The Supreme Court of South Carolina

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N O T I C E

In the Matter of James Michael Brown

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 9, 2021, beginning at 1:00 p.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

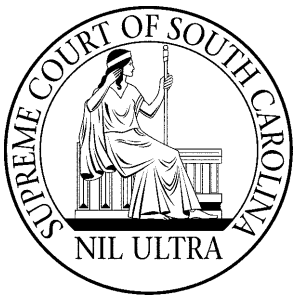
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 16, 2021

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
August 18, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

Leisel Paradis, Petitioner,

v.

Charleston County School District, James Island Charter High School, Robert Bohnstengel and Stephanie Spann, in their individual capacities, Respondents.

Appellate Case No. 2018-002025

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Consequently, the petition for rehearing is denied. However, for clarification, a new footnote 9 has been added in the attached opinion, which is substituted for the previous opinion, and the previous opinion is withdrawn.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ George C. James, Jr. J.

I stand by my original writing, but I do not believe my differences with the majority warrant the granting of rehearing. I vote with the majority, therefore, to substitute the revised majority opinion and refile.

s/ John Cannon Few J.

Columbia, South Carolina

August 18, 2021

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leisel Paradis, Petitioner,

v.

Charleston County School District, James Island Charter High School, and Robert Bohnstengel and Stephanie Spann, in their individual capacities, Respondents.

Appellate Case No. 2018-002025

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28030
Heard December 12, 2019 – Filed May 19, 2021
Refiled August 18, 2021

REVERSED AND REMANDED

J. Lewis Cromer and J. Paul Porter, both of Cromer Babb Porter & Hicks, LLC, of Columbia, for Petitioner.

Rene Stuhr Dukes, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent Robert Bohnstengel; and Caroline Cleveland, Bob J. Conley, and Emmanuel Joseph Ferguson, all of Cleveland & Conley, LLC, of Charleston, for Respondent Stephanie Spann.

CHIEF JUSTICE BEATTY: A civil conspiracy claim brought by Leisel Paradis ("Petitioner") was dismissed by the circuit court for failing to plead special damages, and the dismissal was upheld by the court of appeals. We granted a petition for a writ of certiorari to consider the narrow question whether South Carolina's requirement of pleading special damages should be abolished. We conclude that it should. South Carolina is the only state with this unique requirement as an element, and we find it resulted from a misinterpretation of law. We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state. Consequently, we reverse the decision of the court of appeals and remand the matter to the circuit court for proceedings consistent with this opinion.

I. FACTS

Petitioner, a teacher, filed a complaint asserting a defamation claim against the Charleston County School District and James Island Charter High School (respectively, "the District" and "the High School"). In addition, Petitioner asserted a civil conspiracy claim against the High School's principal and assistant principal, Robert Bohnstengel and Stephanie Spann ("Respondents"),[1] in their individual capacities. Petitioner alleged Respondents targeted her for an unwarranted and invasive performance evaluation because they were unhappy with her desire to report a student's misconduct to the police, causing her to be blacklisted and ostracized and, ultimately, terminated from her teaching position.

The circuit court dismissed both the defamation and the civil conspiracy claims. The circuit court ruled, *inter alia*, that Petitioner failed to plead special damages as required to advance her civil conspiracy claim. The court of appeals affirmed. *Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 819 S.E.2d 147 (Ct. App. 2018). Petitioner sought a writ of certiorari, raising several issues regarding the civil conspiracy claim. This Court granted the petition for a writ of certiorari as to Petitioner's first question, which asks the Court to abolish the rule imposing a special pleading requirement for civil conspiracy claims—i.e., requiring a plaintiff to plead special damages—which evolved after the Court's decision in *Todd v. South*

[1] The District and the High School participated in the appeal below and filed a response to the petition for a writ of certiorari. However, they did not file briefs with this Court, presumably because they were not parties to the civil conspiracy action that is the subject of the appeal to this Court. As a result, "Respondents" shall be used to refer to the individual parties who submitted briefs, Bohnstengel and Spann.

Carolina Farm Bureau Mutual Insurance Co., 276 S.C. 284, 278 S.E.2d 607 (1981). This pleading requirement has been informally referred to as the *Todd* rule.

II. DISCUSSION

Petitioner contends this Court should overrule precedent requiring the pleading of special damages for civil conspiracy claims, which arose after the issuance of the *Todd* decision in 1981. We agree.

Civil conspiracy has long given rise to uncertainty as to its elements and proper application. *See* 4 James Lockhart, *Cause of Action for Civil Conspiracy*, Causes of Action § 4, at 530 (2d ed. 1994) ("The elements of civil conspiracy are not always defined in exactly the same way."). Over 100 years ago, a law professor analyzed the emerging action, noting its varying definitions and the distinction between civil and criminal conspiracy, and he distilled the following core principles:

> A combination between two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, subjects the confederates to criminal prosecution; and, if injury ensues to an individual therefrom, it subjects them to a civil action by their victim.

Francis M. Burdick, *Conspiracy as a Crime, and as a Tort*, 7 Colum. L. Rev. 229, 246 (1907).

South Carolina employed similar language in defining civil conspiracy. In an early case involving motions to strike and to make the pleadings for civil conspiracy more definite and certain, this Court stated:

> [A] definition of conspiracy has been given as the conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.

