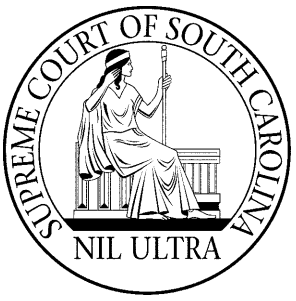

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 13, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

David M. Pascoe, Solicitor of the First Judicial Circuit,
Petitioner,

v.

Alan M. Wilson, South Carolina Attorney General,
Respondent.

Appellate Case No. 2016-000671

David M. Pascoe, Solicitor of the First Judicial Circuit,
Petitioner,

v.

James R. Parks, Clerk of Court for the State Grand Jury,
Respondent.

Appellate Case No. 2016-000630

IN THE ORIGINAL JURISDICTION

Opinion No. 27646
Heard June 16, 2016 – Filed July 13, 2016

DECLARATORY JUDGMENT ISSUED

David M. Pascoe, Jr., of Orangeburg, pro se Petitioner.

C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, LLP, Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Solicitor General Robert D. Cook, Assistant Deputy Attorney General Samuel Creighton Waters, all of Columbia, for Respondents.

CHIEF JUSTICE PLEICONES: We agreed to hear these cases in the Court's original jurisdiction. The cases arise out of an on-going South Carolina Law Enforcement Division ("SLED") investigation into the past conduct of certain members of the General Assembly (the "redacted legislators"). Petitioner David Pascoe ("Pascoe") asks this Court declare "the Attorney General" recused himself and his Office from the redacted legislators matter, and vested Pascoe with the legal authority to act autonomously as the designee of the Attorney General with the powers of that Office. Pascoe further asks this Court command respondent James R. Parks ("Parks"), clerk of the state grand jury, to cooperate with Pascoe's initiation of the state grand jury investigation. We grant the petition for declaratory relief and declare that respondent Attorney General Wilson ("Wilson") and the Attorney General's Office were recused from the redacted legislators investigation; Pascoe lawfully sought to initiate a state grand jury investigation; and the Attorney General's Office's purported termination of Pascoe's designation was not valid. Recognizing the integrity of the parties involved, we decline to formally issue relief in the mandamus action, confident that our resolution of the declaratory judgment action makes clear the responsibilities and roles of the parties.

FACTS

As these cases are being heard in the Court's original jurisdiction, we sit as the fact-finders.[1] The burden of proof as to all issues rests with Pascoe.[2]

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[1] *See* S.C. Code Ann. § 14-3-340 (1977) ("Whenever in the course of any action or proceeding in the Supreme Court arising in the exercise of the original jurisdiction

On July 24, 2014, Wilson appointed Pascoe to serve as the "designated prosecutor" in the investigation and prosecution of Robert Harrell ("Harrell").[3] At the time of Pascoe's appointment, Harrell was being investigated for alleged crimes committed in his capacity as a legislator. A SLED report generated during the Harrell investigation contained the redacted names of certain legislators (the "redacted legislators"), who were allegedly implicated in unethical and illegal conduct.[4]

On October 1, 2014, Pascoe sent Wilson an email referencing a discussion they had the night before, and stating he believed the redacted legislators should be investigated as part of "any corruption probe on the legislature."

On October 2, 2014, Wilson emailed Chief Deputy Attorney General John McIntosh ("McIntosh") with Pascoe's email attached.[5] In his email to McIntosh, Wilson stated, "As this office moves forward with this investigation there might be inherent conflicts between myself and members of the house . . . . Because certain conflicts might exist I want you to take over as supervising prosecutor. . . . Please ensure that I am firewalled from any involvement in that specific instance. . . ." By email the same day, McIntosh accepted the designation as supervising prosecutor. McIntosh further assured Wilson that per his wishes, Wilson would be firewalled

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. . . an issue of fact shall arise . . . , or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Supreme Court, the court may frame an issue therein and certify the same to the circuit court . . . ."); *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 497, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009).

[2] *See Vermont Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994) (citing *Martin v. Cantrell*, 225 S.C. 140, 81 S.E.2d 37 (1954) (declaratory judgment)); 55 C.J.S. *Mandamus* § 405 (2016) (mandamus).

[3] Harrell is the former Speaker of the South Carolina House of Representatives. On October 23, 2014, Harrell pled guilty and resigned from office.

[4] At the time Pascoe was designated the prosecutor in the Harrell matter, a state grand jury had already been impaneled. No issue concerning the validity of Pascoe's authority in that matter is before the Court.

[5] The email CC'd Solicitor General Bob Cook ("Cook").

from any involvement in the matter.

It is unclear from the evidence before this Court whether the initial Harrell investigation led to further investigations beyond that of the redacted legislators. The exhibits before this Court further do not contain any indication the Attorney General's Office itself investigated or pursued the redacted legislators matter after October 2, 2014, although later correspondence discussed *infra* indicate SLED was conducting an ongoing investigation after that date into these individuals. The correspondence between Wilson and McIntosh appear to be internal, and there is no evidence the content of the emails was made available to Pascoe or anyone outside the Attorney General's Office. The exhibits reflect the next communication regarding the redacted legislators matter was in July 2015.

On July 17, 2015, McIntosh wrote a letter to the Chief of the South Carolina Law Enforcement Division, Mark Keel ("Chief Keel"), asking he forward the SLED report resulting from the investigation into the redacted legislators to Pascoe "for a prosecutive decision." The letter further stated, "As you are aware, the Attorney General *recused this office* from the legislative members in the redacted portions of the SLED report but has not recused *this office* from any other matters" (emphasis supplied). From this language, we conclude that SLED may have been investigating matters related to the Harrell probe aside from those involving the redacted legislators.

Chief Keel has provided an affidavit to this Court to the effect that his understanding of the July 17, 2015, letter was that the Attorney General's Office had thereafter recused itself from any involvement in the redacted legislators matter, and that SLED was to deal exclusively with Pascoe. Chief Keel further states that in accord with his understanding, after the July 17, 2015, letter, he and SLED in fact dealt exclusively with Pascoe in the matter, and at no point was any information or evidence concerning the redacted legislators investigation shared with the Attorney General's Office.

On July 24, 2015, McIntosh's July 17, 2015, letter was forwarded to Pascoe by Assistant Deputy Attorney General S. Creighton Waters ("Waters") as a scanned attachment to an email. Also attached to the Waters email was a scanned letter from Waters to Pascoe, stating:

> As you are aware, several months ago the Attorney General firewalled himself from any involvement into the

> investigation of certain individuals covered in the still-redacted portion of the SLED report. . . . That portion of the investigation still remains open. . . . I am writing to let you know that out of an abundance of caution, [McIntosh] sent [Keel] a letter . . . asking that agency forward to you the results of any further investigation. . . .

The body of the email further stated Pascoe and SLED were to make the decision regarding whether redacted portions of the SLED report should be released to the media. This July 2015, correspondence notifying Pascoe he had been granted authority over the redacted legislators matter also informs Pascoe that the Attorney General's *Office* was recused.

On July 27, 2015, Pascoe responded to Waters' email, stating:

> I will probably give you a call later today or in the morning for some clarification, but my understanding from the two letters you sent me[6] is that the Attorney General is asking that I make a prosecutorial decision on the redacted matters of the SLED report. . . . I assume further investigation was conducted on the redacted matters that I am not privy to as of yet. I may also need to conduct further investigations into those matters.

Given the status of the individuals who were the subject of this investigation, and the fact that it arose out of the state grand jury investigation of then Speaker Harrell, it may be inferred that further investigation into the redacted legislators matter at some juncture might warrant the impaneling of a state grand jury.

We have no evidence of communication between Pascoe and anyone at the Attorney General's Office from July 2015 to September 2015. However, by mid-September 2015, the exhibits reflect disharmony between Pascoe and individuals in the Attorney General's Office, apparently precipitated by media leaks regarding the redacted legislators investigation, and the fact that Solicitor General Cook had

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[6] Presumably, Pascoe is referring to the July 17, 2015, letter from McIntosh to Chief Keel, and the July 24, 2015, letter from Waters to Pascoe, both of which were attached to the email sent by Waters on July 24, 2015.

been in contact with an attorney representing one of the redacted legislators.

On September 17, 2015, McIntosh sent Pascoe a letter noting the Attorney General's Office had possessed the SLED report containing the redacted legislators' names for two years—indicating the report was generated during the Harrell investigation—and that no portion thereof was leaked until after Pascoe was asked to make a "prosecutorial decision." The letter then states, "[D]uring the past ten months, there has been considerable discussion back and forth between this office and law enforcement, in which additional questions have been raised. The length of the inquiry has thus necessarily been prolonged by these additional questions." The letter concludes with a reminder that the public must have confidence in the integrity of the criminal process, and that the public should have full disclosure of all redacted information in the SLED report at the earliest appropriate time.

A number of questions are raised by McIntosh's September 17, 2015, letter. Principally, the nature of the Attorney General's Office's ten month "inquiry" is unclear, though exhibits indicate the Attorney General's Office may have been conducting a separate investigation related to information contained in the Harrell SLED report, but unrelated to the redacted legislators matter.

On September 25, 2015, Pascoe responded by letter to McIntosh, writing:

> I ask that your office not interfere in this investigation any further unless I ask for your assistance. . . . [I]t is my understanding from my discussions with SLED that your office conducted no further investigation into the matters after my October 1, 2014 email. . . . *The Attorney General's Office* has a very clear conflict of interest in this matter. If the public is to have confidence in the integrity of the criminal process in this case, *it is imperative that the Attorney General's Office recuse itself*. . . . [Y]our letter does nothing but heighten my concern that the *Attorney General's Office continues to work behind the scenes in an investigation for which you claim a conflict of interest* (emphasis supplied).

On September 27, 2015, Cook emailed Pascoe. In that email, Cook stated he was "stunned" at the contents of Pascoe's September 25, 2015, letter to McIntosh. Cook then stated:

> [W]e all understood perfectly well that *the Office had no role in the [redacted name] matter*. [McIntosh] and I had discussed sending it to you since you were already involved in Harrell. Our concern was the integrity of the process, *(so why would we interfere in that decision afterwards?)* The [Attorney General], as Chief Prosecutor, always retains authority *over the integrity* of a criminal investigation even in a matter in which he is not involved (emphasis supplied).

Cook concluded, "I don't know how I or we were interfering with *your investigation or decision* . . . . I am offended that you think I would interfere in *your case*" (emphasis supplied).

From this exchange, it appears the common understanding was that Pascoe had full control of the redacted legislators matter to the exclusion of the Attorney General's Office. Cook's email suggests the Attorney General's Office's sole concern was the "integrity" of the investigation—ensuring no one involved was leaking information to the media. Protecting "the integrity of the process" appears to be Cook's justification for communicating with the attorney representing one of the redacted legislators.

On September 30, 2015, McIntosh wrote Pascoe a letter stating there was no basis for suggesting the Attorney General's Office was "interfering with *[Pascoe's] investigation*" (emphasis supplied), and further asserting:

> I also take exception to your statement that *the Attorney General's Office* has a very clear conflict of interest in this matter. I am unaware of any conflict which I have, but out of an abundance of caution, the specific portions of the SLED report regarding the interview with [redacted name] *were referred to you for handling as you deem appropriate*. I also take exception to your statement that the Attorney General's Office continues to work behind the scenes in an investigation which you claim a conflict of interest. I can assure you that this office is not doing any such thing. . . . (emphasis supplied).

This exhibit represents the first instance anyone in the Attorney General's Office "take[s] exception" to the unequivocal representations made in the July 2015, correspondence that the Attorney General's Office was recused due to a conflict of interest. While the September 30, 2015, letter denies the assertion that the Attorney General's Office has a "very clear" conflict of interest, McIntosh seems to base this on his personal lack of an actual conflict. Further, the letter does not state that the Attorney General's Office is not recused. Moreover, the letter goes on to state the entire case had been assigned to Pascoe for "handling as [he] deem[ed] appropriate."

By October 21, 2015, the tension appears to have dissipated as evidenced by an email from Pascoe to Cook. In the email, Pascoe referenced a meeting he had that day with McIntosh and Cook, and stated, "I am very grateful that you recommended we sit down and discuss our issues. As it turns out, we have no 'issues' and we are on the same page. . . . " Nothing in the email or subsequent communications indicate what was discussed at the meeting, or what the mutual understanding entailed. The email further requested advisory opinions[7] on two issues related to the redacted legislators investigation.[8]

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[7] *See* Alan Wilson South Carolina Attorney General, http://www.scag.gov/opinions (last visited July 13, 2016) ("By statute, the Governor, members of the General Assembly, other elected government officials, state agencies, or people appointed to serve on boards and commissions are entitled to legal advice from the Attorney General's Office. The Attorney General also issues legal opinions to certain local officials. An Attorney General's opinion is thus a written public document responding to a specific legal question asked by these elected or appointed government officials. All opinions have been reviewed by the Opinions Section and represent the highest standards of research. An Attorney General's opinion attempts to resolve questions of law as the author believes a court would decide the issue. Unlike a court, however, Attorney General opinions cannot decide factual disputes.").

