sales contract and security agreement] was later assigned . . . does not change the nature of the agreement.").

In our view, CFCU is entitled to exercise its rights under both Articles 2 and 9 simultaneously, so long as it does not obtain double recovery, and repossessing and selling the vehicle did not extinguish CFCU's rights under the sales contract, including the right to recover interest from Brown at the agreed-upon rate and collection costs. *See* S.C. Code Ann. § 36-9-601(a) (2003) ("After default, a secured party has the rights provided in this part and, except as otherwise provided in [s]ection 36-9-602, *those provided by agreement of the parties*." (emphasis added)); S.C. Code Ann. § 36-9-602 (2003) (mandating that certain statutory provision in Article 9 may not be waived or varied); *Andrews v. von Elten & Walker, Inc.*, 315 S.C. 199, 202, 432 S.E.2d 500, 502 (Ct. App. 1993) (ruling "the UCC does not prohibit a secured party in possession of collateral from proceeding judicially on a guaranty"). Had the transaction between Brown and the dealership been simply a contract for the sale of goods unaccompanied by the creation of a security agreement, there is no question that CFCU, as the dealership's assignee, would be entitled to sue Brown for a breach of the contract, and the applicable statute of limitations would be that of SCUCC Article 2. We can discern no reason why this right should be taken away merely because a security interest in the vehicle was created concomitantly with its sale.

Here, although CFCU captioned its complaint as a "debt collection" action, it alleged Brown defaulted under the contract, CFCU repossessed and sold the

vehicle "in accordance with the terms of the [c]ontract and applicable law," CFCU applied the proceeds "to the [c]ontract," and Brown owed an outstanding balance that included interest and collection costs pursuant to the contract. Accordingly, CFCU's action relates to the sales contract and is governed by SCUCC Article 2. Because CFCU's action was filed within the six-year statute of limitations in section 36-2-725, we reverse the circuit court's grant of summary judgment to Brown.

## VI. DENIAL OF SUMMARY JUDGMENT

CFCU argues the circuit court erred by denying its motion for summary judgment on the merits because there was no genuine issue of material fact surrounding Brown's breach of contract and resulting indebtedness and CFCU was entitled to judgment as a matter of law. CFCU further argues that while a denial of summary judgment is generally not appealable, this denial is appealable because it accompanies the circuit court's appealable grant of summary judgment to Brown. We find this issue is not appealable. *See Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) ("This [c]ourt has repeatedly held that the denial of summary judgment is not directly appealable."); *id.* at 477, 443 S.E.2d at 380 ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict."); *id.* ("In short, the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings.").

## VII. CONCLUSION

We reverse the circuit court's grant of summary judgment to Brown, vacate its ruling regarding the SCCPC and FDCPA, and remand for further proceedings.

**VACATED IN PART, REVERSED IN PART, AND REMANDED.**

**THOMAS, J., concurs.**

**SHORT, J., concurring in part and dissenting in part:** I concur with the majority in its disposition of the first and third issues. As to the second issue, I respectfully dissent.

The second issue in this case is whether the applicable statute of limitations is the statute of limitations in Article 2 (governing the sale of goods) or the statute of limitations for the default on a security interest (governed by general statutes because Article 9 does not contain its own statute of limitations). Considering the applicable statute of limitations under facts similar to those presented in this case, the Court of Appeals of North Carolina in *North Carolina National Bank v. Holshouser*, 247 S.E.2d 645, 647 (N.C. Ct. App. 1978), found the Article 2 statute of limitations did not apply. The court found Article 2 would apply to the sales aspects of such a transaction and Article 9 would apply to the security aspects of the transaction. *Id.* Because Article 9 contains no statute of limitations, the court in *Holshouser* looked to other statutes of limitations in North Carolina. *Id.*

I recognize many courts have applied the Article 2 statute of limitations to an action on a secured transaction similar to this action. *See* Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks - Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 39-40 (2008) (explaining many courts have ignored the Official Comments to Article 2 and summarily cited *Associates Discount Corp. v. Palmer*, 219 A.2d 858 (N.J. 1966) in finding Article 2 applies under similar facts); *id.* at 2 n.4 (listing cases that have applied the Article 2 statute of limitations); *DaimlerChrysler Servs. N. Am., LLC v. Ouimette*, 830 A.2d 38, 42 (Vt. 2003) (citing multiple jurisdictions applying the Article 2 statute of limitations to a suit for default on a motor vehicle retail installment sales contract). However, I agree with the rationale of the North Carolina Court of Appeals in *Holshouser* and find the circuit court did not err when it found the three-year statute of limitations applied in this case.

The sales transaction between Brown and Johnny's Subaru Isuzu, LLC (Johnny's) was for the sale of goods, namely the vehicle. Johnny's assigned the Retail Installment Sale Contract (the Contract) to CFCU. The Contract provided the financing terms and created a security interest. As a transaction for the sale of goods, CFCU correctly contends the SCUCC applied to the sale of the vehicle. *See* S.C. Code Ann. § 36-2-102 (2003) ("Chapter [2 of the SCUCC] applies to transactions in goods; it does not apply to any transaction . . . intended to operate only as a security transaction . . . ."). However, in my view, CFCU's cause of action does not arise from a breach of the *sales* contract under the SCUCC; rather, it is a debt collection action on the security interest, not arising under the SCUCC. *See BancOhio Nat'l Bank v. Freeland*, 468 N.E.2d 941, 944 (Ohio Ct. App. 1984)

(finding an action based on the note secured by a vehicle was not governed by Article 2 where the financer was not the seller of the vehicle); *see also Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283, 1289-90 (E.D. Wash. 2015) (distinguishing between a hybrid agreement, which constituted both a contract for sale and a secured transaction and was subject to Article 2, and a financing agreement separate from the sale of goods, which was not subject to Article 2); S.C. Code Ann. § 36-1-201(35) (Supp. 2015) ("'Security interest' means an interest in personal property or fixtures, which secures payment or performance of an obligation.").