Charles v. Texas Co., 192 S.C. 82, 101, 5 S.E.2d 464, 472 (1939) (*Charles I*).

The Court reiterated this description in the appeal from the verdict in the same case, finding no error in a jury charge defining a civil conspiracy in these terms. *See Charles v. Texas Co.*, 199 S.C. 156, 176, 18 S.E.2d 719, 727 (1942) (*Charles II*)

("Ordinarily a conspiracy is where two or more persons combine or agree to do something to the detriment or hurt of another. If they agree to do an unlawful thing for the detriment or hurt of another or if they agree to do a lawful thing but agree to do it in an unlawful manner that would be a conspiracy."); *cf. Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 387, 9 S.E.2d 796, 803–04 (1940) (observing "the second cause of action [failed to] allege the required elements of a conspiracy to accomplish an unlawful purpose or a lawful purpose unlawfully").

In *Charles II*, the Court pointed out the "well known principle" that resulting damages are the gist of any civil conspiracy action and an unexecuted conspiracy does not give rise to a civil cause of action. 199 S.C. at 177, 18 S.E.2d at 727. Thus, the Court emphasized that proof of an overt act and resulting damages were also fundamental elements to sustain a civil claim, and it found these points were adequately conveyed in the trial judge's instructions. The Court further explained, "Each conspirator is liable for all damages naturally resulting from any wrongful act of a co-conspirator in exercising the joint enterprise," and "[w]hether the damages proximately resulted from the wrongful act of the conspirators is ordinarily a question for the jury." *Id.* at 174, 18 S.E.2d at 726 (citation omitted).

Appeals involving civil conspiracy were somewhat infrequent immediately following *Charles I* and *Charles II*, but the two decisions were recognized as authoritative, even when later cases did not fully articulate all of the requisite elements. *See, e.g.*, *Lakewood Water Co. v. Garden Water Co.*, 222 S.C. 450, 453, 73 S.E.2d 720, 721 (1952) ("The two decisions of *Charles v. Texas Company*, 192 S.C. 82, 5 S.E.2d 464, and *Id.*, 199 S.C. 156, 18 S.E.2d 719, rather fully enunciate the principles which govern civil actions for conspiracy and they need not be repeated here.").

The definition of civil conspiracy approved in *Charles I* and *Charles II* is also fairly universal in contemporary tort law.[2] *See generally* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("Although stated variously from jurisdiction to jurisdiction, the basic elements of a civil conspiracy are (1) an agreement between two or more individuals,

[2] Most states provide by common law for the claim, and a few states have also enacted statutes in this regard. *See* 54 James L. Buchwalter, *Cause of Action for Civil Conspiracy*, Causes of Action § 2, at 603 (2d ed. 2012) ("Civil conspiracy is a claim recognized under the common law of most states. A civil conspiracy may also be actionable under state statutes specifically forbidding various types of concerted action for certain purposes." (citation omitted)).

(2) to do an unlawful act or to do a lawful act in an unlawful way, (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators, and (4) pursuant to a common scheme."); 15A C.J.S. *Conspiracy* § 4 (2012) ("The requisite elements [for civil conspiracy] are: (1) a combination between two or more persons; (2) to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means; (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object; (4) which act results in damage to the plaintiff.").

In 1981, however, the Court issued the *Todd* decision, which has been interpreted as creating a new element for civil conspiracy claims in South Carolina—a requirement that a plaintiff plead special damages. In *Todd*, the plaintiff alleged five causes of action stemming from the termination of his employment, and each cause of action incorporated all of the prior allegations: "(1) intentional interference with contractual relations, (2) extreme and outrageous conduct, (3) bad faith termination of the employment contract, (4) invasion of privacy, and (5) conspiracy to so damage the plaintiff." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 287, 278 S.E.2d 607, 608 (1981). One of the issues considered by the Court was whether Todd's fifth cause of action stated a claim for civil conspiracy. *Id.* at 292, 278 S.E.2d at 610.

The *Todd* Court began by citing, *inter alia*, *Charles I*, and stating: "Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Id.* at 292, 278 S.E.2d at 611. The Court generally observed the difference between a criminal conspiracy and a civil conspiracy is that the agreement is the gravamen of the offense of criminal conspiracy, whereas "the gravamen of the tort [of civil conspiracy is] the damage resulting to [the] plaintiff from an overt act done pursuant to the common design." *Id.* (citing a former version of *Corpus Juris Secundum*).[3] The Court reiterated that a civil conspiracy becomes actionable only once overt acts occur that proximately cause damage to the plaintiff; therefore, "conspiracy in and of itself is not a civil wrong." *Id.* (citation omitted).

The Court found Todd did not plead overt acts in furtherance of the conspiracy, so the complaint failed to state a claim for civil conspiracy as a matter of law:

[3] Similar language is in the updated version. *See* 15A C.J.S. *Conspiracy* § 104 (2012) (distinguishing civil and criminal conspiracy).