[8] Specifically, the email requested an opinion as to:

> 1. Whether it is a violation of South Carolina law for a Member of the General Assembly to use his own campaign funds to pay for campaign services performed

On December 11, 2015, Cook emailed Pascoe the Attorney General opinion covering the issues "as thoroughly as possible." There is no indication in the exhibits filed with this Court of any further communication between Pascoe and the Attorney General's Office until March 2016.

In February 2016, having determined in conjunction with Pascoe that a state grand jury investigation into the redacted legislators matter was necessary, Chief Keel sent a SLED agent to the Attorney General's Office to obtain templates for a state grand jury initiation from SLED Lieutenant Pete Logan ("Lt. Logan"), whose office was located within the state grand jury division of the Attorney General's Office. According to an affidavit by Robert E. Bogan ("Bogan")—a former prosecutor at the Attorney General's Office and assistant to Pascoe in the investigation of the redacted legislators matter—Bogan called Lt. Logan on or about February 12, 2016, to "get the format of the state grand jury initiation paperwork." Bogan asserts he did not disclose to Lt. Logan the subject of the investigation, only that he was assisting Pascoe. Bogan claims Lt. Logan assumed which investigation Bogan was referencing, and replied that the Attorney General did not think it was an appropriate state grand jury case. It does not appear from the exhibits that the templates were supplied.

In March 2016, Pascoe and Chief Keel signed the authorization to initiate a state grand jury proceeding.[9] The initiation memorandum stated the Attorney General's Office was recused from making a prosecutive decision, and such authority was conferred upon Pascoe. On March 18, 2016, presiding judge Clifton Newman met with Pascoe and state grand jury clerk Parks. Judge Newman acknowledged his notification of the state grand jury initiation by signing the memorandum.[10] Parks

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> by a business in which the Member or a member of the Member's family has an economic interest, and
>
> 2. Whether it is a violation for a South Carolina House Majority Leader to cause or influence the House Legislative Caucus to hire and pay a business in which the Majority Leader has an economic interest.

[9] *See* S.C. Code Ann. § 14-7-1630(B) (Supp. 2015).

[10] South Carolina Code Ann. § 14-7-1630(B) (Supp. 2015) states, "the Attorney General may notify in writing to the chief administrative judge for general sessions

then administered the oath of secrecy to Pascoe, and agreed to administer the oath to select members of his staff at a later date. Parks also signed subpoenas at Pascoe's request.

On March 22, 2016, McIntosh and Cook met with Chief Keel and expressed concern as to Pascoe's authority to initiate a state grand jury investigation. According to Chief Keel's affidavit, when he asked McIntosh why neither he nor Pascoe were contacted to discuss these concerns when he sent a SLED agent three weeks earlier to obtain the initiation templates, McIntosh responded he "didn't respond to rumors and didn't know why he should call Solicitor Pascoe."

On March 24, 2016, Parks notified Pascoe via email he would not administer the state grand jury secrecy oath to Pascoe's staff, and would no longer issue subpoenas. In his affidavit, Parks explains he originally cooperated with the state grand jury initiation because he was under the impression the proceeding was authorized based on the language of the initiation memorandum, and Judge Newman's acknowledgment.

On March 25, 2016, Pascoe filed a Petition for a Writ of Mandamus in this Court, asking the Court command Parks: (1) issue the oath of secrecy to Pascoe's staff involved in the state grand jury investigation; (2) issue subpoenas as required; and (3) "perform all other necessary and proper duties required by his office." This Court granted Pascoe's petition for original jurisdiction to address the merits of the mandamus action.

On March 28, 2016, McIntosh sent a letter to Pascoe purportedly terminating all authority delegated to Pascoe "on July 17 and July 24, 2015," because of Pascoe's attempt to "unlawfully" initiate a state grand jury investigation. In his letter, McIntosh stated, "[Y]ou were *given full power to prosecute this matter at the local level* if you deemed such action to be appropriate. However, rather than seeking explicit authority for a State Grand Jury investigation, you sought to initiate that investigation surreptitiously with respect to this office" (emphasis supplied).

It is not clear what this "local level" language is meant to suggest. However, nothing in the exhibits before this Court suggests that Pascoe's authority in the redacted legislators matter did not include all the power of the Attorney General,

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in the judicial circuit in which he seeks to impanel a state grand jury that a state grand jury investigation is being initiated."

including the impaneling of a state grand jury.

On March 29, 2016, by letter, McIntosh purported to "designate" Fifth Circuit Solicitor Dan Johnson to replace Pascoe, assuring, "The Attorney General has authorized me to say that should you need *any investigative tools, including the State Grand Jury*, please let me know and you will be given that authority"[11] (emphasis supplied).

On March 30, 2016, Pascoe filed a Petition for Declaratory Relief with this Court, seeking the Court declare: (1) Attorney General Alan Wilson recused himself and his office from the investigation and prosecution of the redacted legislators matter; (2) the recusal was full, final, and irrevocable "leaving no role for [Wilson] or his Office in the matter"; (3) in so doing, Wilson exercised his statutory authority to vest Pascoe with the legal authority to act as the designee of the Attorney General imbued with the powers of that office; (4) Wilson's attempt to direct Clerk Parks in this matter was an *ultra vires* act; (5) Wilson's attempt to revoke Pascoe's designation in this matter was an *ultra vires* act; (6) Wilson's attempt to designate Fifth Circuit Solicitor Dan Johnson to investigate and prosecute this matter was an *ultra vires* act; and (7) Wilson and his office must cease and desist from any further involvement in this matter and act in strict accordance with the Court's judgment concerning the law of recusal. We granted Pascoe's petition for original jurisdiction to address the merits of the declaratory judgment action.

LAW/ANALYSIS

As mentioned *supra*, because these cases are being heard in the Court's original jurisdiction, the Court sits as both the finder of fact and finder of law.[12] We further note that in our view, the present dispute reflects the sincere desire of the parties to ensure the redacted legislators investigation is carried out pursuant to the laws of this state.

On the merits, as discussed *infra*, while some evidence weighs against Pascoe's

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[11] Dan Johnson declined to accept the designation pending the outcome of the current litigation.

[12] *See* § 14-3-340; *Sanford*, 385 S.C. at 497, 685 S.E.2d at 607.

position, we conclude Pascoe has met his burden of proving by a preponderance of the evidence he was vested with the authority to act as the Attorney General in the redacted legislators matter, and that this authority necessarily included the power to initiate a state grand jury investigation. We further conclude McIntosh's attempt to terminate Pascoe was not effective. Given these determinations, we find it unnecessary to issue a writ of mandamus as we expect the parties will act in accordance with this decision.

Pascoe has the burden of proving his cases by a preponderance of the evidence. *See Vermont Mut. Ins. Co.*, 316 S.C. at 10, 446 S.E.2d at 421 (citing *Martin v. Cantrell*, 225 S.C. 140, 81 S.E.2d 37 (1954) (declaratory judgment)); 55 C.J.S. *Mandamus* § 405 (2016) (mandamus). A preponderance of the evidence is evidence which convinces the fact finder as to its truth. *Gorecki v. Gorecki*, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010) (citation omitted).

Both Pascoe and Wilson argue any transfer of authority was governed by S.C. Code Ann. §§ 14-7-1650 *et seq.* (Supps. 2014 & 2015). We disagree, and find the transfers of authority were not governed by the State Grand Jury Act.

Article 15 of Chapter 7 of Title 14 of the South Carolina Code contains the State Grand Jury Act. S.C. Code Ann. § 14-7-1600 (Supps. 2014 & 2015). Regarding the October 2014, Wilson recusal and subsequent transfer of authority to McIntosh, the version of the State Grand Jury Act effective at that time addressed only the Attorney General's "disqualification"[13] *after* the state grand jury initiation process had begun. *See* S.C. Code Ann. § 14-7-1650(C)(2) (Supp. 2014); *see also, e.g.*, *Ex parte Harrell*, 409 S.C. 60, 760 S.E.2d 808 (2014). More to the point, § 14-7-1650(C)(2), stated, "[I]n the case of the Attorney General's disqualification, the matter shall be referred to a solicitor for investigation and prosecution. Any doubt regarding disqualification *shall be resolved by the presiding judge of the state grand jury*" (emphasis supplied). The fact that disqualification disputes were to be

[13] This version of the statute did not contemplate recusal or voluntary/involuntary removal. It only contemplated disqualification "[w]here it is determined that a conflict of interest" exists. *See* § 14-7-1650 (Supp. 2014).

The content of subsection (C)(2) was amended shortly thereafter effective June 3, 2015.

resolved by the judge presiding over the state grand jury proceeding further demonstrates the statute only applied to removal of the Attorney General by disqualification *after* the state grand jury initiation process had begun.

The Wilson recusal and transfer of authority to McIntosh occurred outside the context of a state grand jury proceeding, and, therefore, it occurred outside of the State Grand Jury Act.

Likewise, we find the transfer of authority from McIntosh to Pascoe was not governed by the State Grand Jury Act. The applicable version of § 14-7-1650,[14] effective at the time of the July 2015, transfer of authority to Pascoe, only applies to recusal or disqualification post-initiation of the state grand jury investigation. Specifically, §14-7-1650(C), states, in pertinent part:

> When the Attorney General determines that he should recuse himself *from participation in a state grand jury investigation and prosecution*, the Attorney General may either refer the matter to a solicitor for investigation and prosecution, or remove himself entirely from any involvement in the case and designate a prosecutor to assume his functions and duties pursuant to this article. . . . (emphasis supplied).

This statute, like the version effective in October 2014, addresses a circumstance in which there is an ongoing state grand jury proceeding. Accordingly, we hold the October 2, 2014, transfer of authority to McIntosh, and the July 17, and 24, 2015, transfer of authority to Pascoe, are not governed by any provision of the State Grand Jury Act.

Further, we find the preponderance of the evidence supports two conclusions: that Wilson unequivocally recused himself from any aspect of the redacted legislators investigation and delegated all authority vested in the elected Attorney General to McIntosh in the October 2, 2014, letter asking that McIntosh "take over as

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[14] Effective June 3, 2015. Wilson submits he substantially influenced the statutory changes made to the State Grand Jury Act that became effective June 3, 2015. Among those changes is the recognition of the Attorney General's ability to recuse himself, as well as his ability to delegate his authority in whole or in part. *See* § 14-7-1650(C) (Supp. 2015).

supervising prosecutor"; and, subsequently, that McIntosh, acting as the Attorney General, recused himself and the Attorney General's Office from the redacted legislators investigation, and appointed Pascoe to act as the Attorney General vested with the Attorney General's power and authority for the purpose of that investigation in the July 2015, correspondence.[15] *See Gorecki*, 387 S.C. at 633, 693 S.E.2d at 422 (noting a preponderance of the evidence is evidence which convinces the fact finder as to its truth (citation omitted)).

The initial correspondence from the Attorney General's Office to both Pascoe and Chief Keel in July 2015, stated, without reservation, that the Attorney General's *Office* was recused from the redacted legislators investigation, leaving only Pascoe as the state's highest prosecutor in that matter.[16] Indeed, in his March 28, 2016, letter purporting to terminate Pascoe, McIntosh referred to the dates of July 17, and 24, 2015, as the instances when Pascoe was delegated authority in the redacted legislators matter; the correspondence on those dates stated the Attorney General's Office was recused. Second, the exhibits demonstrate that high level officials at the Attorney General's Office repeatedly stated that the matter was solely within Pascoe's authority, referring to the matter as, *inter alia*, "your investigation or decision," "your investigation," and "your case." Third, several communications maintained the Attorney General's Office was "out of it," and vehemently denied the Attorney General's Office at any point interfered with the redacted legislators investigation. Fourth, Cook's emails suggest the *only* authority remaining with the Attorney General's Offices was ensuring the "integrity" of the investigation, i.e., ensuring no one involved was leaking confidential information to the media. And fifth, no correspondence indicated the Attorney General's Office retained any control over the redacted legislators investigation, or that Pascoe was acting at the Office's direction. Specifically, there is no evidence McIntosh, Cook, or Waters requested an update or information as to the progress or contents of the

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[15] Thus, Pascoe was acting as the Attorney General for the purpose of the redacted legislators matter fully vested with the authority of South Carolina Constitution Article V, § 24, and, therefore, is not in violation of S.C. Code Ann. § 1-7-380 (2005).

[16] We acknowledge that McIntosh's affidavit submits his July 17, 2015, letter was "in-artfully" drafted. Nonetheless, we find the words of that letter unequivocally conveyed to Pascoe the authority to act as the Attorney General in the redacted legislators matter.

investigation. To the contrary, McIntosh repeatedly reassured the investigation was exclusively under Pascoe's control, and that the Attorney General's Office had not and would not interfere.[17]

We further find of critical importance the fact that Chief Keel, a neutral witness, expressed in his affidavit his understanding was that since July 2015, the entire Attorney General's Office was recused from any further involvement in the investigation of the redacted legislators. Chief Keel states that he had no contact or communication with the Attorney General's Office regarding the redacted legislators matter after July 17, 2015. Chief Keel's affidavit further provides he worked exclusively with Pascoe on the investigation, and when the need for a state grand jury proceeding became apparent, he and Pascoe reviewed "letters and correspondences," [sic] and agreed initiation of a state grand jury was authorized by the July 17, 2015, letter.