Based on the analysis in *Holshouser*, I would find the circuit court properly granted Brown's motion for summary judgment. *See McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014) ("Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations."). Accordingly, I would affirm the second issue.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Jonetha Singleton, Appellant,

v.

Starshaka N. Cuthbert, Respondent.

Appellate Case No. 2013-001387

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Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

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Opinion No. 5422
Heard April 13, 2015 – Filed July 6, 2016

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**REVERSED AND REMANDED**

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Bernard McIntyre, of Beaufort, for Appellant.

Elizabeth Hall Freeman, of Hall Booth Smith, PC, and Jeffrey Alan Ross, of Jeff Ross Law, LLC, both of Charleston, for Respondent.

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**MCDONALD, J.:** In this action arising from an automobile accident, Jonetha Singleton appeals, arguing the circuit court erred in directing a verdict that she was negligent as a matter of law under section 56-5-2770(A) of the South Carolina Code (2006) in turning left behind another vehicle stopped behind a stopped school bus. We reverse.

**FACTS AND PROCEDURAL BACKGROUND**

On October 6, 2010, Singleton was involved in an automobile accident in Beaufort County. Singleton was making a left turn into her mother's driveway when Starshaka Cuthbert's vehicle, approaching from the oncoming direction, continued past a stopped school bus and struck her. Just before Singleton made her left turn, she was stopped one car behind the stopped bus. Although the school bus's caution lights were activated, Cuthbert did not stop for the school bus and hit Singleton's car on the right side.

Singleton filed a complaint on November 10, 2011, seeking compensatory and punitive damages. Cuthbert answered, asserting comparative negligence as a defense. During the trial on May 6, 2013, Cuthbert moved for directed verdict, asserting Singleton violated section 56-5-2770(A) by turning left behind the vehicle stopped behind the school bus. Cuthbert contended Singleton was negligent as a matter of law because Singleton's own testimony established the school bus's flashing red lights were activated, the bus was stopped, she came to a stop, and then she proceeded to make her left turn while the bus was still stopped. Singleton countered that no evidence established she was "meeting or overtaking" the bus as referenced in section 56-5-2770(A).

The circuit court granted Cuthbert's motion for directed verdict, determining Singleton was negligent in violating section 56-5-2770(A) because she made the left turn without waiting for the school bus to deactivate its warning lights or resume moving. The issues of Cuthbert's negligence, the comparative negligence of each party, and causation were submitted to the jury.

The jury returned a verdict for Cuthbert. Singleton moved for judgment notwithstanding the verdict (JNOV) and a new trial. The circuit court denied both motions.

## ISSUE

Did the circuit court err in directing a verdict that Singleton was negligent as a matter of law under section 56-5-2770(A) of the South Carolina Code by turning left behind a vehicle stopped behind a stopped school bus?

## STANDARD OF REVIEW

"In ruling on a motion for a directed verdict . . . , the trial court must view the

evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 259, 768 S.E.2d 389, 395 (2015). The circuit court must deny the motion "when the evidence yields more than one inference or its inference is in doubt." *Id.* "This Court will reverse the trial court only when there is no evidence to support the trial court's ruling." *Id.*

**LAW AND ANALYSIS**

Singleton argues the trial court erred in directing a verdict that she was negligent as a matter of law under section 56-5-2770(A) of the South Carolina Code in turning left behind a vehicle stopped behind a stopped school bus. We agree.

Section 56-5-2770(A) provides:

> The driver of a vehicle meeting or overtaking from either direction a school bus stopped on a highway or private road must stop before reaching the bus where there are in operation on the bus flashing red lights specified in State Department of Education Regulations and Specifications Pertaining to School Buses, and the driver must not proceed until the bus resumes motion or the flashing red lights are no longer actuated.

S.C. Code Ann. § 56-5-2770(A) (2006).

The circuit court granted Cuthbert's motion for directed verdict, finding Singleton was negligent as a matter of law for admittedly turning left behind the vehicle stopped behind a bus with flashing caution lights. Singleton admitted the school bus's flashing red lights were on, the bus was stopped, she came to a stop, and then she proceeded to turn left into the driveway while the bus was still stopped. She assigns error, however, to the circuit court's interpretation of "meeting and overtaking" under section 56-5-2770(A).

Singleton asserts the trial court erred in interpreting the meaning of either the word "meeting" or the word "overtaking" as set forth in section 56-5-2770(A). Singleton asserts she was not "meeting" the bus because she was more than one vehicle behind the bus and she was traveling from behind the bus. Therefore, in order for section 56-5-2770(A) to apply, the court must have determined she was

"overtaking" the bus. However, because Singleton stopped and turned before she reached the bus, she did not "overtake" the bus. Singleton asserts the pivotal question is whether turning left behind a vehicle behind a stopped school bus constitutes overtaking a school bus as a matter of law.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson Cty. Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

Singleton argues there is no ambiguity in the word "overtaking" and asserts the word "overtake" means "catch up with and pass by." She cites *Fisher v. J. H. Sheridan Co.*, 182 S.C. 316, 189 S.E. 356 (1936) in support of her argument. *Fisher* involved an act from 1934, which provided:

> [A]ll motor vehicles traveling upon the public highways of this State are required to come to a full and complete stop before *passing* any school bus which has stopped for the purpose of taking on and discharging school children and shall remain stopped until said children are taken on or discharged and until such school bus has moved on.