> As noted, the fifth cause of action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. *No additional acts in furtherance of the conspiracy are plead*. The only alleged wrongful acts plead are those for which damages have already been sought. . . .
>
> The trial judge erred by overruling the demurrer to the conspiracy cause of action in the complaint, since Todd can recover no additional damages for the alleged fifth cause of action. The rule applicable to these pleadings is stated at 15A C.J.S. Conspiracy § 33, at 718.
>
> > "Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong."
>
> Todd seeks damages in his first four causes of action *for the same acts* incorporated by the fifth cause. He is therefore precluded from seeking damages *for the same acts yet again*. As such, the fifth cause fails to state an action.

Id. at 293, 278 S.E.2d at 611 (emphasis added). Although *Todd* ostensibly spoke in terms of the failure to plead *additional acts* to support the civil conspiracy claim and not allowing duplicative recoveries for the same acts, cases after *Todd* began enumerating three required elements to assert an allegation of civil conspiracy, including the element of pleading "special damage":

> A civil conspiracy . . . consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10, 344 S.E.2d 379, 382 (Ct. App. 1986); *accord Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 600, 358 S.E.2d 150,

152 (Ct. App. 1987) (citing *Lee* and its three-part definition of civil conspiracy); *Yaeger v. Murphy*, 291 S.C. 485, 487, 354 S.E.2d 393, 394 (Ct. App. 1987) (citing the definition in *Lee*).

While the requirement of pleading special damages became known as the *Todd* rule, notably none of the foregoing cases (*Lee*, *Island Car Wash*, and *Yaeger*) specifically cited *Todd* for the three-part definition of civil conspiracy incorporating this element. *Island Car Wash* and *Yaeger* relied solely on the definition in *Lee* and did not cite *Todd* for any legal proposition. *Lee* did cite *Todd*, but it was in the context of distinguishing civil and criminal conspiracy and reiterating the need to show an overt act and resulting damage for a civil claim.

In *Lee*, the court of appeals indicated the parties had confused civil and criminal conspiracy. 289 S.C. at 10, 344 S.E.2d at 381. The court stated the definition involving an agreement to undertake "an unlawful act or a lawful act by unlawful means" defined only a criminal conspiracy, and instead enumerated a three-part test for a civil action—"(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." *Id.* at 10, 344 S.E.2d at 382. In doing so, it cited this Court's decision in *Charles I*, along with a 1915 Tennessee decision and several United Kingdom cases.[4] *Id.*

We note this Court's precedent demonstrates the definitional elements of civil conspiracy actually parallel the elements of criminal conspiracy.[5] *See Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (observing the elements of criminal conspiracy and civil conspiracy "are quite similar" and noting

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[4] While the United Kingdom cases have some efficacy, we do not find them determinative of South Carolina law. In particular, we note some of the decisions consist of a collection of individual determinations, with each individual expressing his own, singular opinion. Although such decisions reach one ultimate result, they are not all in agreement in their reasoning.

[5] *See* S.C. Code Ann. § 16-17-410 (2015) ("The common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means."); *see also State v. Davis*, 88 S.C. 229, 232, 70 S.E. 811, 812–13 (1911) ("[T]he description which seems to have the widest recognition and approval by the authorities declare a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." (citation omitted)).

civil conspiracy turns on the existence of damages). The similarity is logical because the major difference between civil and criminal conspiracy is a plaintiff's need to additionally prove an overt act and resulting damages to obtain a civil recovery. *See* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("The elements of civil conspiracy are quite similar to those required of a criminal conspiracy, with the distinguishing factor being that an agreement is the essence of a criminal conspiracy, while damages are the essence of a civil conspiracy."); *id.* § 55 ("The gist of a civil conspiracy is not the unlawful agreement or combination but *the damage caused by the acts committed in pursuance* of the formed conspiracy." (emphasis added)); *see also* 15A C.J.S. *Conspiracy* § 7 (2012) ("Although criminal and civil conspiracy have similar elements, the distinguishing factor between the two is that damages are the essence of a civil conspiracy, and the agreement is the essence of a criminal conspiracy.").[6]

Later cases began reciting *Lee*'s three-part test for civil conspiracy that developed post-*Todd* and which included the requirement of pleading special damages. *See LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *see also Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006); *Lawson v. S.C. Dep't of Corr.,* 340 S.C. 346, 532 S.E.2d 259 (2000); *Future Group II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Inexplicably, this new requirement for special damages was labeled the *Todd* rule.

Although the Court did not mention "special damages" in *Todd*, several years after *Todd* a few cases, such as *Lee*, 289 S.C. at 10, 344 S.E.2d at 382, recited the three-part test for civil conspiracy that appeared to contain the pleading requirement as an element of the claim. This definition, in turn, was then quoted repeatedly by our appellate courts. This pleading requirement became known as the *Todd* rule.

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[6] In a case discussing criminal conspiracy, this Court has observed that "unlawful" merely means "contrary to law" and is not limited to criminal conduct. *State v. Davis*, 88 S.C. 229, 233, 70 S.E. 811, 813 (1911) ("It is enough if the acts agreed to be done, although not criminal, are wrongful; that is amount to a civil wrong." (citations omitted)). As for civil conspiracy, early English law has noted that, "[i]n view of the infinite variations of oppressive misconduct[,] no definition [of "unlawful means"] can be given which is at once satisfactory and exhaustive." *Pratt v. Brit. Med. Ass'n*, [1919] 1 K.B. 244, 260 (1918). However, *Pratt* stated precedent recognized that violence or threats of physical violence, threats not involving physical harm, nuisance, and fraud, are readily encompassed, although they are not the only examples. *See id.* at 260–61.