Further, prior to concerns being raised by individuals at the Attorney General's Office, Judge Newman and Clerk Parks accepted that Pascoe had the authority to act as the Attorney General in initiating the state grand jury investigation. Parks' affidavit to this Court states he swore Pascoe into the state grand jury investigation in the presence of Judge Newman, and signed subpoenas at Pascoe's request, as he was "under the impression that the investigation was authorized." Parks' affidavit explains that approximately one week later, on March 24, 2016, he sent a communication to Pascoe copying Judge Newman, explaining that due to myriad legal and procedural issues that had "surfaced," he would not be administering the oath to anyone involved in the case until the issues were resolved.[18]

We find Pascoe has proven by a preponderance of the evidence that the Attorney General's Office in its entirety was recused from the redacted legislators

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[17] It is for this reason we find the transfer of authority was not governed by any doctrine related to agency, which provides for degrees of control between a principal and an agent. Rather, we find the preponderance of the evidence supports the conclusion that an unequivocal cession of authority occurred resulting in Pascoe maintaining the full authority of the Attorney General.

[18] Parks' actions gave rise to Pascoe's initial filing with this Court: the Petition for a Writ of Mandamus.

investigation, and Pascoe was vested with the full authority to act as the Attorney General for the purpose of the investigation.

Wilson contends, however, that only the elected Attorney General may lawfully sign the authorization for a state grand jury investigation.

South Carolina Code Ann. § 14-7-1630(B) (Supp. 2015),[19] states:

> "When the Attorney General and the Chief of [SLED] consider a state grand jury necessary to enhance the effectiveness of investigative or prosecutorial procedures, the Attorney General may notify in writing to the chief administrative judge for general sessions in the judicial circuit in which he seeks to impanel a state grand jury that a state grand jury investigation is being initiated."

Wilson asserts that pursuant to § 14-7-1630(B), and under all circumstances, regardless of any firewall or disqualification, the elected Attorney General personally is the sole individual authorized to initiate a state grand jury investigation. Specifically, Wilson argues his exclusive authority to initiate a state grand jury is non-delegable under § 14-7-1630(B), because other provisions of the State Grand Jury Act refer to the "Attorney General or his designee." He contends that the absence of the term "designee" in the initiation statute should be read to require the Attorney General personally sign the state grand jury initiation request. We disagree.

It is incontrovertible § 14-7-1630(B), requires the signature of the Attorney General in the authorization of a state grand jury investigation; however, we find the strict interpretation of the term "Attorney General"—to require the personal signature of the elected office holder—would lead to an absurd result. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (finding statutes should not be construed so as to lead to an absurd result (citation omitted)); *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910) (holding regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it

[19] This 2015 version of the statute was in effect in March, 2016, when the issue of Pascoe's authority arose.

would lead to a result so plainly absurd that it could not have been intended by the General Assembly)).

Were we to hold that only the elected office holder is authorized to initiate a state grand jury investigation, then even where the Attorney General himself became the subject of an investigation, only he could initiate a state grand jury proceeding in the case against him. We conclude such a holding would lead to an absurd result. *See Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (holding if possible, the court will construe a statute so as to escape an absurdity and carry the intention into effect (citation omitted)). A similar absurd result would arise where the Attorney General resigned or was rendered incapacitated, the effect of which would be that no state grand jury could go forward pending the election of, and qualification of, his successor. *See id.* We find such absurd results could not have been intended by the General Assembly. *See State v. Cnty. of Florence*, 406 S.C. 169, 173, 749 S.E.2d 516, 518 (2013) ("The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature"); *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (finding regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly).

Further, we fail to see how a recused individual could authorize a state grand jury investigation having no knowledge of the facts or evidence in the case. In the instant case, it remains unclear whether anyone at the Attorney General's Office has any information regarding the investigation of the redacted legislators. To the contrary, according to Keel, no one at the Attorney General's Office was made privy to any information obtained by SLED relating to the redacted legislators investigation after July 17, 2015. The facts of the investigation were known only by Keel, Pascoe, and their investigators.

The purpose of § 14-7-1630(B), is to provide the mechanism for the initiation of a state grand jury proceeding. This responsibility should only be exercised by an individual with thorough knowledge of the investigation leading up to the request for a state grand jury. More to the point, how would an Attorney General firewalled from all aspects of an investigation possess the requisite knowledge as to whether subject matter jurisdiction lies with the state grand jury. *See, e.g.*, *Ex parte Harrell*, 409 S.C. at 70–71, 760 S.E.2d at 813 ("Relevant to this case, the subject matter jurisdiction of a state grand jury covers 'a crime, statutory, common

law or other, involving public corruption as defined in [s]ection 14-7-1615, a crime, statutory, common law or other, arising out of or in connection with a crime involving public corruption . . . , and any attempt, aiding, abetting, solicitation, or conspiracy to commit a crime, statutory, common law or other, involving public corruption. . . .'" (citing S.C. Code Ann. § 14-7-1630(A)(3) (Supp. 2013))); *see also* § 14-7-1630(B) (requiring the individual seeking authorization of the state grand jury investigation "allege the type of offenses to be inquired into and, in the case of [certain offenses], must allege that these offense may be of a multicounty nature or have transpired or are transpiring or have significance in more than one county of the State.").

As evidenced by the statute itself, a state grand jury proceeding is an investigatory tool which we find is available to the Attorney General or his designee vested with the authority over an investigation within the subject matter jurisdiction of the Act. *See* § 14-7-1630(B) (stating authorization of a state grand jury is proper where a state grand jury is necessary "*to enhance the effectiveness of investigative* or prosecutorial procedures" (emphasis supplied)); *see also The Perils of Parallel Civil and Criminal Proceedings: A Primer*, 10 No. 4 HEALTH LAW., 1, 4 (1998) ("One of the government's most powerful investigatory tools is the grand jury"); *cf. United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 419 (1983) (noting the concern of tempting prosecutors to manipulate the grand jury's "powerful investigative tools"). Finally, nothing in the statute requires *only* the elected Attorney General may authorize a state grand jury investigation.

We conclude the General Assembly intended that the individual acting with the authority of the Attorney General may lawfully seek to impanel a state grand jury. *See Cnty. of Florence*, 406 S.C. at 173, 749 S.E.2d at 518; *Kiriakides, Inc.*, 312 S.C. at 275, 440 S.E.2d at 366; c*f. Matter of Special Sept. 1978 Grand Jury (II)*, 590 F.2d 245 (7th Cir. 1979).

Accordingly, since we find Pascoe was acting with the authority of the Attorney General when he signed the initiation of the state grand jury investigation, we hold the initiation was lawful and valid. Because we find Pascoe lawfully authorized the initiation of the state grand jury investigation, the Attorney General's purported termination of Pascoe after the initiation of the state grand jury was ineffective.

As to Pascoe's mandamus action, as noted *supra*, our rulings in the declaratory judgment action clarify the roles of the parties involved. Therefore, we need not issue a writ of mandamus.

The Declaratory Judgment is therefore

ISSUED

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: The Attorney General makes two arguments of law in defense of his decision to fire Solicitor Pascoe. First, he contends a statute forbids a solicitor from suing the Attorney General. Second, he contends the South Carolina Constitution gives him the absolute authority to supervise all criminal litigation, and thus to remove an appointed prosecutor when he deems it appropriate. Because I believe both arguments are valid, and because I believe the constitutional argument renders irrelevant any factual finding except an actual conflict of interest on the part of the Attorney General, I would not follow the approach chosen by the majority. Rather, I would instruct the presiding judge of the circuit court to answer this key factual question—whether the Attorney General has an actual conflict of interest—after which the presiding judge may direct the proceedings accordingly. In all likelihood, the result would be the same. However, because I believe the law requires we follow a different procedure to reach that point, I respectfully dissent.

South Carolina Code section 1-7-380 (2005) provides, "The several solicitors of the State shall not engage in litigation against the State or any of its departments." David M. Pascoe is a "solicitor," this is "litigation," and Pascoe "engaged" in it "against the State" by suing the Attorney General in this Court's original jurisdiction. Pursuant to the plain language of section 1-7-380, I would dismiss the action. The result of that dismissal would bring these issues before the presiding judge of the circuit court.[20]

Article V, section 24 of the Constitution of South Carolina provides, "The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." In my opinion, "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases" has the power to remove an appointed

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[20] It makes little apparent sense that Pascoe cannot sue the Attorney General to resolve these issues, but he may ask the presiding judge in a pending case to do so. However, the language of section 1-7-380 is plain and unambiguous. *See City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 304, 755 S.E.2d 425, 428 (2014) ("The wisdom or folly of the Act is not for us to judge; we must enforce the Act as written."); *Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 337, 312 S.E.2d 716, 720 (Ct. App. 1984) ("The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts.").

prosecutor—even one to whom he had previously given complete discretion for the prosecution. This constitutional authority should be subject only to (1) an express and unmistakable recusal of the office by the Attorney General himself—not by his assistants—with specific relinquishment of his article V, section 24 supervisory responsibility, or (2) the disqualification of the Attorney General by order of the court based on the Attorney General's concession or the court's finding of an actual conflict of interest.

The words written by the Attorney General and his assistants in the various emails and letters may be clear, but what they intended—and the legal significance of what they wrote—is far from clear. The majority has done a thorough job analyzing the evidence, and its findings of fact are adequately supported by the evidence.[21] However, I do not agree that the majority's findings of fact are

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[21] We have the authority to find facts in our original jurisdiction. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 497, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009). However, we have hardly ever done so. In *Sanford*, the only case I have been able to find in which we made factual findings in our original jurisdiction, we examined the file from a State Ethics Commission investigation to determine whether a letter written by the Governor "constitute[d] a complete waiver of confidentiality" in the investigation. 385 S.C. at 493, 685 S.E.2d at 605. In all other cases, we have used our original jurisdiction to resolve questions of law, and when fact-finding is necessary to determine the law, we have assigned the responsibility to find facts to a circuit court judge. *See* S.C. Code Ann. § 14-3-340 (1977) ("Whenever in the course of any action or proceeding in the Supreme Court arising in the exercise of the original jurisdiction . . . an issue of fact shall arise . . . , or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Supreme Court, the court may frame an issue therein and certify the same to the circuit court . . . ."). *See also, e.g.*, *Ex parte Smith*, 407 S.C. 422, 422, 756 S.E.2d 386, 386 (2014) (stating "this Court granted the petition for original jurisdiction in this case and appointed the Honorable Clifton Newman to serve as special referee"); *Roberts v. LaConey*, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007) (noting the Court "accepted this declaratory judgment matter in our original jurisdiction . . . [and] referred [it] to a Special Referee . . . to take evidence and issue a report containing proposed findings of fact "); *City of Columbia v. Tindal*, 43 S.C. 547, 554, 22 S.E. 341, 344 (1895) (in an action "in the original jurisdiction of this court," stating,

sufficient to resolve this case. First, the majority does not squarely address the key factual question in the case—the only factual question whose answer could disqualify the Attorney General without his consent—whether he actually has a conflict of interest. The Rules of Professional Conduct provide "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7, RPC, Rule 407, SCACR. When an attorney has a conflict of interest, a court has the power to remove the attorney from the action. *See State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) (the circuit court removed an assistant solicitor due to a conflict of interest, but we found the order was not immediately appealable); *State v. Justus*, 392 S.C. 416, 419-20, 709 S.E.2d 668, 670 (2011) (affirming the circuit court's removal of defense counsel due to a conflict of interest). The Attorney General told McIntosh he "might" have a conflict of interest; McIntosh later referred to a recusal, but did not state the Attorney General's or his actions were based on a conflict. With no concession or finding of a conflict of interest, this Court should not prevent the Attorney General from exercising his constitutional responsibility to supervise criminal prosecution and his authority to remove a prosecutor when he deems it appropriate.

Second, the majority places too much emphasis on the fact that the Attorney General gave Pascoe complete authority to prosecute the case. This is an important fact, and I agree with the majority that he did it. However, this fact does not negate the Attorney General's supervisory responsibility under article V, section 24 of the constitution. The Attorney General's power to assign solicitors to prosecute cases derives from statute. *See, e.g.*, S.C. Code Ann. 1-7-50 (2005) (stating the Attorney General must defend "any officer or employee of the State" and "[s]uch appearance may be by . . . any solicitor . . . when directed to do so by the Attorney General."); S.C. Code Ann. 1-7-320 (2005) ("Solicitors shall perform the duty of the Attorney General . . . whenever they shall be . . . required to do so; and they shall assist the Attorney General . . . in all suits of prosecution in behalf of this State when . . . called upon by the Attorney General."); S.C. Code Ann. 1-7-350 (2005) ("The several solicitors of the State shall, . . . as assigned by the Attorney General, represent in all matters, . . . [and] . . . they shall be subject to the call of the Attorney General, who shall have the exclusive right, in his discretion, to so assign them in case of the incapacity of the local solicitor or otherwise.").