182 S.C. at 320–21, 189 S.E. at 358 (emphasis added). Our supreme court held the act required an automobile to stop regardless of which way it is traveling, and the word "passing" meant "going by" regardless of whether the automobile and bus are traveling in same direction. *Id.*

Similarly, the common simple definitions of "overtake" include "to move up and past (someone or something that is in front of you) by moving faster" and "to go past another vehicle that is moving more slowly in the same direction." *Overtake Definition*, MERRIAM–WEBSTER.COM, http://merriam-webster.com/dictionary/overtake (last visited February 19, 2016). The first full definition of "overtake" includes the phrases "to catch up with" and "to catch up with and pass by." *See e.g.*, *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 648, 689 S.E.2d 638,

643 (Ct. App. 2009) (considering common definitions and their uses within the rules of statutory construction).

In the court's charge to the jury, the court stated:

> I ruled that [Singleton] violated that statute . . . because she was in close proximity to the bus, under her testimony. If the bus had stopped and traffic had backed up for two miles, you know, you could turn. It's only when you get close enough that a child might be in danger that you couldn't . . . turn.

Singleton argues the court's ruling is not supported by *Fisher* or any other case law because she was not passing, seeking to pass, or catching up to the school bus. The circuit court's own instructions demonstrate it expanded the operation of section 56-5-2770(A) to encompass not only "meeting or overtaking" vehicles, but also those "in close proximity to" a school bus. While this would certainly be reasonable behavior for a driver (and perhaps relevant to the consideration of due care), it is not mandated by the plain language of section 56-5-2770(A). Thus, to the extent this statute is even applicable to the current situation, whether Singleton was negligent is a factual issue that should have been determined by the jury.

**CONCLUSION**

Because Singleton was neither "meeting or overtaking" a stopped school bus at the time of this accident, the circuit court erred in directing a verdict that she was negligent as a matter of law under section 56-5-2770(A). Accordingly, we reverse the circuit court's ruling and remand the matter for a new trial.

**REVERSED AND REMANDED.**

**LOCKEMY, C.J., concurs.**

**SHORT, J.:** I respectfully dissent. I find the language of the statute to be unambiguous in that the driver of a vehicle meeting or overtaking from either direction a school bus stopped on a highway or private road must stop before reaching the bus where there are in operation on the bus flashing red lights and the driver must not proceed until the bus resumes motion or the flashing red lights are no longer actuated. Singleton's testimony was that when she approached the

school bus from behind, the bus' flashing red lights were activated and the bus was stopped. She came to a stop behind the school bus, but she turned left while the bus was still stopped. By her own testimony and the clear language of the statute, I find she was in violation and the evidence supports the trial court's ruling.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Ashley Noojin, Appellant,

v.

Frank Noojin, III, Respondent.

Appellate Case No. 2014-001573

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Appeal From Richland County
Michelle M. Hurley, Family Court Judge

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Opinion No. 5423
Heard February 1, 2016 – Filed July 6, 2016

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**AFFIRMED**

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John O. McDougall, of McDougall, Self, Currence & McLeod, LLP, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

J. Mark Taylor of Moore Taylor Law Firm, P.A., of West Columbia, for Respondent.

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**GEATHERS, J.:** Ashley Noojin, Ph.D. (Mother) appeals the family court's order finding her in contempt and requiring her to pay Frank Noojin's, M.D. (Father) attorney's fees and costs. She argues the family court erred in (1) finding she willfully violated a court order; (2) excluding an exhibit; (3) limiting cross-

examination of an expert witness; and (4) ordering her to pay Father's attorney's fees and costs and failing to award her attorney's fees and costs. We affirm.

## FACTUAL/PROCEDURAL HISTORY

Father and Mother married in 1993 and divorced on April 8, 2011. Father is a surgeon, and Mother is a licensed clinical psychologist. Two children (Son and Daughter, collectively Children)[1] were born of the marriage.

Prior to the final divorce hearing, the couple reached a child custody agreement wherein they shared joint custody, with Mother as the primary custodial parent and Father having frequent "nights of contact and visitation with the children." The agreement outlined a "phase-in" visitation schedule from December 18, 2010, until February 19, 2011, with the regular schedule to begin on March 1, 2011. The regular schedule allotted visitation every other weekend and one evening dinner on the alternate weeks. The agreement provided Children could extend (1) the weekends to include Thursday or Sunday night when Friday or Monday was a holiday and (2) the weeknight dinner to an overnight visit. The agreement outlined specific visitation schedules for holidays, birthdays, summer vacations, and spring break.

Additionally, the agreement provided:

> The visitation provided to Father in this Agreement shall take into consideration each child's wishes and desires in this regard, however, the *children's wishes shall not be controlling unless otherwise specifically provided in this Agreement*. . . . The parties agree to engage in family counseling with a therapist mutually agreeable to the parties. They shall attend family counseling once or twice per month and Father will use his weekday time with the children for this counseling, if necessary.

(emphasis added). In addition to the visitation schedule, the agreement provided:

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[1] Daughter was born in 1998 and Son was born in 2000. They were twelve and ten, respectively, at the time of the custody agreement in 2010 and fifteen and thirteen at the time of the contempt hearing in 2013.