See, e.g., *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 ("hold[ing] the conspiracy action is barred under *Todd*" where special damages were not properly alleged). However, the pleading requirement's relationship to *Todd* is rendered somewhat tenuous because, as previously noted, the earliest cases did not specifically cite *Todd* for this requirement. *See, e.g.*, *Island Car Wash*, 292 S.C. at 600, 358 S.E.2d at 152; *Yaeger*, 291 S.C. at 487, 354 S.E.2d at 394.

This test resulted in the dismissal of civil conspiracy actions that did not expressly plead special damages on the basis they failed to adequately allege a cause of action. South Carolina courts held that, because special damages are a required element of a civil conspiracy claim, a plaintiff must plead special damages that go beyond the damages alleged in other claims to state a cause of action. Those cases further stated that, if a plaintiff merely repeated the damages from another claim without specifically listing special damages as part of the civil conspiracy allegation, then the civil conspiracy action must be dismissed. *See, e.g.*, *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim *instead of specifically listing special damages* as part of their civil conspiracy claim, their conspiracy claim should be dismissed." (emphasis added)); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*.").[7]

We granted Petitioner's motion to argue against the *Todd* rule in the current case, where her civil conspiracy claim was dismissed at the pleadings stage for the failure to plead special damages.[8] Petitioner contends the requirement of pleading special damages for civil conspiracy should be abandoned because it resulted from,

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[7] The law requiring the dismissal of a civil conspiracy claim for failing to plead special damages has also been cited in federal courts applying South Carolina law. *See, e.g.*, *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015); *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F. Supp. 2d 645 (D.S.C. 2009).

[8] The *Todd* rule requiring the pleading of special damages was previously called into question in another case before this Court, but we declined to abandon the rule at that time because a trial had been held some twelve years prior in that matter, and there was concern that it would be unfair to change the requirements for pleadings and proof upon remand, given the age of the case. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 34 n.3, 791 S.E.2d 140, 145 n.3 (2016).

inter alia, a misreading of *Corpus Juris Secundum*. We agree the *Todd* rule should be abolished.

In *Todd* the Court cited 15A C.J.S *Conspiracy* § 33 and held a plaintiff in a civil conspiracy action must allege acts in furtherance of the conspiracy. The Court noted the only wrongful acts alleged were those for which damages had already been sought, so the claim failed as a matter of law. This was taken in cases after *Todd* as imposing a requirement of pleading (and proving) special damages for a civil conspiracy claim. We find this section of *Corpus Juris Secundum* simply addressed a prohibition on duplicative recoveries; it did not establish a requirement of pleading special damages for civil conspiracy claims. The plaintiff in *Todd* failed to plead any overt acts in furtherance of the conspiracy. Thus, the Court correctly concluded the civil conspiracy claim failed as a matter of law. In that situation, the Court noted, the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim.

We note that, in addition to perhaps resulting from a misinterpretation of *Corpus Juris Secundum* and *Todd*, the pleading requirement for civil conspiracy also perhaps resulted, at least in part, from differing interpretations of the term "special damages." Traditionally, general damages are implied by law and can be alleged without particularity because they are the proximate and foreseeable consequences of the defendant's conduct. Special damages, in contrast, are those that might be the natural result of an injury, but not the necessary or usual consequences of the defendant's conduct, and they typically are unique to a particular case. *See* 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1310 (4th ed. 2018) (distinguishing general and special damages). Under the South Carolina Rules of Civil Procedure ("SCRCP") and under the federal procedural rules, special damages must be specifically pled to avoid surprise and give notice to the opposing party. *See, e.g.*, Rule 9(g), SCRCP.

In this context, however, it seems South Carolina precedent has varied in what it considers "special damages." *See generally* Michael G. Sullivan, *Elements of Civil Causes of Action* 89–90 (5th ed. 2015, Douglas MacGregor, ed.) ("The requirement that the plaintiff plead special damages means essentially this - that the complaint must describe damages that occurred as a result of the conspiracy in *addition* to any alleged as a result of other claims."). *But see Hackworth*, 385 S.C. at 116–17, 682 S.E.2d at 875 ("Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. . . . Special damages . . . are not implied at law because they do not necessarily result from the wrong. Special damages must, therefore, be specifically alleged in the complaint to

avoid surprise to the other party." (internal citation omitted)). We further note the SCRCP, which require that special damages be specifically pled, were not in effect at the time *Todd* was decided.

The essential principle *Todd* intended to address was the need to plead an overt act in furtherance of the agreement, not special damages. As a result, we overrule *Todd* and cases relying on *Todd* or other precedent, such as *Lee*, to the extent they impose or appear to impose a requirement of pleading (and proving) special damages. South Carolina's position in this regard was an outlier, as our research indicates South Carolina was the only state to require the pleading of special damages.