"There being a necessity for some testimony, [the action] was referred, under an order from this court, to [a] special referee").

This statutory grant of power is subject to the provisions of the constitution, and thus the use of the power to assign a solicitor to prosecute a case cannot amount to a relinquishment of the Attorney General's responsibility under the constitution to supervise all criminal cases.

Third, the majority finds the Attorney General "unequivocally recused himself," and McIntosh and Waters made "unequivocal representations . . . in the July 2015 correspondence" by which McIntosh "recused himself and the Attorney General's Office." These are also important facts, and I cannot disagree with the majority that is what happened. However, I do not agree that either action was "unequivocal." Rather, the evidence is contradictory, and the subsequent actions of McIntosh, Cook, Waters, *and* Pascoe indicate none of them believed the Attorney General or McIntosh intended to relinquish the supervisory responsibilities set forth in article V, section 24. This uncertainty is important to the constitutional analysis, as I believe this Court should not find that the Attorney General relinquished this responsibility unless the actions he took to do so were his own actions, and were, in fact, unequivocal.

I will summarize some of the evidence to illustrate my point. On October 2, 2014, the Attorney General wrote an email to McIntosh stating, "Please ensure that I am firewalled from any involvement in that specific instance" and "I want you to take over as supervising prosecutor." In this email, the Attorney General placed McIntosh in charge of the case, thus intentionally keeping the office of the Attorney General involved in the investigation and prosecution. As the majority finds, "McIntosh accepted the designation as supervising prosecutor." The record before us does not contain any evidence of other action regarding recusal taken by the Attorney General himself after the October 2 email, and McIntosh appears to explain in an affidavit that the October 2 email was the only communication he received from the Attorney General on the subject. Everything else relied on by the majority for its finding that the entire office was recused consists only of actions taken by McIntosh, Cook, or Waters. In particular, the July 2015 correspondence came from McIntosh and Waters—not directly from the Attorney General.

In addition, the July 2015 correspondence is internally inconsistent as to whether the office was recused. McIntosh's July 17 letter was written to Chief Keel referencing what appears to be a follow-up investigation of persons mentioned in the SLED report. Despite the "recused this office" statement, McIntosh

"request[ed] that, upon completion of the investigation of those persons, the report be forwarded" to Pascoe. The action of directing the future delivery of an uncompleted report is inconsistent with the office being recused.

Moreover, the "recused this office" statement is inconsistent with the Attorney General putting McIntosh in charge by the October 2, 2014 email, particularly his telling McIntosh to "ensure that I am firewalled." The July 24 letter from Waters to Pascoe also states the Attorney General "firewalled" himself. The act of firewalling might be equivalent to the recusal of an individual, but it is the opposite of recusing an entire office.[22] The purpose of a firewall is to enable the rest of an office to continue working on the matter despite one lawyer's conflict. Finally, like McIntosh's July 17 letter, Waters' letter shows the continued involvement of the office because it informs Pascoe that at McIntosh's direction he will receive the "results of any further investigation" from Chief Keel.

Further, McIntosh, Cook, and Waters continued their involvement in the case long after July. McIntosh wrote Pascoe on September 17, 2015 describing "considerable discussion" between the Attorney General's office and law enforcement. Apparently exercising the "supervising prosecutor" authority the Attorney General gave him in October 2014, McIntosh admonished Pascoe "the public must have every confidence that the integrity of the criminal process is protected." On September 27, 2015, Cook emailed Pascoe stating, "The [Attorney

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[22] The term "firewall" is used to describe a hypothetical barrier placed between a lawyer and the remainder of the lawyer's firm or office to prevent the lawyer's conflict of interest from being imputed to the entire organization. *See, e.g.*, *In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1342 (Fed. Cir. 2011) ("Nor is it disputed that after Cooper joined the law firm of Floyd and Buss, the firm was and is representing parties adverse to [his former client]. The firm did not take any steps to exclude Cooper from the firm's activities in this lawsuit; there is no representation that the traditional 'firewall' was erected."). The term "firewalled" is synonymous with "screened" in our Rules of Professional Conduct. *See* Rule 1.0(n), RPC, Rule 407, SCRCP (defining "Screened" as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law").

General], as Chief Prosecutor, always retains authority over that integrity of a criminal investigation even in a matter in which he is not involved." On September 30, 2015, McIntosh wrote a letter to Pascoe in which he denied the office has a conflict of interest and offered to "assist you any way possible as to legal research." An office does not do legal research in a matter as to which the office is unequivocally recused.

Pascoe accepted the involvement of the Attorney General's office after the July 2015 correspondence. For example, Pascoe emailed Creighton Waters on July 27, 2015 stating, "I will . . . call later today or in the morning for some clarification." On September 15, 2015, Pascoe emailed Cook asking if the Attorney General's office ever dealt with a legal issue Pascoe faced in his investigation of the redacted portions of the SLED report. There is considerable email correspondence between Pascoe and Cook in September, much of which is arguably unrelated to the investigation. On October 21 and 23, 2015, however, Pascoe wrote Cook and officially requested two advisory opinions on matters related directly to the investigation.[23] Pascoe stated, "Bob, I want to thank you for taking the time to meet with me last week. I always value your opinion and advice. Per our discussion, I need your opinion on two issues dealing with South Carolina Code Section 8-13-700," which is entitled in part, "Use of official position or office for financial gain"—the subject of Pascoe's investigation. On November 16, 2015, Pascoe emailed Cook asking, "I was just wondering if you are making any pro[gress] on the issues I asked you to look into and give me an opinion." Cook delivered his opinion on December 11, 2015 via email. Pascoe responded, "I will call you next week after I have an opportunity to review it . . . so I can pick your brain."

Finally, Pascoe wrote McIntosh on September 25, 2015 and stated "it is imperative that the Attorney General's Office recuse itself," indicating Pascoe did not believe the office had already done so. These facts and others are inconsistent with a finding that the Attorney General and McIntosh intentionally and unequivocally relinquished the duty to supervise this case under article V, section 24 of the constitution.

In my opinion, the lack of action by the Attorney General himself in recusing the office, the confusion as to whether the July 2015 correspondence was in fact a

[23] *See supra* note 8.

recusal of the office, and the subsequent behavior of those involved indicating they did not think so are critical to the analysis of whether the Attorney General retained or relinquished his constitutional responsibility under article V, section 24. If we are going to find that the Attorney General forfeited his constitutional duty to supervise all criminal prosecutions, we ought to do so only on the basis of the Attorney General's own actions that are in fact clear. By allowing the imprecise and internally inconsistent writing of two assistants—months after the Attorney General ceased communication with them about the case—to constitute the forfeiture of the responsibilities of a constitutional officer, we set a dangerous precedent. This and other constitutional responsibilities are too important for this Court to allow their forfeiture on imprecise and inconsistent statements made by unelected subordinates to constitutional officers.

By requiring the presiding judge of the circuit court to answer the key factual question of whether the Attorney General has an actual conflict of interest, and permitting the presiding judge to thereafter direct the proceedings accordingly, we comply with section 1-7-380, we enable a more precise fact-finding inquiry than this Court can conduct on the record before us, and we ensure the responsibility imposed on the Attorney General by article V, section 24 of the constitution to "supervise the prosecution of all criminal cases" is honored unless he actually has a conflict of interest that prevents him from doing so. *See also* S.C. Code Ann. § 14-7-1650(C)(2) (Supp. 2014) ("Any doubt regarding disqualification [of the Attorney General] shall be resolved by the presiding judge of the state grand jury."). I respectfully argue that this is the procedure we should follow.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Graham Franklin Douglas, Respondent.

Appellate Case No. 2015-000606

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Chesterfield County
The Honorable J. Michael Baxley, Circuit Court Judge,

Opinion No. 27647
Heard March 2, 2016 – Filed July 13, 2016

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Ernest A. Finney, III, of Sumter, all for Petitioner.

S. Jahue Moore, of Moore, Taylor Law Firm, P.A., of West Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (2014). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Janette Buchanan and Shana Smallwood, Individually and as Co-Personal Representatives of the Estate of James S. Buchanan, Respondents,

v.

The South Carolina Property and Casualty Insurance Guaranty Association, Appellant.

Appellate Case No. 2015-000246

Appeal From Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5424
Heard May 4, 2016 – Filed July 13, 2016

AFFIRMED

Howard A. Van Dine, III, Allen Mattison Bogan, Erik Tison Norton, and Tara C. Sullivan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Daniel W. Luginbill, of Wilson & Luginbill, LLC, of Bamberg, for Respondents.

LOCKEMY, C.J.: In this declaratory judgment action, the South Carolina Property and Casualty Insurance Guaranty Association (the Association) appeals the trial court's order granting summary judgment in favor of Janette Buchanan and Shana Smallwood, individually and as co-personal representatives of the estate of James Buchanan (Respondents). On appeal, the Association argues the trial court erred in finding the Association's statutory offset of $376,622 should be deducted from the claimant's total amount of stipulated damages of $800,000 rather than the Association's mandatory statutory claim limit of $300,000. We affirm.

FACTS/PROCEDURAL HISTORY

On January 7, 2008, James Buchanan was involved in a motor vehicle accident in Bamberg, South Carolina, caused by a vehicle driven by Eddie Best and owned by Travis Scott. Scott's vehicle was insured for one million dollars by AequiCap Insurance Company (AequiCap). Mr. Buchanan died at the scene of the accident.

Mrs. Buchanan, individually and as the personal representative of Mr. Buchanan's estate, initiated a wrongful death lawsuit in Bamberg County against Best and Scott, both of whom were South Carolina residents. During the pendency of the wrongful death action, a Florida court declared AequiCap insolvent. As a result of AequiCap's insolvency, the Association assumed management of the claims against AequiCap's South Carolina insureds pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act).[1]

Mrs. Buchanan, Scott, and Best reached a settlement in the wrongful death lawsuit, and the trial court approved the settlement on February 24, 2014. As part of the settlement agreement, the parties stipulated that Mrs. Buchanan sustained $800,000 in damages. Respondents recovered a total of $376,622 from workers' compensation benefits and the codefendants' insurance.

On April 11, 2013, Respondents filed an action against the Association for a declaration that the Association must pay $300,000, the limit of its exposure under S.C. Code Ann. § 38-31-60 (2015). Respondents asserted the balance due to them after offsetting their $376,622 recovery was $423,378, which exceeded the statutory limit. The Association answered, claiming the credit for the $376,622 already received should be applied to its $300,000 statutory cap, which would

[1] *See* S.C. Code Ann. §§ 38-31-10 through -170 (2015).

reduce its obligation to zero. The Association and Respondents filed cross-motions for summary judgment.

On May 28, 2014, the trial court held a hearing on the cross-motions. On September 9, 2014, the trial court granted Respondents' summary judgment motion and denied the Association's motion. In its order, the trial court found the plain language of the Act mandated that the Association pay Respondents $300,000. The trial court found Respondents' "covered claim" under the AequiCap policy was $800,000, to which an offset of $376,622 would be applied under section 38-31-100(1) of the South Carolina Code (2015), leaving a balance of $423,378 on the covered claim. The trial court held the Association's obligation to pay the balance due on the claim was then limited by the $300,000 cap set forth in section 38-31-60. The Association filed a motion for reconsideration, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Id*. at 7−8, 760 S.E.2d at 788 (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006)). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Id*. at 8, 760 S.E.2d at 788 (quoting *Sloan*, 380 S.C. at 467, 636 S.E.2d at 605−06)).

LAW/ANALYSIS

The Association argues the Act unambiguously requires that any offset be deducted from the Association's $300,000 statutory claim limit rather than a claimant's total amount of damages on a covered claim. We disagree.

"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). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "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." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

"It is axiomatic that 'words in a statute must be construed in context,' and 'the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.'" *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014) (quoting *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008)). "Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Id.* at 124−25, 754 S.E.2d at 492−93.

"[The Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent." *Id.* at 124, 754 S.E.2d at 492. Section 38-31-60(b) states the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." "Because [the Association] is a creature of statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365−66, 764 S.E.2d 920, 922 (2014). "Pursuant to the Act, [the Association] must pay certain 'covered claims,' as the term is defined in section 38-31-20(8) [of the South Carolina Code (2015)]." *Id.* at 366, 764 S.E.2d at 922. A "covered claim" is "an

unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer." § 38-31-20(8). However, the Association's obligation to pay covered claims "includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars." S.C. Code Ann. § 38-31-60(a)(iv) (2015).

"As a condition precedent to recovery from [the Association], a claimant is required to first exhaust all available coverage from solvent insurers, and [the Association] is allowed to offset the full limits of such other coverage against its obligations under the Act." *Brock*, 410 S.C. at 366, 764 S.E.2d at 922. Regarding the exhaustion and offset of coverage from solvent insurers, section 38-31-100(1) provides as follows:

> A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy. *Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage* as set forth on the declarations page and the association shall receive a full credit for such limits, *or, where there are no applicable limits, the claim must be reduced by the total recovery.* Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

(emphases added).