> Each party shall exert *every reasonable* effort to maintain *free access* and *unhampered contact* between the children and each of the parties and to *foster* a feeling of *affections between the children and the other party*. *Neither* party shall do anything which *may estrange* the *children from the other party* or *injure the children's opinion* as to his/her mother or father or which may *hamper the free and natural development* of the children's *love and respect for the other party.*

(emphases added). The parties also agreed to (1) refrain from making disparaging remarks about the other parent in the presence of Children and discourage third parties from doing so; (2) consult each other regarding Children's education, illness, health, welfare, and "other matters of similar importance affecting" Children; and (3) refrain from having physical or verbal confrontations or allowing another to do so in the presence of Children. On December 15, 2010, the family court approved the agreement and incorporated it into the final decree of divorce (the divorce order).

In February 2013, Father filed a complaint for contempt and the parties proceeded to a three-day contempt hearing.[2] At the hearing, Father testified that after the standard visitation began on March 1, 2011, he did not receive regular visits. He outlined the limited visitation he received from 2011 to 2013. Specifically, in 2011,[3] according to Father, he received one of the twenty dinners; one full weekend and four partial weekends of the twenty weekends; none of the five days allotted for spring break; one of the two days allotted for Father's Day; none of the five days allotted for Thanksgiving; and two of the ten days allotted for Christmas. In 2012, Father received one of the twenty-three dinners; two weekends of the twenty-five weekends; none of the three days for spring break; five hours of the two days allotted for Father's Day; and two days of the eight days allotted for Christmas. The contempt hearing began on April 30, 2013, and from

[2] The hearing took place on April 30, August 8, and September 23, 2013.

[3] The majority of the visits were with Son only as Daughter ceased participating in dinner and weekend visitation in 2011.

January to April 2013, Father received one of the eight dinners, none of the eight weekends, and none of the three days allotted for spring break.[4]

Following the hearing, the family court found Mother in contempt for failure to comply with the divorce order and ordered her to pay Father $41,375.84 in attorney's fees and costs. This appeal followed.

## ISSUES ON APPEAL

1. Did the family court err in finding Mother in contempt?

2. Did the family court err in excluding a letter Father wrote to Children on December 13, 2010?

3. Did the family court err in limiting cross-examination of a witness?

4. Did the family court err in awarding attorney's fees and costs?

## STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id.* at 388-89, 709 S.E.2d at 654 (emphasis removed). Further, a finding of contempt rests within the sound discretion of the family court. *DiMarco v. DiMarco*, 393 S.C. 604, 607, 713 S.E.2d 631, 633 (2011). "Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion." *Id.*

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[4] We are not persuaded by Mother's argument that the family court erred in its findings of fact with respect to the amount of visitation Father actually received. Father admitted he spent time with Son on a few instances that were not a weekend or dinner visit. Whether Father failed to include in his visitation chart a few occasions in which he visited with Children would not change the ultimate disposition of this case.

## LAW/ANALYSIS

### I. Willful Contempt

Mother raises several grounds as to how the family court erred in its finding of contempt. We have reduced those arguments to their analytical essence.

At the outset, we note that because the family court was in a better position to assess the credibility and demeanor of the witnesses, we defer to the family court as to any alleged error regarding the specific factual findings. After observing these parties over the course of a three-day hearing, the family court was in a better position to evaluate their credibility and assign comparative weight to their testimony. *See S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 26, 720 S.E.2d 503, 509 (Ct. App. 2011) (holding it is proper to defer to the family court even if conflicting evidence is presented on appeal as long as ample evidence in the record supports the family court's findings and conclusions); *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001) (holding the appellant carries the burden of demonstrating error in the family court's findings of fact); *Lewis*, 392 S.C. at 388-89, 709 S.E.2d at 654 (stating the appellate court generally defers to the factual findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor).

Within that framework, we find the record supports the family court finding Mother in contempt for her willful disobedience of the divorce order. "Contempt is a consequence of the willful disobedience of a court order." *Tirado v. Tirado*, 339 S.C. 649, 654, 530 S.E.2d 128, 131 (Ct. App. 2000). "A willful act is one 'done voluntarily and intentionally with the specific intent . . . to fail to do something the law requires to be done . . . .'" *Id.* (alterations by court) (quoting *Spartanburg Cty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)). A finding of contempt, therefore, must be reflected in a record that is "clear and specific as to the acts or conduct upon which such finding is based." *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982). "Contempt is an extreme measure; this power vested in a court is not lightly asserted." *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975). "Prior to invoking this power, the court must necessarily consider the ability of the defendant to comply with the order." *Id.* "A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order." *Abate v. Abate*, 377 S.C. 548, 553, 660

S.E.2d 515, 518 (Ct. App. 2008). "Civil contempt must be shown by clear and convincing evidence." *DiMarco*, 393 S.C. at 607, 713 S.E.2d at 633.

When considered in the aggregate, Mother's actions and her failure to act when necessary demonstrated a willful violation of the divorce order. The facts of this case are similar to *Eaddy v. Oliver*, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001), in which a father argued the family court erred in failing to find a mother in contempt for her violation of a visitation order. During the family court hearing in *Eaddy*, the father testified to ongoing problems with the mother in arranging visitation and stated there had been periods of several months when he did not see the child. *Id.* at 43, 545 S.E.2d at 832. He stated plans were made for the child without his knowledge and the child went on other social outings instead of visiting him as provided in the order. *Id*. The father testified regarding the mother's refusal to cooperate or keep him informed about the child. *Id.* at 43, 545 S.E.2d at 833. He stated he had made several attempts to discuss his lack of visitation with the mother but the mother "responded by telling him [the child] did not want to see him, hanging up the phone, and refusing to answer letters from his attorney." *Id*. This court held the family court erred in failing to hold the mother in contempt because the father's testimony constituted a prima facie showing of contempt and the mother did not produce evidence tending to establish a defense or explanation for failing to comply with the family court order. *Id*. "Once the movant makes a prima facie showing by pleading an order and demonstrating noncompliance, 'the burden shifts to the respondent to establish his defense and inability to comply.'" *Id.* at 42, 545 S.E.2d at 832 (quoting *Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989)).