In light of our decision today, we are returning to our long-standing precedent pre-*Todd* and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.[9] *See Charles II*, 199 S.C. at 176, 18 S.E.2d at 727; *Charles I*, 192 S.C. at 101, 5 S.E.2d at 472; *see also* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. *Conspiracy* § 4 (2012) (same). By doing so, we are returning not only to our historical roots, but also to the traditional elements of a civil conspiracy claim as they have been similarly defined by the majority of jurisdictions.[10]

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[9] Since civil conspiracy is an intentional tort, an intent to harm, which has also been discussed in our conspiracy law, remains an inherent part of the analysis. *See* 16 Am. Jur. 2d Conspiracy § 53 (2020) ("Since one cannot agree, expressly or tacitly, to commit a wrong about which they have no knowledge, in order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong." (footnotes omitted)).

[10] Most states incorporate the elements of an agreement to do an unlawful act or a lawful act by unlawful means (or the common variation of an unlawful purpose or a lawful purpose by unlawful means). *See, e.g.*, *Harp v. King*, 835 A.2d 953, 972 (Conn. 2003); *Mustaqeem-Graydon v. SunTrust Bank*, 573 S.E.2d 455, 461 (Ga. Ct. App. 2002); *Yoneji v. Yoneji*, 354 P.3d 1160, 1168 (Haw. Ct. App. 2015); *Hall v. Shaw*, 147 N.E.3d 394, 407–08 (Ind. Ct. App. 2020); *Coghlan v. Beck*, 984 N.E.2d

We disagree with the concurring/dissenting opinion to the extent it goes beyond the sole question accepted by this Court—which asks, "Should the Court reverse the special damages pleading requirement on civil conspiracy claims arising from Todd v. S.C. Farm Bureau Mut. Ins. Co.?"— and appears to consider a point raised by Respondents in their brief. Namely, whether civil conspiracy itself should be "abolished" as an independent claim in this state and should, instead, always be dependent on an underlying actionable wrong or tort. Respondents have not cross-appealed in this matter, and we reject Respondents' attempt to advance this issue for the first time on appeal. Any further arguments potentially affecting the viability of Petitioner's claim, whether they arise from this Court's decision or otherwise, are properly raised upon remand to the circuit court, in the first instance, particularly where the case was halted at the pleadings stage.

We note a few jurisdictions recognize two forms of civil conspiracy. The first, which is the general rule, requires an underlying actionable wrong or tort, and liability is imposed on an individual for the tort of another. A second form, also described as an exception to the general rule, exists when the conduct complained of would not be actionable if done by one person, but where by force of numbers or other exceptional circumstances, the defendants possess a peculiar power of coercion that gives rise to an independent tort of civil conspiracy (often referred to as the "force of numbers" or "economic boycott" exception). *See Am. Diversified Ins. Servs., Inc. v. Union Fid. Life Ins. Co.*, 439 So. 2d 904 (Fla. Dist. Ct. App. 1983); *Baker v. Wilmer Cutler Pickering Hale & Dorr LLP*, 81 N.E.3d 782 (Mass. App. Ct. 2017); *see also Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013)

132, 151 (Ill. App. Ct. 2013); *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 260–61 (Ky. Ct. App. 2008); *Franklin v. Erickson*, 146 A. 437, 438 (Me. 1929); *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 428 (Md. 2009); *Swain v. Morse*, No. 346850, 2020 WL 3107696, at *7 (Mich. Ct. App. June 11, 2020); *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013); *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. Ct. App. 2008); *George Clift Enters., Inc. v. Oshkosh Feedyard Corp.*, 947 N.W.2d 510, 537 (Neb. 2020); *Jay Edwards, Inc. v. Baker*, 534 A.2d 706, 709 (N.H. 1987); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253, 263 (N.J. 2005); *In re Fifth Third Bank, N.A.*, 719 S.E.2d 171, 181 (N.C. Ct. App. 2011); *Schmitt v. MeritCare Health Sys.*, 834 N.W.2d 627, 635 (N.D. 2013); *Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. Ct. 2008); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002); *Pohl, Inc. of Am. v. Webelhuth*, 201 P.3d 944, 954–55 (Utah 2008); *Wilson v. State*, 929 P.2d 448, 459 (Wash. Ct. App. 1996); *N. Highland Inc. v. Jefferson Mach. & Tool, Inc.*, 898 N.W.2d 741, 747 (Wis. 2017).

(observing "[s]ome courts have applied an 'economic boycott' or 'force of numbers' exception to the general rule that the basis for a civil conspiracy must be an independent wrong or tort," but not deciding whether to adopt the exception in that state because it would not be applicable, in any event). Early South Carolina law pre-*Todd* appeared to reference similar concepts. *See, e.g.*, *Howle v. Mountain Ice Co.*, 167 S.C. 41, 58, 165 S.E. 724, 729 (1932); *Charles II*, 199 S.C. at 170, 18 S.E.2d at 724. However, to rule on whether this Court has or ever will recognize an exception to the general rule would require the Court to issue an advisory opinion on a distinct subject that has not yet been disputed in this case.

III. CONCLUSION

Because the court of appeals upheld the dismissal of Petitioner's civil conspiracy claim based on the failure to plead special damages, we reverse and remand the matter to the circuit court for further proceedings on Petitioner's claim for civil conspiracy. Our decision in Petitioner's case is based solely on the narrow question before the Court regarding the abolishment of the *Todd* rule, and we do not reach any other issue concerning the viability or merits of Petitioner's claim. Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis.