We find section 38-31-100(1) is unambiguous and the plain reading of section 38-31-100(1) requires that any recovery from solvent insurers be deducted from the total amount of the covered claim rather than from the Association's $300,000 statutory cap.

Before seeking compensation from the Association, Respondents exhausted the coverage available from solvent insurers, as required by section 38-31-100(1), by recovering $376,622 from workers' compensation benefits and the codefendants' other insurance policies. We find the trial court properly determined section 38-31-100(1) mandated that the $376,622 Respondents recovered from the solvent insurers be deducted from the $800,000 payable on the covered claim. *See* § 38-31-100(1) ("Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage, . . . or, where there are no applicable limits, the claim must be reduced by the total recovery.").

We find the language "[a]ny amount payable on a covered claim under this chapter" in section 38-31-100(1) refers to the total amount of damages suffered under the covered claim. In addition, we find the phrase "[a]ny amount payable on a covered claim under this chapter" is not synonymous with "the Association's obligation on a covered claim"—which would be either the policy limits if the limits were less than or equal to $300,000, or a maximum of $300,000 if the policy limits exceeded $300,000. *See* § 38-31-60(b) (providing the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent"); § 38-31-60(a)(iv) (stating the Association's obligation to pay covered claims "includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars"). In our view, if the legislature had intended the statutory cap to be reduced by the recovery, it could have drafted the statute to read "the Association's *obligation* under this chapter must be reduced by the total recovery." However, instead, the legislature said that "the *claim* must be reduced by the total recovery." § 38-31-100(1) (emphasis added). We find our reading of section 38-31-100(1) is consistent with the Act's purpose of providing some protection for consumers whose insurers become insolvent. *See S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994) ("[The Association's] purpose is to provide some protection to insureds whose insurance companies become insolvent.").

After offsetting the $376,622 recovery against the $800,000 covered claim, the remaining unpaid amount on the covered claim was $423,378, which was within the limits of Scott's one million dollar policy with AequiCap but exceeded the $300,000 statutory cap on the Association's obligation to pay. Section 38-31-

60(a)(iv) required the Association to pay $300,000 of this outstanding amount. Accordingly, we hold the trial court properly applied the $376,622 offset to the $800,000 payable on the covered claim and did not err in ordering the Association to pay Respondents $300,000.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolyn Taylor-Cracraft, Appellant,

v.

Gerald Cracraft, Respondent.

Appellate Case No. 2014-001483

Appeal From Saluda County
Kellum W. Allen, Family Court Judge

Opinion No. 5425
Heard March 15, 2016 – Filed July 13, 2016

REVERSED AND REMANDED

Victoria L. Eslinger, James Grant Long, III, Manton M. Grier, Jr., and Jennifer Joan Hollingsworth, all of Nexsen Pruet, LLC, of Columbia, for Appellant Carolyn Taylor-Cracraft.

John S. Nichols and Blake Alexander Hewitt, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and William Randall Phipps, of Phipps Family Law, P.A., of Hilton Head Island, for Respondent Gerald Cracraft.

LOCKEMY, C.J.: In this divorce action, Carolyn Taylor-Cracraft (Wife) appeals the family court's order, arguing (1) the family court lacked jurisdiction to

apportion her 2.26 acres of riverfront property (the Highway 221 Property) because it was nonmarital property that had not been transmuted into marital property; (2) the family court erred in listing the Highway 221 Property and the parties' jointly-owned corporation, RiverWinds Landing, Inc. (the Corporation), for sale at $800,000; (3) the family court's 61% to 39% division of the marital estate was not equitable and the family court erred in "awarding" her all of the marital debt; and (4) the family court erred in not awarding attorney's fees to her. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Wife and her husband, Gerald Cracraft (Husband), married on October 7, 2001. They separated on July 13, 2010. No children were born of the marriage.

On September 2, 2011, Wife filed for a divorce from Husband. On April 3, 2014, the family court granted Wife a divorce on the ground of adultery. The family court identified the marital property and awarded 61% of the marital property to Wife and 39% to Husband. The family court determined the Highway 221 Property Wife owned before the marriage was transmuted into marital property. In finding the Highway 221 Property transmuted, the family court concluded the property was used in support of the marriage and "exclusively for marital purposes with the expectation and intent of creating a joint retirement" by using the Corporation to operate a marina on the property. The family court ordered the Highway 221 Property and the Corporation to be listed for sale for $800,000. Last, the family court ordered Husband and Wife to pay their own attorney's fees. Wife appealed.

STANDARD OF REVIEW

"Appellate courts review appeals from the family court de novo." *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014). "Thus, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Id.* "[H]owever, this broad scope of review does not require the Court to disregard the findings of the family court, which is in a superior position to make credibility determinations." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "The appellant retains the burden to demonstrate the error in the family court's findings of fact." *Buist*, 410 S.C. at 574, 766 S.E.2d at 383.

LAW/ANALYSIS

I. Transmutation of the Highway 221 Property

Wife argues the family court lacked jurisdiction to apportion the Highway 221 Property because it was nonmarital property that was not transmuted into marital property. We agree.

Section 20-3-630(A) of the South Carolina Code (2014) defines "marital property" as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held." However, "property acquired by either party before the marriage" and "any increase in value in non-marital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage" are considered nonmarital property. § 20-3-630(A)(2) & (5). "The [family] court does not have jurisdiction or authority to apportion nonmarital property." S.C. Code Ann. § 20-3-630(B) (2014).

Property that is nonmarital when acquired may be transmuted into marital property in three ways: (1) "it becomes so commingled with marital property that it is no longer traceable," (2) it "is titled jointly," or (3) it "is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Id*. at 295, 372 S.E.2d at 110−11. "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Id*. at 295, 372 S.E.2d at 111. "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id*. at 296, 372 S.E.2d at 111.

"A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital." *Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740. "If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Id*.

In *Murray v. Murray*, the husband brought a home and several rental properties into the marriage. 312 S.C. 154, 156−57, 439 S.E.2d 312, 314 (Ct. App. 1993). The income from the rental properties was deposited in a joint checking account, and the wife made contributions of labor and time to the improvement and maintenance of the marital home and rental properties. *Id*. at 157−58, 439 S.E.2d at 314−15. Nevertheless, this court held the family court could have reasonably found the wife failed to prove the properties were transmuted. *Id*. at 158, 439 S.E.2d at 315 (finding the family court did not commit reversible error in determining the home and rental properties were not marital property). The husband's will, executed eight years into the marriage, provided that upon his death his real property would be liquidated—with one-third of the proceeds to go to his wife and the remaining two-thirds to go to his children—and that his wife could remain in the marital home only until the estate was settled. *Id*. "This [was] evidence that he considered the marital residence and the rental properties, which were still titled in his name alone, to be his separate property after his marriage to [his wife]." *Id*. However, "[a] spouse has an equitable interest in appreciation of property to which she contributed during the marriage, even if the property is nonmarital." *Id*. at 154, 159, 439 S.E.2d at 316 (finding the family court did not err in awarding the wife a special equity of $13,250 in the nontransmuted marital home, which represented fifty percent of the appreciation in the home during the parties' marriage).

Wife owned the Highway 221 Property before the parties married in October 2001. She had received the property through her divorce from her first husband in June 2001. In 2002, Husband and Wife decided to build a marina on the Highway 221 Property, which was titled in Wife's name only. The parties intended to use the profits from the marina to supplement their retirement incomes and enter early retirement. The parties operated the marina through the Corporation, which they incorporated on June 6, 2002.

Wife leased the Highway 221 Property to the Corporation for the operation of the marina. Wife signed the lease agreement in her capacity as landlord, and Husband

signed the lease on behalf of the tenant Corporation in his capacity as vice-president and treasurer of the Corporation. The lease agreement stated the lease was made between Wife and the Corporation on July 1, 2002. The lease agreement provided for a three-year lease commencing on July 1, 2002, and expiring on June 30, 2005, and gave the Corporation an option to extend the lease for five additional terms of three years each. The typed date "April 2004" on the notary's signature block was crossed out and replaced with the handwritten date "July 2002." Husband testified he remembered signing the lease agreement but did not recall when he signed it. Wife denied backdating the date on the notary's signature block to read "July 2002." The lease provided the Corporation would not pay monthly rent; instead the Corporation would pay to have the property cleared and graded in the first year of the lease term and would pay the county property taxes in the second and third years of the lease term. The lease permitted the Corporation to remove its personal property and trade fixtures upon the expiration of the lease. However, the lease provided, "All alterations, improvements[,] and additions, upon completion of construction thereof, shall become part of the Leased Premises and the property of the Landlord without payment therefore by Landlord and shall be surrendered to Landlord at the end of the term."

On April 19, 2004, Wife executed a will. In the will, Wife gave Husband a life estate in the Highway 221 Property and gave her two children a remainder interest in the property upon Husband's death. The will stated the devises of the Highway 221 Property were subject to the lease agreement between Wife and the Corporation.

Husband introduced into evidence a bill from attorney James Poag, Jr., dated April 19, 2004, charging Wife $375 for a will, lease, and spousal election waiver. The family court stated the evidence produced at trial suggested the lease was executed in April 2004 along with Wife's will, "almost two years after the lease was purportedly executed in July 2002."

Wife testified she never intended the Highway 221 Property to be marital property, as evidenced by the lease agreement and her will. Wife testified that she always intended to leave the Highway 221 Property to her children and that Husband knew "from day one that he would never be a part of it; he would never have a part of that land unless I chose to sell it."

In 2008, Wife decided to list the Highway 221 Property and the Corporation for sale in a single listing for $2.4 million. Wife explained she originally did not intend to sell the Highway 221 Property; however, when she and Husband became very tired in 2008 and her health began to fail, she decided to put the property on the market. Wife was unable to sell the Highway 221 Property and the Corporation. Wife admitted that, if someone had purchased the property, the proceeds of the sale would have been used to supplement her and Husband's retirement.

Husband testified he made the following financial contributions to the Corporation: (1) $52,000 from his nonmarital IRA in 2003, which was used during the first stage of constructing the marina; (2) $25,000 from his nonmarital IRA in 2011 to build docks; and (3) $3,000 from his social security check to pay taxes in 2011. There was testimony that Husband contributed time and labor at the marina by overseeing construction, installing riprap, mowing the grass, and operating the marina while Wife worked at her full-time job.

Upon our review of the record, we find the preponderance of the evidence shows the Highway 221 Property was not transmuted. The lease agreement and Wife's will show Wife intended that the Highway 221 Property remain nonmarital after her marriage to Husband. Instead of investing the land directly into the Corporation and making the land a corporate asset, Wife chose to retain ownership and simply lease the land to the Corporation. We find the lease shows Wife did not intend to transmute the property regardless of whether the lease was executed in April 2004—as the family court suspected—or on July 1, 2002, as the lease agreement states.

In addition, we find Wife's 2004 will shows Wife considered the Highway 221 Property to be her separate property after her marriage to Husband. Like the *Murray* will, Wife's will—which gave Husband a life estate in the Highway 221 Property and gave her two children a remainder interest in the property upon Husband's death—directed the full disposition of the property without indicating Husband had any right to alter the disposition. We also find the fact Wife executed her will two years into the marriage—rather than in 2002 when she and Husband first decided to build the marina—does not render the will less indicative of her intent that the Highway 221 Property remain nonmarital. In *Murray*, the husband executed his will eight years into the marriage, and this court nevertheless found the will was sufficient evidence to affirm the family court's determination that the

husband intended the marital home and rental properties to remain his separate property after the marriage. In addition, like the property in *Murray*, the Highway 221 Property has remained titled in Wife's name alone.

We acknowledge that Wife listing the land and the Corporation for sale in 2008 for a single price of $2.4 million might be some evidence that she intended to transmute the property. However, we find the preponderance of the evidence shows Wife did not intend the Highway 221 Property to become marital property.[1] Based on the foregoing, we reverse the family court's finding that the Highway 221 Property was transmuted and remand for the family court to determine whether Husband has an equitable interest in the appreciation of the Highway 221 Property. *See Murray*, 312 S.C. at 154, 159, 439 S.E.2d at 316 ("A spouse has an equitable interest in appreciation of property to which she contributed during the marriage, even if the property is nonmarital.").

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[1] Our appellate courts have also addressed transmutation where the parties showed an intention to use nonmarital property for their joint retirement. *See Pittman v. Pittman*, 407 S.C. 141, 145−46, 151, 754 S.E.2d 501, 503−04, 506−07 (2014) (finding the husband's land surveying business was transmuted into marital property when the parties decided the wife would reduce the hours she worked as a nurse to work for the business full-time; the parties made all major business decisions jointly; the wife's personal credit was used in support of the business; marital funds were expended to discharge business debts; and the parties agreed to raise the wife's salary to increase her social security income because she was older than the husband—"a decision the parties made for their mutual benefit so they would have more money during their retirement"); *Jenkins v. Jenkins*, 345 S.C. 88, 99, 545 S.E.2d 531, 537 (Ct. App. 2001) (finding acreage and a rental home the husband acquired from his mother were transmuted into marital property when the parties planned to make the home their primary residence during their retirement, the wife was substantially involved in the general care and maintenance of the property, the parties expended marital funds on improving the property, and the husband executed a will leaving the property to the wife). We find this case is distinguishable from *Pittman* and *Jenkins* because the lease and Wife's will show that Wife intended the Highway 221 property to remain nonmarital even though she and Husband intended to use their marina business to supplement their retirement.