Here, Mother asserts her failure to comply with the divorce order resulted from Father's agreement to not require Children to visit him against their wishes. She argues she did not introduce the concept of "forced visitation," as the family court found; however, if she did, that concept was adhered to by Father and the family's therapist. Therefore, according to Mother, her "alteration of the visitation schedule" was not done with bad purpose and was not a willful disobedience of the court order. We disagree.

Part of Mother's contemptuous behavior centers on her introduction and implementation of the concept of "forced" visitation as a negative notion, failure to facilitate visitation, and acquiescence in Children's refusal to participate in visitation. For a proper understanding of this case, an extensive presentation of the

facts is necessary. Although the record includes a large volume of email exchanges between Mother and Father, a few particularly poignant exchanges are addressed below.

For example, on December 15, 2010—the day the family court approved the custody agreement—Mother emailed Father, stating in pertinent part:

> pushing [Children] beyond where they feel comfortable will do damage and hurt all of you in the long run[.] I know we set a schedule but this is your chance to show them the kind of dad that you want to be. Let them ask you for more time. . . . They do not want a schedule even though you do. . . . *My allegiance is with them and only with you as well if you listen to them*.

(emphasis added). On March 15, 2011, after requests from Father for visitation, Mother wrote Father, explaining "*I will never support forcing time with you against their will*. If you make that choice, *you are on your own. I was offering my help if you were willing to listen to their thoughts and feelings*." (emphases added). On March 27, 2011, Mother sent Father a lengthy email detailing her tumultuous relationship with her own father that developed after she was "forced" to visit with him following her parents' divorce. She explained she told Children about the pain the visitations caused and they asked "will [Father] do to us what your dad did to you." She stated she "assured them that [Father] would never do the things to them that" her father did to her, i.e., require Children to visit him against their wishes.

In August 2011, Mother wrote Father scolding him for calling Daughter to ask her about her eighth-grade speech, stating Daughter was "very upset" by the call and she "needs to be prepared" if Father is going to contact her. On September 5, 2011, Mother wrote Father stating she encouraged Son to see Father; however, "*The only thing [she did] not do is force him. . . . Forcing him is not the answer.*" (emphasis added). On May 8, 2012, apparently irritated with Mother, Father wrote an email expressing his frustration that two years had passed in which Children had minimal contact with Father. Father stated the following:

> It seems that the visitation part of the agreement is ignored . . . . [Y]ou either do not tell me about school functions or dismiss me from them when you don't want

> me there. . . . [Y]ou never answer the phone and you do not have the kids return them. . . . I can't believe you allow your daughter to have a cell phone block so her own father who loves her and cannot communicate with her. . . . You rarely inform me of anything going on with my daughter. I have to find out from other people what my children are doing. . . . As their mother[,] you control most of what they do and who they associate with and, after informing them that their father was seeking "forced" visitation, informed them that that was wrong and that it didn't work for you. You overly interjected your own personal experience into my relationship with my kids! Now, knowing their father is optional.

On May 23, 2012, after Father requested to schedule visitations with Son, Mother wrote Father stating *Son did not want Mother* to plan a visitation schedule for him, explaining Son was busy with "huge tests" and "he will be ready to have some conversations about the summer once school gets out." Father asked Mother to assist Son in creating a schedule "since he's only 12," but Mother responded, "If he wanted me to help him plan, I would be happy to."

In emails exchanged between August 20 and 30, 2013—after the second day of the three-day contempt hearing—Mother expressed her concern with Father's request for dinner with the children; however, she stated she would "comply with the court orders and [Father's] request." Nevertheless, in additional emails, she skirted visitation requests. Further, she stated, "You [do not] seem to even care what your plan is doing to them." Father responded as follows:

> Of course I am concerned. Maybe you should consider allaying their fears about time with their Dad. Did you ever consider that I might have something to contribute to their emotional development, their future relationships, their education, and more? . . . Ostracizing and alienating me (and having the children participate in this with your approval) is not allowing any of us to heal.

A few days later, in September 2013, in an attempt to thwart another visitation request, Mother stated, "As you are well aware, the court-approved agreement provided that visitation takes into account the children['s] wishes and

should include therapy."[5] She went on to state Children were "distraught" and would run away if "forced to visit with" Father.

In addition to these emails, Jennifer Savitz-Smith, the family's therapist and an expert in counseling children and family counseling, testified that although Mother and Children used the term "forced" visitation, the term was not a part of her lexicon and Father did not introduce the term to her. Moreover, when asked her expert opinion regarding Mother's emails and behaviors, Allison Foster, Ph.D., an expert in clinical psychology, testified she would be concerned about Mother's "circumnavigation" of the court order.