REVERSED AND REMANDED.

HEARN and JAMES, JJ., concur. KITTREDGE, J., concurring in result in a separate opinion. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur in result. In overruling the so-called "special damages" requirement of *Todd v. South Carolina Farm Bureau Mutual Insurance Co.*,[11] the Court must necessarily examine the elements of civil conspiracy. I commend Chief Justice Beatty for his excellent opinion, which tracks this Court's meandering civil conspiracy jurisprudence and properly restores the elements of a civil conspiracy claim to its original understanding. As a result of today's opinion, it is again settled that a civil conspiracy claim requires proof of (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. Stated differently, we have abandoned the standardless formulation that required only (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) which caused the plaintiff special damage. I write separately to address the effect of *Todd* on the election of remedies and note my support for the concurrence of Justice Few.

First, in my judgment, *Todd* is more properly viewed as an election of remedies case, not a pleading case. *Todd* created a fiction that special damages caused by the civil conspiracy were somehow different than the damages caused by the underlying unlawful conduct. That misunderstanding, in turn, led to a misapplication of our election of remedies law. Because a civil conspiracy claim was purportedly supported by special damages, some trial courts would avoid an election of remedies and permit a double recovery. Today's rejection of a special damages requirement should restore a proper approach to election of remedies. For one wrong, there is one recovery.

Next, I view Justice Few's concurrence as well within the question accepted by this Court for review. The misguided pleading rule that grew out of *Todd* spawned a series of cases that further separated civil conspiracy from its original moorings. Justice Few compellingly frames the amorphous nature of the civil conspiracy cause of action that resulted from *Todd* and its progeny. It is the second element—to commit an *unlawful act* or a lawful act by *unlawful means*—that restores an objective legal standard to this cause of action. When the appellate courts of this state approved of an analytical framework that allowed one's personal sense of fairness and right and wrong to be sufficient for a civil conspiracy claim, we created a rudderless cause of action. Justice Few correctly observes that the post-*Todd*

[11] 276 S.C. 284, 278 S.E.2d 607 (1981).

sanctioned civil conspiracy claim "permit[ted] the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror's sense of fairness or responsibility." I do not construe Justice Few's concurrence as "abolishing" civil conspiracy. Rather, by restoring the traditional elements of a civil conspiracy claim and overruling *Todd*'s so-called special damages pleading requirement, this Court returns civil conspiracy to its historical roots. Because the Court has reset the elements of civil conspiracy and restored an objective standard, I would apply today's decision prospectively with one exception: for those cases that were tried under the *Todd* rubric and are on appeal now, I would evaluate the merits of the appeal under the *Todd* framework.

JUSTICE FEW: I agree with the majority that the requirement of pleading and proving special damages in a civil conspiracy action is based on a misunderstanding of law, and the requirement must be eliminated. To that extent, I concur in the majority opinion. However, the special damages requirement we now hold legally invalid previously served the valid practical purpose of restraining the use of the undefined civil conspiracy cause of action. In almost all legitimate civil actions, there are no "special damages" as that term was used in civil conspiracy. In other words, it was hardly ever possible to allege or prove "damages that go beyond the damages alleged in other causes of action." As a practical matter, therefore, the requirement of special damages prevented civil conspiracy from being a significant cause of action in civil litigation. Now, any plaintiff may bring a civil conspiracy action against any defendant—even for lawful, non-tortious conduct—and the law imposes no meaningful standards on courts and juries by which they must judge the defendant's conduct. I disagree with the majority that we should unleash this still-undefined and now-unrestrained menace on the public as an independent tort. To that extent, I respectfully dissent.

Certainly, civil conspiracy is a proper cause of action in its derivative form. If two people conspire to commit fraud, for example, but the actual fraudulent conduct is carried out by only one of them, the injured plaintiff should be able to sue both of them. The law imposes specific requirements a plaintiff must meet for a fraud cause of action, and those requirements provide standards by which courts and juries must judge the conduct of both defendants. The same is true for defamation, one of the plaintiff's theories of recovery in this case. If one defendant who did not personally commit defamatory acts conspired with another who did defame the plaintiff, the legal elements the plaintiff must establish in a defamation case—along with the legal requirements for conspiracy—guide the court and the jury in deciding whether the conspirator should also be liable for defamation.

As an independent tort, however, the undefined theory of civil conspiracy leaves courts and juries free to determine civil liability—both of the alleged tortfeasor and the supposed conspirator—not based on the law, but by using the individual judge or juror's sense of fairness or responsibility. Imagine in a fraud case that the dispute arose out of business competition between the plaintiff and the defendant. The defendant intentionally made a false statement to the plaintiff for the purpose of gaining competitive advantage. Imagine further the plaintiff's fraud cause of action fails because the court or the jury finds—applying the law—the plaintiff had no right to rely on the false statements. The defendant's conduct might have been unfair or

irresponsible, but the plaintiff loses on the fraud claim—rightfully—because the law does not support the claim.

If, however, the plaintiff's lawyer thought to add a cause of action for civil conspiracy, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Civil conspiracy—as the majority "return[s] . . . to our historical roots"—permits the court and jury to impose liability for lawful, non-tortious conduct.