II. Valuation of the Corporation and the Highway 221 Property

Wife argues the family court erred in ordering the Corporation, the Highway 221 Property, and the improvements built on the property to be listed for sale for $800,000. We agree.

Among other requirements, in making an equitable distribution of marital property, the family court must determine the fair market value of the marital property to be divided between the parties. *Johnson*, 296 S.C. at 293, 372 S.E.2d at 110. "By statute, marital property subject to equitable distribution is presumptively valued at the date of the divorce filing." *Moore v. Moore*, 414 S.C. 490, 522, 779 S.E.2d 533, 550 (2015) (citing S.C. Code Ann. § 20-3-630(A)).

"When valuing business interests for the purpose of equitable distribution, the family court should determine the fair market value of the corporate property as an established and going business." *Id.* at 524, 779 S.E.2d at 551 (quoting *Reid v. Reid*, 280 S.C. 367, 373, 312 S.E.2d 724, 727 (Ct. App. 1984). "This is to be accomplished by considering the business' net asset value, the fair market value for its stock, and earnings or investment value." *Id.*

The family court ordered the Highway 221 Property and the Corporation to be listed for sale for $800,000. Because we find the Highway 221 Property was not transmuted, we hold the family court improperly ordered the Highway 221 Property to be sold with the Corporation. Therefore, we reverse as to this issue and remand for the family court to determine the value of the Corporation alone.

III. Equitable Distribution

Wife argues the family court's 61% to 39% division of the marital estate was not equitable. Wife also argues the family court erred in "'awarding' Wife all of the marital debt."

> In making an equitable distribution of marital property, the court must (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the property so identified; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party

> to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which distribution is to take place.

Johnson, 296 S.C. at 293, 372 S.E.2d at 110. "How the individual factors are weighed depends on the facts of each case." *Id.* at 299, 372 S.E.2d at 113. Section 20-3-620(B) of the South Carolina Code (2004) provides factors for the family court to consider in apportioning marital property and instructs the family court to "give weight in such proportion as it finds appropriate" to each of the factors. One factor the family court considers is the nonmarital property of each spouse. § 20-3-620(B)(7).

As previously stated, we find the Highway 221 Property was not transmuted. Accordingly, we reverse as to this issue and remand for the family court to reapportion the marital estate, which we find does not include the nontransmuted Highway 221 Property. In addition, the family court should reassess the apportionment factors—specifically, the factor relating to the nonmarital property of each spouse—when it reapportions the marital property on remand.

IV. Attorney's Fees

Wife argues "attorney's fees should be revisited" if we reverse any portion of the family court's final order. We agree.

"The court, from time to time after considering the financial resources and marital fault of both parties, may order one party to pay a reasonable amount to the other for attorney fees, expert fees, investigation fees, costs, and suit money incurred in maintaining an action for divorce from the bonds of matrimony . . . ." S.C. Code Ann. § 20-3-130(H) (2014).

> In determining whether to award attorney's fees, the family court should consider the following: (1) the party's ability to pay his/her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fees on each party's standard of living.

Brown v. Brown, 408 S.C. 582, 587, 758 S.E.2d 922, 924 (Ct. App. 2014).

Because we find the Highway 221 Property was not transmuted and reverse and remand as to the first three issues raised on appeal, we reverse and remand as to the attorney's fees issue as well. *See Crossland v. Crossland,* 397 S.C. 406, 418, 725 S.E.2d 509, 516 (Ct. App. 2012) (reversing and remanding for the family court to reconsider the issue of attorney's fees when substantive results achieved by counsel were reversed on appeal).

CONCLUSION

Accordingly, the decision of the family court is

REVERSED AND REMANDED.

WILLIAMS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tina G. McMillan, Respondent,

v.

Jimmy D. McMillan, Appellant.

Appellate Case No. 2014-002151

Appeal From Spartanburg County
Dale Moore Gable, Family Court Judge

Opinion No. 5426
Heard June 6, 2016 – Filed July 13, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Bruce Wyche Bannister and Luke Anthony Burke, both of Bannister, Wyatt & Stalvey, LLC, of Greenville, for Appellant.

Christopher David Kennedy and N. Douglas Brannon, both of Kennedy & Brannon, P.A., of Spartanburg, for Respondent.

GEATHERS, J.: In this divorce action between Jimmy D. McMillan (Husband) and Tina G. McMillan (Wife), Husband appeals the family court's final order of divorce, arguing the family court erred in finding: (1) Husband's business that was

created prior to the marriage was transmuted into marital property; (2) Husband's businesses that were created during the marriage were marital property; (3) Husband did not have a nonmarital interest in his retirement accounts; and (4) Wife's jewelry that was acquired during the marriage was nonmarital property. Husband also argues the family court erred in equitably apportioning the marital estate without weighing the statutory factors and sealing the record without consideration of the necessary factors. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on October 4, 1996. At the time of the final divorce hearing, Husband was sixty-six years old, and Wife was forty-eight years old. The parties did not have any children together. Wife left the marital residence on December 5, 2011. On December 31, 2011, Wife filed a complaint against Husband seeking an order of separate support and maintenance and requesting equitable division of their marital property. On January 23, 2013, Husband filed an amended answer and counterclaim seeking a divorce on the grounds of adultery.

The family court held a hearing on November 12, 13, and 14, 2013. The parties presented evidence about several businesses Husband created with his partner Buddy Carter. In 1977, Husband and Carter started McMillan-Carter, Inc., a grading company. During the marriage, Husband and Carter formed Carmac, LLC in 1996 and Tractor Factor, LLC in 2001 as holding companies for McMillan-Carter's real estate and equipment. Husband and Carter also formed Reynolds Utilities, LLC in 2005; Peloton, Inc. in 2006; and Panacea Biofuels, LLC in 2008.

Husband testified he did not intend for McMillan-Carter or any of the other companies to be marital property. Wife testified they "always lived out of" the businesses during the marriage. The parties also presented evidence about their other real and personal property, including their marital home at 171 Tucapau Road, Husband's retirement account, and Wife's jewelry.

On March 5, 2014, the family court entered a final order granting the parties a divorce on the statutory ground of adultery. The family court found, "Throughout this marriage, [Husband] built his business holdings significantly to include multiple businesses and business properties. [Husband] worked on a regular and

daily basis to expand his businesses and the marital estate. [Wife] worked in the marital businesses and cared for the home." The family court identified four parcels of real estate owned by Husband's businesses; these parcels were appraised for a total of $1,571,000 with $580,140.17 of debt. Additionally, the family court identified certain personal property owned by the businesses that had marital value, including Husband's fifty percent share in business vehicles valued at $26,481 and oil containers valued at $125,000. The family court found, "The business properties listed above, both real and personal[,] are marital property and subject to equitable division." The family court also found Wife's jewelry "[was a gift] and not subject to equitable distribution." The family court found the total value of the marital estate was $1,629,468.41. It apportioned to Husband "possession and ownership of all of his business interests to include real and personal property identified at [the] trial." After apportioning the parties' remaining real and personal property between Husband and Wife, it ordered Husband to pay Wife $595,263.20 to balance the equitable division of the marital estate. The family court further ordered that the record be sealed "[g]iven the vast amount of financial information that was introduced into evidence in this matter and the fact that much of this information deals with [Husband's] business partner[,] who is not a party to this action[,] and the fact that [Wife] is a sitting Magistrate Court Judge."

On March 24, 2014, Husband filed a Rule 59, SCRCP, motion to alter or amend the family court's order, which the family court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err by finding the parties' work for Husband's companies constituted a basis for transmutation when they were properly compensated for their work?

2. Did the family court err by finding McMillan-Carter was transmuted into marital property when the company was created prior to the marriage and no marital funds or efforts were used to increase equity in the company?

3. Did the family court err by finding Carmac and Tractor Factor were marital property when the companies were acquired in exchange for nonmarital property?

4. Did the family court err by finding Reynolds, Panacea, and Peloton were marital property when the vast majority of funds contributed to the companies were nonmarital funds?

5. Did the family court err by finding Husband did not have a nonmarital interest in his retirement accounts when Husband presented evidence he had funds in the retirement accounts prior to the marriage and no contrary evidence was presented?

6. Did the family court err by finding Wife's jewelry acquired during the marriage was nonmarital property?

7. Did the family court err by dividing the marital estate without giving weight to the fifteen statutory factors the court is required to consider for equitable division?

8. Did the family court err by sealing the record without the consent of the parties and without considering the factors required by the Rule 41.1(d) of the South Carolina Rules of Civil Procedure?

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "Thus, this [c]ourt has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence; however, this broad scope of review does not require the [c]ourt to disregard the findings of the family court, which is in a superior position to make credibility determinations." *Id.*

LAW/ANALYSIS

I. Marital Estate

A. Transmutation of McMillan-Carter

Husband first argues the family court erred by finding McMillan-Carter, a company he formed prior to the marriage, was transmuted into marital property

because no marital funds were used to increase equity in the company.[1] Husband further argues he and Wife were appropriately compensated for their work in the company with salaries and their use of income from McMillan-Carter to support the marriage did not demonstrate intent to transmute the business to marital property. We agree.

"A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital." *Wilburn v. Wilburn*, 403 S.C. 372, 382, 743 S.E.2d 734, 740 (2013). "If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Id.* "If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate." *Pruitt v. Pruitt*, 389 S.C. 250, 261, 697 S.E.2d 702, 708 (Ct. App. 2010).

Property acquired prior to the marriage is generally nonmarital property and not subject to equitable division. S.C. Code Ann. § 20-3-630(A)(2) (2014). "Even if property is nonmarital, it may be transmuted into marital property during the marriage." *Pruitt*, 389 S.C. at 261, 697 S.E.2d at 708. "Transmutation occurs if the property is utilized in support of the marriage or in such a manner as to evidence an intent to make it marital property." *Id.* "Transmutation is a matter of intent to be gleaned from the facts of each case." *Smallwood v. Smallwood*, 392 S.C. 574, 579, 709 S.E.2d 543, 545 (Ct. App. 2011) (quoting *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001)).

"The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Id.* at 579, 709 S.E.2d at 545-46 (quoting *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110-11 (Ct. App. 1998)). "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to

[1] We note the family court did not explicitly find McMillan-Carter was transmuted or that any of Husband's other businesses were marital property. However, we find the family court treated each of the companies as marital property based on our review of the order.

build equity in the property, or exchanging the property for marital property." *Id.* at 579, 709 S.E.2d at 546 (quoting *Johnson*, 296 S.C. at 295, 372 S.E.2d at 111). However, "[t]he mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* (quoting *Johnson*, 296 S.C. at 295-96, 372 S.E.2d at 111).

We agree with Husband that Wife failed to produce objective evidence at trial showing McMillan-Carter was transmuted. *See id.* at 579, 709 S.E.2d at 545-46; *id.* at 579, 709 S.E.2d at 546. At trial, Wife presented some evidence of commingling the business with marital property because she testified she used a company car, phone, and gas card, and she testified they planned vacations and "always lived out of the company." However, we find the preponderance of the evidence did not demonstrate an intent to treat McMillan-Carter as marital property. *See id.* at 579, 709 S.E.2d at 545 ("Transmutation is a matter of intent to be gleaned from the facts of each case.").

Husband never placed the business in Wife's name, and Michael Meilinger—an expert witness qualified in business valuation—testified no marital funds were contributed to McMillan-Carter during the marriage. Furthermore, although Wife worked for the company for a year and a half without earning a salary, she then performed part-time work for the company for several years and earned a $52,000 annual salary. Wife did not make any business decisions, and Meilinger testified she was fairly compensated for her work, which does not support transmutation. Additionally, Husband was paid a regular salary by the business, which Meilinger testified exceeded the fair market value for his work. *See Wilburn*, 403 S.C. at 385, 743 S.E.2d at 741 ("[W]hile the use of property in support of a marriage is relevant to transmutation, the mere use of income from nonmarital assets does not transmute those assets into marital property and is not relevant to transmutation."). We find the lack of intent to transmute is also demonstrated by the fact that Husband did not own the entire company, but rather was a fifty-fifty partner with Carter.

Moreover, we find the facts of this case are distinguishable from other cases in which our courts determined businesses were transmuted. For example, in *Pittman v. Pittman*, the supreme court found a husband's surveying business was transmuted when the wife reduced the hours she worked as a nurse to work full

time for the business, she was paid a higher salary for her services with the expectation it would benefit both parties in retirement together, she was listed as the secretary of the business, the husband and wife made business decisions together, her personal credit was used in support of the business, and marital funds were used to discharge business debt. 407 S.C. 141, 148-52, 754 S.E.2d 501, 505-07 (2014). Whereas the wife in *Pittman* played an integral part in the business and helped make decisions, in the present case, Wife was not actively involved in the business and only drew a salary for administrative work. Furthermore, there is no evidence here of marital funds being used to support the business as there was in *Pittman*.