Accordingly, we find the record reveals Mother's unwillingness to comply with the court order from the day the family court approved the custody agreement. *See Tirado*, 339 S.C. at 654, 530 S.E.2d at 131 ("Contempt is a consequence of the willful disobedience of a court order."). The evidence demonstrates Mother coined

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[5] Despite Mother's argument on appeal, as we read the plain language of the agreement, Father's visitation rights were not contingent upon Children's wishes *or* the family attending therapy. *See Bogan v. Bogan*, 298 S.C. 139, 142, 378 S.E.2d 606, 608 (Ct. App. 1989) ("The language used in a decree must be given its ordinary and commonly accepted meaning."); *id.* ("Where an instrument evidences care in its preparation, it will be presumed its words were employed deliberately and with intention."); *see also Hawkins v. Mullins*, 359 S.C. 497, 503, 597 S.E.2d 897, 900 (Ct. App. 2004) (reversing the family court's failure to find a mother in contempt for failing to produce the child for summer visitation, finding the mother's claims regarding misunderstanding the family court's orders were "disingenuous" and the mother had a history of interfering with the father's visitations); *cf. Ward v. Washington*, 406 S.C. 249, 255, 750 S.E.2d 105, 109 (Ct. App. 2013) (holding evidence supported finding Mother could have reasonably misinterpreted the order; therefore, her actions of withholding visitation were not willful). Moreover, as to any alleged inconsistencies in the remedial provisions of the contempt order, there can be little doubt that the family court did not intend for future therapy to be used as a precondition or tool to prohibit Father's visitation with either child. The family court explicitly stated: "this family needs therapy with . . . whomever can be agreed upon. However, I *specifically find* that such therapy shall *not be used as a tool or pre-condition* to prohibit Plaintiff-Father from the regular parenting time and contact with the children afforded him under the terms of the court-approved Custody Agreement." (emphasis added).

the term "forced visitation," alienated Father by imparting to Children scheduling visitation was inappropriate, refused to set a schedule, and sought Children's guidance any time Father sought to enforce the custody agreement. Not only did Mother fail to require Children to visit with Father, she imparted to Children the idea that they *did not have to* visit with Father if they did not want to. We find Mother's actions in this regard constituted a willful disobedience of the divorce order. *See Watson v. Poole*, 329 S.C. 232, 239, 495 S.E.2d 236, 240 (Ct. App. 1997) (affirming a change in custody to a father when "Mother has exhibited an unwillingness to facilitate the child's visitation with Father").

We recognize Father initially yielded to Children's wishes and allowed for more flexibility in deciding when to visit with him. However, as the email exchanges demonstrate, Mother continued to refuse or thwart visitation efforts even after Father sought to enforce the agreement because weeks would pass without him seeing Children. The email exchanges directly contradict Mother's testimony that she was unaware Father sought the visitation allotted in the order. Moreover, Mother continued these actions after the contempt hearing began. *See Schadel v. Schadel*, 268 S.C. 50, 57, 232 S.E.2d 17, 20 (1977) (holding the family court erred in failing to hold a mother in contempt after she "refused visitation" of the father with their children in contravention of family court orders).

We find the instant case is distinguishable from *Nash v. Byrd*, 298 S.C. 530, 534-35, 381 S.E.2d 913, 915-16 (Ct. App. 1989), in which this court affirmed the family court's declination to hold a mother in contempt. In *Nash*, the mother would not force a child to visit his father after she would prepare the child for visitation, but the child would refuse to get in the car with the father. *Id*. This court observed the child suffered severe physical and emotional problems as a result of the visits, the visitation problems were caused by the father's conduct, and the mother took all reasonable steps to resolve the problems. *Id*. Here, the record is devoid of evidence demonstrating Children suffered any psychological disorders or physical harm as a result of visiting with Father or the visitation problems were caused by Father. In fact, during oral arguments, this court specifically asked Mother whether visitation with Father caused Children any psychological or physical harm, which Mother unequivocally denied. Rather, Mother did not require Children to visit with Father because *Children did not want to* and Mother disagreed with the notion of scheduling visitation.

Our jurisprudence has little case law addressing this issue—holding a custodial parent in contempt for his or her refusal to require minor children to visit the noncustodial parent against the children's wishes—however, in the absence of psychological or physical harm, most jurisdictions would support finding the behavior Mother displayed was willful disobedience and constituted contempt.[6] *See Schotz v. Oliver*, 361 So. 2d 605, 606 (Ala. Civ. App. 1978) (affirming a finding of contempt when a mother "informed the court that she was not willing to force the unwilling child to visit with respondent as directed by the court. Nor [was] she willing to forcibly remove the child from the car in order to deliver custody to respondent. If the child were willing to visit respondent, [the mother] says she would comply with the order by delivering the child to the designated location"); *Clark v. Atkins*, 489 N.E.2d 90, 97 (Ind. Ct. App. 1986) (affirming a finding of contempt when a mother did not require the children to visit with their father, rejecting the contemptuous mother's argument that her minor children's refusal to visit their father justified her noncompliance with a visitation order); *Pratt v. Spaulding*, 822 A.2d 1183, 1187 (Me. 2003) (affirming a finding of contempt when the mother "explicitly refused [the father]'s request for contact with his son on two days when such contact was required by court order. Subsequently, by not answering her phone, by refusing to return calls, and by having her phone disconnected, she rendered the child unavailable for contact with [the father] for approximately two months, until he brought the contempt motion"); *Casbergue v. Casbergue*, 335 N.W.2d 16, 18 (Mich. Ct. App. 1983) ("[The mother] testified that she told her daughters that they were required to visit their father by the visitation order but that she did not impose any discipline to make it clear that she expected the children to comply with the order. We hold that the trial court did not err . . . in finding [the mother] guilty of contempt for violation of the order."); *In re Marriage of Marez & Marshall*, 340 P.3d 520, 527 (Mont. 2014) ("[W]here a parent fails to make reasonable efforts to require a recalcitrant child to attend visitation as provided for in a parenting plan, the parent has not made a good faith effort to comply with the parenting plan, and a contempt order may be appropriate."); *Smith v. Smith*, 434 N.E.2d 749, 752 (Ohio Ct. App. 1980) (affirming the trial court's finding the custodial parent in contempt for failing to abide by a visitation order,