We need not imagine how a defamation claim could unfold; we can turn to the plaintiff's allegations in this case. The plaintiff alleged in her complaint the principal of the school where she taught became angry when she asked him to report a student to the police for disruptive behavior in her classroom. She claimed the principal retaliated against her by placing her into a formal job evaluation process she did not deserve and her conduct did not warrant. By the time the evaluation results were reported, the principal was no longer involved, both because he did not participate in the evaluations and because he was no longer employed at the school. She claimed statements made about her during the evaluation process—not by the principal—defamed her as being a bad teacher. On a derivative claim for conspiracy to commit defamation, the principal would have the defenses of truth, fair reporting privilege, the two-year statute of limitations for defamation,[12] and perhaps others. If the statements made by those conducting the evaluation were true or fair, or if the claim was brought outside the limitations period, the principal—like those who made the defamatory remarks—would rightfully benefit from those legally defined defenses.

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[12] *See* S.C. Code § 15-3-550(1) (2005) (requiring "an action for libel [or] slander" be brought "[w]ithin two years"). The General Assembly, in enacting subsection 15-3-550(1), made a policy judgment that defamation actions must be brought in a shorter time than the general limitations period of three years set forth in section 15-3-530 of the South Carolina Code (2005). In this case, the defendants prevailed on the statute of limitations defense as to the plaintiff's defamation claims. By now permitting the plaintiff to sue for the very same conduct—defamation—outside the limitations period for defamation cases—simply because the defamation claim is labeled as civil conspiracy—the majority frustrates the General Assembly's intent to require defamation cases be brought within two years.

The plaintiff's lawyer in this case did think to add a cause of action for civil conspiracy. Thus, on the majority's remand for trial, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Defamation defenses do not apply to civil conspiracy, which—as confirmed by the majority to be an independent tort—permits the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror's sense of fairness or responsibility. In other words, the civil conspiracy claim we remand for trial permits a court and jury to impose liability for defamation despite the fact the law provides valid defenses that prevent liability.

My point is illustrated by a case I tried years ago when I was a circuit judge. I have modified the facts slightly for simplicity. In an aging twenty-four unit condominium building in a beachfront city here in South Carolina, owners could sell individual units for an average of $250,000. A real estate developer believed he could renovate the building and sharply increase the value of each unit. The developer offered to purchase each unit for $400,000 on the condition that each of the twenty-four owners must sell. The owners realized their units were undervalued; they predicted that even this offer was less than full value; and they decided to seek competing offers from other developers. After receiving a superior offer from a second developer, and a counter offer from the first, the owners voted to accept the offer from the second developer. Twenty-three of them entered contracts to sell their units to the second developer.

The first developer—understandably—did not give up. He had figured out a way to bring a combined financial benefit of $3.6 million ($150,000 each) to the twenty-four unit owners, to renovate an aging building in the city, to employ quite a few people in the renovation and resale process, and to make a considerable profit for himself. He knew the condominium owners' association by-laws did not permit a sale or renovation of the entire building on less than a unanimous vote. Thus, he knew the second developer could not complete the deal without successfully purchasing all twenty-four units. So, the first developer approached one of the unit owners and purchased that individual unit for $600,000. By doing so, he placed himself back in control of the deal he had conceived.

Everybody was furious with the first developer, and they all sued him on every conceivable cause of action. The breach of contract claim failed because the developer had no contract with anyone except the one owner who sold to him. The breach of fiduciary duty claim failed because the developer owed no such duty. The

fraud and slander of title claims failed because the developer made no false statement. The intentional interference with a contract claim failed because the developer was justified in purchasing real estate to further his own financial interests. The interference with prospective contractual rights claim failed because the unit owners had a contract to sell to the second developer, not prospective contractual rights. I dismissed each of those claims because—applying the law—the plaintiffs had no right to recover from the developer. Nothing was left, except civil conspiracy.

In a hearing on the developer's motion for a directed verdict, the plaintiffs acknowledged the developer's actions were lawful. Quoting, however, from this Court's opinion in *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988), the plaintiffs argued "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another,'" and, "An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used."

The plaintiffs' arguments were facially correct. The first developer intentionally conspired with the owner of one unit for the purpose of preventing the other twenty-three owners from realizing the extra value in their units, and for the purpose of preventing the second developer from profiting from renovation of the building and resale of the renovated units. Yet, I granted a directed verdict on the civil conspiracy claim. I did so because the law should never permit a court or a jury to impose civil liability for lawful, non-tortious conduct. Without specific requirements, elements, or standards, the decision maker is left with nothing but its own sense of what is fair or responsible. That is neither fair nor responsible.

In our free-enterprise economy, we encourage entrepreneurs to use aggressive tactics to seize competitive advantage, create jobs for our people, and build value for our communities. For these efforts, entrepreneurs rightfully expect to earn handsome profits. Participants in this healthy competition use every lawful tactic at their disposal. Those who lose out are understandably envious, and often angry. But, actions that conform to the law—even when motivated by anger or an intent to harm—must not be the basis of civil liability. As the Supreme Court of the United States admonished 160 years ago,

> An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of

> actions in their relation to motives, but jurisprudence deals with actions in their relation to law . . . .