Similarly, we find this case is distinguishable from *Edwards v. Edwards*, in which the produce stand on the husband's inherited land was the parties' main source of income during the marriage, the wife worked seven days a week during the stand's thirty-two week selling period, the wife did not receive wages for her work for the produce stand, and the parties had building permits naming both of them as owners of the property. 384 S.C. 179, 184-85, 682 S.E.2d 37, 39-40 (Ct. App. 2009). Here, Husband did not recognize Wife as an owner of the company like the couple in *Edwards* did in their business. Further, whereas the wife in *Edwards* was actively involved in the produce stand but not paid, Wife here was compensated for her work for McMillan-Carter.

We find this case is more analogous to *Wilburn*, in which our supreme court held the wife's contributions to the management of the husband's timber company and use of income from the timber company to support the marriage did not establish transmutation. 403 S.C. at 384-85, 743 S.E.2d at 740-41; *see also Smallwood*, 392 S.C. at 580, 709 S.E.2d at 546 (finding the wife's contributions of time and labor to the husband's three rental properties without pay were insufficient to prove transmutation when there was no evidence the parties regarded the rental properties as common to the marriage). Overall, although Wife testified they "lived out of the company," we find the preponderance of the evidence does not support an intent to transmute. Wife was adequately compensated for her work, Wife did not make business decisions, Husband drew a regular salary from the company, Husband did not give Wife stock or name her an owner, Husband had a business partner, and no marital funds were used to increase equity in the company.

B. Tractor Factor and Carmac

Husband also argues the family court erred by finding Tractor Factor and Carmac—two businesses formed during the marriage—were marital property because they were acquired in exchange for nonmarital property from McMillan-Carter. We agree.

"Generally, property acquired by either spouse during the marriage is marital property unless the acquisition falls under one of several exceptions." *Jenkins*, 345 S.C. at 100, 545 S.E.2d at 537-38. "One such exception is that property acquired during the marriage in exchange for nonmarital property is nonmarital." *Id.* at 100, 545 S.E.2d at 538; S.C. Code Ann. § 20-3-630(A)(3). "The burden to show property is not subject to equitable distribution is upon the one claiming that property acquired during the marriage is not marital." *Brown v. Brown*, 379 S.C. 271, 283, 665 S.E.2d 174, 181 (Ct. App. 2008).

We find Husband has met his burden of proving the family court erred by determining Tractor Factor was marital property subject to equitable distribution. *See id.*; *Feldman v. Feldman*, 380 S.C. 538, 542, 670 S.E.2d 669, 671 (Ct. App. 2008) ("[O]ur broad scope of review does not relieve the appellant of the burden of convincing this [c]ourt that the family court committed error."). Meilinger testified Tractor Factor was created with one hundred percent nonmarital funds from McMillan-Carter, and McMillan-Carter loaned Tractor Factor money for down payments on equipment. Wife did not provide any testimony showing Tractor Factor received contributions from marital funds. *See Roe v. Roe*, 311 S.C. 471, 477, 429 S.E.2d 830, 834 (Ct. App. 1993) (finding uncontradicted testimony offered by one spouse is sufficient to establish property is nonmarital). Accordingly, we find evidence in the record shows Tractor Factor was nonmarital property because it was acquired in exchange for nonmarital funds from McMillan-Carter. *See* § 20-3-630(A)(3) (providing property acquired during the marriage in exchange for nonmarital property is nonmarital).

Similarly, we find Husband met his burden of showing Carmac was nonmarital property. Meilinger testified Husband and Carter formed Carmac entirely with funds from McMillan-Carter. Wife did not provide any testimony about marital funds being contributed to Carmac. *See Roe*, 311 S.C. at 477, 429 S.E.2d at 834 (finding uncontradicted testimony offered by one spouse is sufficient to establish property is nonmarital). Accordingly, we find evidence in the record shows

Carmac was nonmarital property because it was acquired in exchange for nonmarital property from McMillan-Carter. *See* § 20-3-630(A)(3) (providing property acquired during the marriage in exchange for nonmarital property is nonmarital).

Even though we find Carmac is nonmarital property, real estate owned by Carmac could still be marital property if there was evidence marital funds were used to purchase the real estate. *See Pool v. Pool*, 321 S.C. 84, 89, 467 S.E.2d 753, 756-57 (Ct. App. 1996), *aff'd as modified*, 329 S.C. 324, 494 S.E.2d 820 (1998) (finding exercise equipment purchased for a nonmarital business during the marriage was marital property because the husband used marital funds to purchase it and did not establish the equipment was separate property). Carmac owned four parcels of real estate, which the family court identified as marital business properties. Meilinger testified Carmac borrowed money in 1997 to purchase 451 Pennsylvania Avenue. Meilinger also testified McMillan-Carter paid the debt for real properties owned by Carmac. Otherwise, the record does not contain evidence of the source of funds for the parcels of real estate. We find the real estate was purchased with nonmarital funds and, therefore, should not have been classified as marital property. *See* § 20-3-630(A)(3); *Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741 ("[The wife's] testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts."). Accordingly, we find the family court erred by classifying the real estate owned by Carmac as marital property and reverse the family court's finding.

C. Reynolds, Peloton, and Panacea

Husband argues the family court erred by finding his three other businesses created during the marriage—Reynolds, Peloton, and Panacea—were marital property. Husband argues the minimal percentage of marital funds contributed to these companies compared to the amount of nonmarital funds contributed shows a lack of intent to treat the businesses as marital property. We disagree.

We find Husband has failed to meet his burden of proving the family court erred in determining Reynolds, Peloton, and Panacea were marital. *See Feldman*, 380 S.C. at 542, 670 S.E.2d at 671 ("[O]ur broad scope of review does not relieve the appellant of the burden of convincing this [c]ourt that the family court committed error."); *Brown*, 379 S.C. at 283, 665 S.E.2d at 181 ("The burden to show property

is not subject to equitable distribution is upon the one claiming that property acquired during the marriage is not marital.").

Neither party disputes Husband contributed some marital funds to Reynolds, Peloton, and Panacea. Because the evidence in the record shows Reynolds, Peloton, and Panacea were each formed during the marriage using a portion of marital funds, we find these companies were marital, and Husband did not meet his burden of proving the companies were nonmarital. *See* S.C. Code Ann. § 20-3-630(A) (defining marital property generally as "all real and personal property . . . acquired by the parties during the marriage"); *see also Pool*, 321 S.C. at 89, 467 S.E.2d at 756-57 (finding husband used marital funds to purchase exercise equipment and failed to meet his burden of proving the equipment was nonmarital property; thus, the equipment purchased during the marriage was marital property); *Brown*, 379 S.C. at 283, 665 S.E.2d at 181.[2]

D. Retirement Account

Husband argues the family court erred by finding he did not have a nonmarital interest in his retirement account because he presented evidence of a $75,000 pre-marital interest in the account, which Wife did not dispute. We agree.

"[B]oth vested and nonvested retirement benefits are marital property if the benefits are acquired during the marriage . . . ." *Shorb v. Shorb*, 372 S.C. 623, 629, 643 S.E.2d 124, 127 (Ct. App. 2007). However, property acquired before the marriage, including retirement benefits, is generally nonmarital property. *Id.*; S.C. Code Ann. § 20-3-630(A)(2).

In *Chanko v. Chanko*, this court held the family court erred by finding the husband's entire retirement account was a marital asset. 327 S.C. 636, 641-42, 490 S.E.2d 630, 633 (Ct. App. 1997). The husband accrued retirement benefits for seven years before the marriage and testified the retirement fund had an

[2] Although Husband argues the infusion of marital funds did not transmute the companies because he did not intend to treat them as marital, we find the companies were marital because they were formed during the marriage using a percentage of marital funds. Because the companies were marital, we need not reach any arguments about transmutation.

approximate value of $75,000 prior to the marriage. *Id.* The wife did not dispute the premarital value the husband assigned or present evidence that the premarital portion of the retirement account had been transmuted. *Id.* at 642, 490 S.E.2d at 633. This court held that even though the husband did not provide any documentary evidence of the premarital value, it was error to include the entire retirement account as marital property based on the evidence presented of premarital value. *Id.* at 641-42, 490 S.E.2d at 633.

We find the family court erred by failing to assign nonmarital value to a portion of Husband's retirement account. At trial, Husband did not testify that $75,000 of his retirement account accrued before the marriage. However, in his financial declaration, Husband stated the nonmarital portion of his retirement account had a $75,000 value. Additionally, Meilinger testified Husband reported a $75,000 nonmarital value of his retirement account. Wife did not testify about Husband's retirement account or dispute the $75,000 figure. We find this situation is analogous to *Chanko* as the financial declaration and Meilinger's testimony, which were undisputed by Wife, were sufficient evidence for Husband to establish a portion of his retirement account was nonmarital. *See Chanko*, 327 S.C. at 641-42, 490 S.E.2d at 633 (holding the family court erred in awarding the wife 50% of the husband's entire retirement when it was undisputed the husband worked seven years before the marriage and the wife did not dispute the premarital value of the retirement account that the husband testified to at trial); *Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741 ("[The wife's] testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts."). Accordingly, because the preponderance of the evidence shows Husband's retirement account had a $75,000 premarital value, we find the family court erred by classifying this portion as marital property. *See Crossland*, 408 S.C. at 451, 759 S.E.2d at 423 ("[T]his [c]ourt has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence . . . .").

E. Jewelry

Husband argues the family court erred by finding Wife's jewelry was nonmarital property because interspousal gifts are marital property subject to equitable division. We agree.

"'[M]arital property' . . . means all real and personal property which has been acquired by the parties during the marriage . . . ." S.C. Code Ann. § 20-3-630(A) (2014). "Interspousal gifts of property . . . are marital property which is subject to division." *Id.*

We find the family court erred in classifying the jewelry as nonmarital property. *See Crossland*, 408 S.C. at 451, 759 S.E.2d at 423 ("In appeals from the family court, this [c]ourt reviews factual and legal issues de novo."). At trial, Husband testified he bought some of Wife's jewelry and Wife bought some. Wife testified, "Well, the diamond, the engagement ring, we had traded up on that, so actually, he only paid half of what it was worth, but I honestly don't know." This evidence shows that either Wife bought the jewelry during the marriage or it was an interspousal gift from Husband, and we find Wife failed to meet her burden of proving to the family court it was nonmarital. *See* S.C. Code Ann. § 20-3-630(A); *id.*("Interspousal gifts of property . . . are marital property which is subject to division."); *Brown*, 379 S.C. at 283, 665 S.E.2d at 181 ("The burden to show property is not subject to equitable distribution is upon the one claiming that property acquired during the marriage is not marital."). Accordingly, we find the family court erred in not considering the value of the jewelry in the equitable distribution.

F. Line of Credit

Husband argues Wife's $47,000 line of credit on the marital home after the separation should have been considered nonmarital debt. We agree.

At trial, Wife acknowledged she took a $47,000 line of credit on the marital home after the separation and commencement of litigation. She testified she "needed money to live on." We find Wife failed to prove this debt incurred after the commencement of the litigation was subject to equitable distribution. *See Wooten v. Wooten*, 364 S.C. 532, 547, 615 S.E.2d 98, 105 (2005) ("When a debt is incurred after marital litigation begins, the burden of proving the debt is marital rests upon the party who makes such an assertion."). Because Wife testified she used the money "to live on," we find the evidence in the record shows that the debt was not incurred for the joint benefit of the parties. *See id.* ("When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was

incurred for marital purposes, *i.e.,* for the joint benefit of both parties during the marriage."); *id.* at 547, 615 S.E.2d at 105-06 (affirming this court's reversal of the family court's allocation of credit card debt incurred by the wife after the start of the marital litigation to the husband because the wife failed to prove it was a marital debt). Accordingly, we find the family court erred by not considering this debt as nonmarital.