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[6] *See Rice v. Rice*, 335 S.C. 449, 456-64, 517 S.E.2d 220, 224-28 (Ct. App. 1999) (surveying case law from other jurisdictions because South Carolina case law provided "little guidance" as to how a court should decide a specific custody issue and relying on case law from varying jurisdictions to support its holding).

holding the custodial parent interfered with the noncustodial parent's visitation rights by using "the children's reluctance to visit [the noncustodial parent] as an excuse to thwart [that parent]'s right of visitation"); *id.* ("In the absence of proof showing that visitation with the defendant would cause physical or mental harm to the children or a showing of some justification for preventing visitation, *the plaintiff must do more than merely encourage the minor children to visit the defendant*." (emphasis added)).

The above-cited approach of various jurisdictions is consistent with our state's policy to ensure minor children of divorce are not estranged from the noncustodial parent. *See McGregor v. McGregor*, 255 S.C. 179, 183, 177 S.E.2d 599, 600 (1970) ("The general rule is that minor children, notwithstanding the divorce, are entitled to the love and companionship of both parents, and the well[-]rounded development of a normal child demands an association with both parents."). Therefore, we find the above-cited cases instructive, but limit our holding in this regard to the facts presented and do not suggest that in every situation in which a custodial parent fails to force a child to visit a noncustodial parent, such custodial parent should be held in contempt. A contempt finding is determined on a case-by-case basis. The finding was appropriate here because not only did Mother coin the negative term "forced visitation," she emboldened Children in their refusal to visit Father, alienated Father by imparting to Children scheduling visitation was inappropriate, and refused to facilitate visitation or set a schedule.

In any event, notwithstanding Mother's failure to "force" or facilitate visitation by requiring visitation against Children's wishes, Mother's additional actions support a finding of contempt. Mother argues she did not interfere with or fail to promote Father's relationship with Children, and she did not disparage Father or encourage disparagement of Father by Children. Further, she argues the family court erred in finding she failed to exert every reasonable effort to maintain free access and unhampered contact between Children and Father as required by the court order. We disagree. Mother nonchalantly admitted she allowed Son to block Father's phone number from his cell phone without providing any consequences.[7] Further, Father testified—and the emails indicate—his calls to

[7] Daughter blocked Father's phone number from her cell phone one month before the divorce order. However, Son blocked Father's number over a year after

Mother, Children, and the family home went unanswered or unreturned.[8] Additionally, Mother admitted she allowed Children to disinvite Father from social or school events and she either did not inform Father of Children's school events or asked Father to leave events he attended; and, she made Children aware of her requests that he leave.

Furthermore, we find Mother's actions and her failure to administer any consequences for Children's behavior toward Father estranged Children from Father, encouraged disparagement of Father, and injured Children's opinion of Father in violation of the divorce order. Mother admitted that during a January 11, 2013 instance—the exchange that ultimately led to Father finally filing the instant contempt action—when Mother met Father with Children, Children refused to get out of the car, asserting Father would have to "drag them out of the car"; and stating, "Are [you] going to use your manly muscles to make me or something" and "we're not going with you, you moron." Mother admitted she should have corrected Children's behavior in the moment but she did not. Mother testified, she "was quiet for a moment. [Then she] said to [Father], . . . [']This is between the two of you. This is between you and the children. Talk to them and explain.'" We find Mother's inaction in this regard and her passive acquiescence of Children disparaging Father was a willful violation of the court order.[9]

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visitation began. Mother admitted both blocks only lasted three months and Children reinitiated the blocks each time they expired.

[8] Mother's arguments on appeal are contradictory in that on one hand, she argues the cell phone blocks did not prevent Father's communication with Children "because he could reach them by email and the house telephone." Yet, on the other hand, she notes, "With respect to the claim of unanswered calls on the house phone, Father acknowledged that the only land line in the house could not be heard throughout the entire house or from outside." Given Father's voicemails on the landline were unreturned, Mother's logic would leave Father to communicate with *minor* children by email only.

[9] *See Commonwealth ex rel. Ermel v. Ermel*, 469 A.2d 682, 684 (Pa. Super. Ct. 1983) (affirming a finding of contempt when a father pleaded with the mother "to assist him by talking to the child or helping him get her to the car [for visitation], but [the mother] said nothing and looked at the ceiling"); *Rideout v. Rideout*, 40 P.3d 1192, 1197 (Wash. Ct. App. 2002) (noting "[m]ost importantly" in its finding of contempt against a mother that the mother improperly maintained any dispute about the child's visitation with the father was between the child and the father),

Moreover, Mother, a licensed clinical psychologist, did not foster "a feeling of affections" between Children and Father as required by court order; instead, the evidence supports the family court finding Mother hampered the free and natural development of Children's love and respect for Father. The record is replete with evidence showing Mother hovered over Children's every move and interaction with Father, perpetuated the idea of alienation, and supported their emotional distance from Father. In one example among many, Mother interfered with Father's attempt to build a relationship with Children after he invited Children's friends to a visitation dinner. Mother called some of the friends and canceled the dinner arrangements. Mother admitted that when Father would not disclose all of the invited friends, she told Father, "'Please don't make me call all of their friends to try to find out who it is [Father invited to the dinner]. I just don't -- the children don't want their friends there.'" She further testified, "Their dad has never asked them if they wanted their friends there. So they were re[al]ly upset by that. That's why I did what I did. If the children had[] wanted their friends, I wouldn't have even [] gotten involved; but it was going to be a surprise for them, and they were very upset." Mother's behavior in this regard was a violation of the court order. *See* Roy T. Stuckey, *Marital Litigation in South Carolina*, 581 (4th ed. 2010) (noting South Carolina case law holds the "custodial parent should not have unfettered freedom to control all aspects of visitation with the noncustodial parent").