II. Equitable Division

We recognize our reversal of the family court's designation of certain property as marital property and Wife's jewelry as nonmarital property impacts the equitable distribution award. We specifically note that two of the factors a family court must consider in apportioning the marital estate are the value of the marital property and the nonmarital property of the parties. S.C. Code Ann. § 20-3-620(B)(3), (7) (2014). We have found the family court erred by classifying three businesses, a portion of Husband's retirement account, and a line of credit as marital and by considering Wife's jewelry nonmarital property. Accordingly, we remand this matter to allow the family court to consider the equitable apportionment anew, analyzing the statutory factors in light of our opinion.[3] *See Casey v. Casey*, 293 S.C. 503, 505, 362 S.E.2d 6, 7 (1987) ("In some instances[,] the erroneous designation of an asset as marital property may require remanding for consideration of the entire equitable distribution award and alimony."); *Dickert v. Dickert*, 387 S.C. 1, 7, 691 S.E.2d 448, 451 (2010) (remanding the issue of equitable distribution after reversing the family court's decision about "enterprise goodwill" being marital property, explaining remand "will allow the family court to determine if a change in the marital apportionment should be made in light of the goodwill valuation change"). Because we are remanding this matter to the family court for a new equitable apportionment, we need not address Husband's

[3] We note the family court may also consider Husband's contributions to acquiring the marital home in analyzing the equitable apportionment factors on remand. *See* S.C. Code Ann. § 20-3-620(B)(3) (providing the family court must give weight in such proportion as it finds appropriate to the value of the marital property, including "[t]he contribution of each spouse to [its] acquisition").

argument that the family court erred by failing to give weight to the necessary statutory factors.[4]

III. Sealing the Record

During oral argument, the parties consented to the unsealing of the record. Due to the parties' consent and because the family court did not consider the factors set forth in Rule 41.1(d) of the South Carolina Rules of Civil Procedure before sealing the record, we reverse this issue and order the family court to unseal the record on remand.

Based upon the foregoing, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and MCDONALD, JJ., concur.

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[4] We also need not address Husband's argument that if we find Wife's company-owned Lexus was marital property, we should look to its fair market value instead of valuing it at $500 for purposes of equitable division. Because Husband raised this argument for the first time during oral argument, we decline to address it. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); *see also Divine v. Robbins*, 385 S.C. 23, 44 n.4, 683 S.E.2d 286, 297 n.4 (Ct. App. 2009) (declining to address an issue raised for the first time in a reply brief).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Spartanburg Buddhist Center of South Carolina,
Respondent,

v.

Ron Ork and Luke Dong, Appellants.

Ron Ork and Luke Dong, Third Party Plaintiffs,

v.

Chivin Sun, Robert Pek, Sakhan Sok, Sambo Khieav, Sophay Pres, and Tommy Ong, Third Party Defendants.

Appellate Case No. 2015-000366

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5427
Heard May 9, 2016 – Filed July 13, 2016

REVERSED

Thomas Alexander Belenchia, Larry Eugene Gregg, II, and Thomas Camden Shealy, all of A Business Law Firm, of Spartanburg, for Appellants.

Scott Franklin Talley and Shannon Metz Phillips, both of Talley Law Firm, P.A., of Spartanburg, for Respondent.

MCDONALD, J.: Appellants Ron Ork and Luke Dong appeal several circuit court orders, arguing the court erred in (1) issuing a temporary injunction on April 21, 2014; (2) issuing a second temporary injunction on May 16, 2014; (3) holding Ork in contempt of the April 21 injunction; (4) holding Ork in contempt of the May 16 injunction; and (5) awarding Respondent Spartanburg Buddhist Center (the Center) $3,500 in attorney's fees. We reverse.

FACTS

The Center is the corporate entity of a Buddhist temple located in Spartanburg. This case stems from a disputed election that occurred at the temple on April 20, 2014, and its relation to the construction of a new building. At the April 20 election, a new president and five new board members were chosen. Two days before the election, the temple's head monk, Ron Ork, withdrew $61,400 from the Center's bank account.[1] The Center filed its initial complaint against Ork on April 21, 2014, along with a motion for a temporary injunction.

That same day, the circuit court issued an order granting the motion for a temporary injunction (the first injunction), stating all officers and board members should remain as they were before the April 20 election, pending resolution of the matter. Additionally, Ork was ordered to redeposit any funds taken from the Center's bank account within twenty-four hours.

On April 25, Ork moved to dissolve the first injunction and the circuit court held a hearing. On May 2, the circuit court's clerk emailed the parties' attorneys (the May 2 email) stating the court believed the disputed funds should be placed into a new joint account with attorneys from each party serving as signatories. Additionally, the email purported to enjoin both parties from encumbering the Center's assets or entering into contracts on the Center's behalf without the court's permission.

On May 16, the circuit court filed an order granting a temporary injunction (the second injunction), denying Ork's motion to dissolve and superseding the first injunction. The order required Ork to deposit the disputed funds into a new

[1] We decline to discuss Luke Dong's role in the case because the circuit court did not hold him in contempt.

account for which the attorneys were the only signatories. The funds could only be used "to pay obligations of [the Center] on which the parties agree and for which the parties authorize their representative attorneys to sign." The order enjoined the parties from encumbering the Center's assets or entering into contracts on the Center's behalf without the court's permission. Finally, the order stated no bond was required. Ork filed a motion to reconsider, arguing the first injunction was issued without bond and without notice and the second injunction was issued without bond. However, the motion was denied.

When the parties met on June 27 to open the new account, only $1634.70 of the $61,400 remained. The record reveals three checks were written to a construction company after the first injunction was issued. The first check was written on April 29 in the amount of $20,000, the second on May 5 in the amount of $16,400, and the third on May 9 in the amount of $32,000. Subsequently, the circuit court issued an order and rule to show cause why Ork should not be held in contempt.

At the contempt hearing, Ork reasserted that the first injunction was invalid because it was issued without notice or bond and the second injunction was invalid because it, too, was issued without bond. Additionally, Ork claimed the injunctions did not set forth with specificity the acts intended to be restrained. The circuit court found both injunctions were valid and enforceable.

The circuit court's resulting order held Ork in civil contempt for issuing the April 29 check less than ten days after the first injunction. The court also held Ork in contempt for issuing the May 7 and May 9 checks because the first injunction remained in effect on those dates. Additionally, the court found that even if the first injunction had expired, Ork was still in contempt for violating the directives of the May 2 email and the second injunction. The court awarded the Center $3,500 in attorney's fees and sentenced Ork to jail for five months with the opportunity to purge his contempt by depositing $59,765.35 into the Center's new bank account within ninety days. Ork's motion to reconsider was denied.

LAW/ANALYSIS

I. Willful Contempt

"A party who refuses to abide by an injunction entered by the court would of course be in contempt of court and subject to sanctions . . . ." *Grosshuesch v.*

Cramer, 377 S.C. 12, 29–30, 659 S.E.2d 112, 121 (2008). "On appeal, this Court should reverse the contempt decision only if it is without evidentiary support or the circuit court abused its discretion." *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009).

"Contempt results from the willful disobedience of a court order and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." *Ex parte Kent*, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct. App. 2008). "A willful act is an act 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.'" *Id.* (quoting *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)). "Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order." *Ex parte Cannon*, 385 S.C. at 661, 685 S.E.2d at 824 (quoting *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 760 (Ct. App. 2007)).

Here, the circuit court found Ork in contempt because he wrote checks removing funds from the Center's account after the first injunction required him to redeposit the disputed funds back into the Center's account. The Center argues Ork acted willfully by changing the account's signatories and then spending the disputed funds. Conversely, Ork asserts he complied with the first injunction's lone command to redeposit the disputed funds back into the Center's account. The order itself, which the circuit court acknowledged was "in-artfully drawn," only required Ork to "deposit any funds withdrawn from [the Center's] bank account . . . back into [the Center's] bank account within twenty-four (24) hours." The order did not specifically reference safeguarding the money or restrict how the money could be spent. Accordingly, we believe it was error for the circuit court to place Ork in contempt for spending money from the Center's account when the first injunction failed to specify such restrictions and those restrictions were only implied.[2] *See*

[2] To the extent the Center argues an April 25 chambers conference clarified that the disputed funds were not to be spent by either party during the litigation, we note the substance of that meeting was not placed on the record. *See State v. Gaskins*, 263 S.C. 343, 346, 210 S.E.2d 590, 591 (1974) ("In this State we follow the rule that the acts of a court of record are known by its records alone and cannot be established by parol testimony.").

Cty. of Greenville v. Mann, 347 S.C. 427, 435, 556 S.E.2d 383, 387 (2001) ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do."); *id.* at 435, 556 S.E.2d at 387–88 (holding an appellant could not be held in contempt for failing to comply with an ambiguous and contradictory order); *Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986) ("A court need go no further in reviewing the evidence in a contempt action when there is uncertainty in the commands of an order . . . . 'The language of the commands must be clear and certain rather than implied.'" (quoting *Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973))).

Unlike the first injunction, the second injunction specifically provided that the funds could only be used to pay the Center's obligations "on which the parties agree and for which the parties authorize their representative attorneys to sign." However, the three checks Ork wrote from the Center's account were all issued *before* the second injunction was filed on May 16. *See* Rule 58, SCRCP (stating a judgment is not effective until entered in the record). Therefore, Ork cannot be held in contempt because he could not willfully violate the provisions of an order that did not yet exist. Additionally, during oral argument, this court asked the Center's counsel when Ork had actual knowledge of the second injunction, and counsel cited a statement in Ork's brief indicating Ork did not receive the second injunction until May 21.

Finally, we believe it is clear the May 2 email did not have the effect of a filed order. Although the circuit court correctly noted our judiciary's increasing reliance on new technology, our rules concerning final orders have not changed.[3] *See* Rule 58, SCRCP (stating a judgment is not effective until entered in the record); *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties."); *see also Serowski v. Serowski*, 381 S.C. 306, 315, 672

[3] Assuming, arguendo, that the May 2 email's instructions were mandatory, Ork still would not have been in contempt because he had no knowledge of the email's contents. Notably, Ork's counsel stated during oral argument that after he received the email, he only told Ork that the court ruled against them on their motion to dissolve. Ork's counsel insisted he told Ork to wait until they received a final order before they reviewed the matter further.

S.E.2d 589, 594 (Ct. App. 2009) (holding a court's memorandum instructing counsel how to prepare a proposed order was not the final written order and the court retained discretion to change or amend the final order). Accordingly, we reverse the circuit court's order holding Ork in contempt.[4]

II. Deficiencies in the Injunctions

"Temporary injunctive relief rests within the sound discretion of the trial judge and will not be overturned unless the order is clearly erroneous." *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007).

Temporary injunctions are governed by the provisions of Rule 65, SCRCP. Rule 65(a) provides, "No temporary injunction shall be issued without notice to the adverse party." Rule 65(c) states, "[N]o restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(d) provides,

> Every order granting an injunction . . . *shall* set forth the reasons for its issuance; shall be specific in terms; *shall* describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action . . . .

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[4] We sympathize with the circuit court's efforts to preserve the status quo. Although we believe Appellants (and their counsel) understood the court's intent and instructions, we recognize that "before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." *Kent*, 379 S.C. at 637, 666 S.E.2d at 923 (finding evidence in the record insufficient to establish Kent knew that he willfully disobeyed a court order).

(emphasis added). Ordinarily, use of the word "shall" means an action is mandatory. *S.C. Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986).

We find the first injunction violated certain mandatory provisions of Rule 65. First, the injunction was issued without notice in violation of Rule 65(a), given that Ork did not accept service of the motion for injunctive relief and the resulting order until three days after the order was issued. Second, the injunction failed to require the Center to provide security in violation of Rule 65(c). *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009) (remanding a case when the circuit court failed to order a party to post a bond before issuing a temporary injunction); *Atwood*, 374 S.C. at 73, 646 S.E.2d at 884 (stating even a "nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper"); 12 S.C. Jur. *Equity* § 19 (1992) ("Rule 65(c) . . . requires that security be posted before the court may issue either a restraining order or temporary injunction.").

Although the first injunction was captioned "Order Granting Temporary Injunction," the Center argues it "operated more like a temporary restraining order pending an order from the [t]emporary [i]njunction hearing held April 25, 2014." However, even if the injunction is construed as a temporary restraining order (TRO), the Center was still required to give security under Rule 65(c). Additionally, Rule 65(b) requires that a TRO issued without notice "shall define the injury and state why it is irreparable and why the order was granted without notice." Here, the first injunction stated the Center would "suffer irreparable harm if the injunction is not granted" but did not elaborate on the injury itself or why the order was granted without notice. Accordingly, we find the circuit court erred in issuing the April 21 order without including necessary information, regardless of whether it is considered a temporary injunction or a TRO.

Likewise, we find the circuit court erred in issuing the May 16 order without requiring security. The second injunction stated "no bond shall be required," and based on the May 2 email, it appears the court's reasoning was that no bond was necessary "due to the security created by the dual signatory requirement" on the new bank account. However, as noted earlier, our appellate courts have interpreted

Rule 65(c) strictly. *See Atwood*, 374 S.C. at 73, 646 S.E.2d at 884 (stating that even a nominal bond of $250 was insufficient to satisfy Rule 65(c)). Therefore, it was error for the circuit court to issue the second injunction without satisfying the requirements of Rule 65(c).

III. Attorney's Fees and Costs

Given our decision to reverse the circuit court's findings on contempt, we also reverse the award of attorney's fees. *See Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (reversing issue of attorney's fees when the appellate court reversed the lower court's finding on contempt).

CONCLUSION

Based on the foregoing, we hold the circuit court abused its discretion when it held Ork in contempt of the April 21 and May 16 orders granting injunctive relief. Thus, we reverse the contempt findings as well as the award of attorney's fees.

REVERSED.

LOCKEMY, C.J., and WILLIAMS, J., concur.