Dr. Foster, an expert in clinical psychology, opined Mother's communications and behaviors (1) indicated a strategy to block and thwart visitation as agreed to; (2) suggested a passive-aggressive approach to sabotage visitations; (3) undermined Father; and (4) demonstrated Mother, as the controlling agent, encouraging Children to campaign against Father. Further, Dr. Foster opined Mother's behavior created a "loyalty bind" for Children, in which they

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*aff'd*, *In re Marriage of Rideout*, 77 P.3d 1174 (Wash. 2003); *id*. ("[The mother] *wants to cast herself in the role of a bystander* without the power or right to require that [the child] follow the parenting plan. But the *law imposes a greater responsibility* on [the mother]. She, not [the child], bears the primary responsibility to ensure that [the child] visit with her father according to the parenting plan. And *she must, in good faith, make every effort to require* [the child] to do so." (emphases added)).

could not simultaneously enjoy both parents. Mother's behavior "triangulat[ed] the children, creating an alignment between one parent and the children, and creating toxic circumstances to increase the likelihood that they will reject the other parent." Dr. Foster was concerned about whether Mother had any "investment in being a good-faith gatekeeper of the relationship between the father and the children." Moreover, Dr. Foster opined Mother was unsupportive of Father and created an age-inappropriate toxic dynamic by empowering Children and placing them in the middle of the conflict.

Dr. Foster admitted Father's act of initially leaving the issue of visitation to Children gave Children too much authority and power and sent mixed messages. However, she opined this issue was Mother's fault and Father was not at fault because:

> [H]e's the rejected and estranged parent, and he's the one who's being denied access. She's the gatekeeper. She's been entrusted by the Court with that position as primary custodial parent, and it's my observation that this was a father who was making a wide range of attempts to honor the wishes of his children and his ex-wife and still seek access and visitation.

Based on the foregoing, and mindful that contempt is an extreme measure, we affirm as Mother has failed to persuade us that the family court's contempt finding was not supported by the evidence. *See Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004) ("Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct."); *id.* ("On appeal, the appellate court may reverse a [family court]'s determination regarding contempt only if it is without evidentiary support or is an abuse of discretion.").

Father's initial attempts to appease Children by informally agreeing to a flexible visitation schedule and abide by their wishes did not change the fact that he had a court-ordered right to a specific amount of visitation. *See Miles v. Miles*, 355 S.C. 511, 519, 586 S.E.2d 136, 140 (Ct. App. 2003) ("It is axiomatic that parties cannot modify a court order."). Moreover, the record suggests Father's initial flexibility was an attempt to maintain a relationship with Children in the midst of Mother imparting to Children her problems with being "forced" to visit with her own father and Mother's unwillingness to require Children to abide by a

visitation schedule as mandated by the court order. The record supports the family court finding Father "in good faith intended to placate and ease tensions in order to proceed toward implementation of his court-ordered parenting time." Accordingly, a finding of contempt was appropriate because Father's attempts to exercise his rights were improperly and willfully frustrated by Mother's actions and inactions. *See Hawkins*, 359 S.C. at 503, 597 S.E.2d at 900 (reversing the family court's failure to find a mother in contempt for failing to produce the child for summer visitation).[10]

## II. Attorney's Fees and Costs

Because we affirm the family court's overall contempt findings, we also affirm the award of attorney's fees and costs. Regardless of whether the family court applied the *E.D.M.* factors or compensatory contempt doctrine,[11] the family court correctly determined Father was entitled to attorney's fees. Mother has a gross *monthly* income of $23,451, including her salary, alimony, and child support.

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[10] Because we find this issue is dispositive, we decline to reach Mother's arguments regarding admitting evidence and limiting cross-examination. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive). Moreover, our decision on those two issues would not change the ultimate disposition of this case. *See Weir v. Citicorp Nat. Servs., Inc.*, 312 S.C. 511, 517, 435 S.E.2d 864, 868 (1993) (holding the exclusion of cumulative evidence was not prejudicial error); *Recco Tape and Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994) (holding to warrant reversal, the appellant "must show both the error of the ruling and resulting prejudice").

[11] *See Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct. App. 2007) ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory."); *id.* ("Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders."); *E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992) (stating that when determining whether an attorney's fee should be awarded, the following factors should be considered: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) effect of the attorney's fee on each party's standard of living").

She has over $5 million in savings. Mother's payment of the attorney's fees and costs would not affect her standard of living in any meaningful way. Accordingly, we affirm the award of attorney's fees. *See Whetstone v. Whetstone*, 309 S.C. 227, 235, 420 S.E.2d 877, 881 (Ct. App. 1992) (holding the family court properly awarded a wife attorney's fees incurred as the result of her husband's contempt).

## CONCLUSION

Based on the foregoing, we affirm the family court's order in its entirety.

**AFFIRMED.**

**HUFF and KONDUROS, JJ., concur.**