Adler v. Fenton, 65 U.S. 407, 410, 16 L. Ed. 696, 698 (1860).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard J. Creswick, Petitioner,

v.

The University of South Carolina and Alan Wilson in his official capacity as Attorney General, Respondents.

Appellate Case No. 2021-000833

ORIGINAL JURISDICTION

Opinion No. 28053
Submitted August 11, 2021 – Filed August 17, 2021

JUDGMENT DECLARED

Richard A. Harpootlian and Christopher Phillip Kenney, of Richard A. Harpootlian, PA, of Columbia, for Petitioner.

Vordman Carlisle Traywick III and Robert E. Stepp, of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Respondent University of South Carolina.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Respondent Attorney General Alan Wilson.

PER CURIAM: Petitioner, a professor at the University of South Carolina (the University), seeks a declaration in this Court's original jurisdiction that Proviso 117.190 of the 2021-2022 Appropriations Act[1] does not prohibit a universal mask mandate at the University and asks the Court for expedited consideration of this matter. Both the University[2] and the Attorney General agree with the requests for this Court's acceptance of this case in its original jurisdiction and expedited review. Because this matter involves a question of significant public interest that must be decided before classes resume this week, we accept the matter in our original jurisdiction and expedite its consideration. *See* Rule 245(a), SCACR (explaining this Court may hear matters in its original jurisdiction if the public interest is involved, or if special grounds of emergency or other good reasons exist); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (holding only if an extraordinary reason, such as a question of significant public interest or an emergency, exists will this Court determine a matter in its original jurisdiction). We dispense with further briefing, find oral argument would not be helpful, and declare Proviso 117.190 does not prohibit a universal mask mandate.

On July 30, 2021, Dr. Harris Pastides, Interim President of the University, announced that face coverings would be required for all students, faculty, and staff at all times inside all University buildings except a student's own dorm room, a private office, and when eating inside campus dining facilities. On August 2, 2021, the Attorney General sent a letter to Dr. Pastides opining that the University's universal facemask mandate violated Proviso 117.190. Accordingly, Dr. Pastides issued a statement on August 3, 2021, indicating that in light of the Attorney General's opinion, the University would not require facemasks except in the University's health care facilities and campus public transportation. However, the statement strongly encouraged the use of facemasks indoors unless in a student's own dorm room, in a private office, or eating inside campus dining facilities.

Proviso 117.190 provides:

> (GP: Masks at Higher Education Facilities) A public institution of higher learning, including a technical college, may not use any funds appropriated or authorized pursuant to this act to require that its

[1] https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm#s117.

[2] Although the University is named as a defendant in this lawsuit, it is not actually adverse to any of the parties and, in its return, states that it defers to this Court's interpretation of Proviso 117.190.

> students have received the COVID-19 vaccination in order to be present at the institution's facilities without being required to wear a facemask. This prohibition extends to the announcement or enforcement of any such policy.

In his letter to Dr. Pastides, the Attorney General stated,

> With respect to masks, Proviso 117.190 is ambiguous, to be sure. One reasonable interpretation is to prohibit discrimination by requiring masks for the unvaccinated. Under this interpretation, a uniform mask requirement does not violate the proviso. Based upon this reading, we understand the University has now imposed a mask requirement "inside all campus buildings" with certain exceptions.
>
> Such a policy, however, is likely not consistent with the intent of the Legislature. It is our understanding that Proviso 117.190, while inartfully worded, was intended to prohibit the mandatory wearing of masks, as reflected in its use of the language "without being required to wear a facemask." Our state Supreme Court has advised that "courts are not confined to the literal meaning of a statute where the literal import contradicts the real purpose and intent of the lawmakers." *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002). Given the legislative intent, we are constrained to construe Proviso 117.190 as prohibiting a mask mandate such as the University has imposed.

In his return, the Attorney General asserts this matter does not present a justiciable controversy. We reject this assertion. There is no question that the University withdrew its mask mandate based on the letter from the Attorney General, and the University has now clearly indicated it will defer to our interpretation of the proviso in question. Under these circumstances, this controversy is clearly justiciable.

Contrary to the Attorney General's position that this matter presents a political question, we hold this action involves solely a question of statutory interpretation. The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The first question to be asked when interpreting a

statute is whether the statute's meaning is clear on its face. *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001). If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). Under the plain meaning rule, this Court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 29–30, 661 S.E.2d 349, 351–52 (2008). Only where the language of an act gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent beyond the borders of the act itself. *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

The language of Proviso 117.190 is not ambiguous as to the point in question—whether the proviso prohibits a universal mask mandate. Nothing in the proviso manifests the General Assembly's intent to prohibit all mask mandates at public institutions of higher learning. Instead, the proviso clearly prevents state-supported institutions of higher education from using funds from the 2021-2022 appropriations to fund efforts requiring only unvaccinated individuals to wear facemasks. Nothing in the title or text of the proviso prohibits a universal mask mandate at a public institution of higher learning that applies to all students, faculty, and staff equally, whether vaccinated or unvaccinated. In fact, the proviso implicitly contemplates there could be a universal mask mandate, but its terms prohibit only discrimination against unvaccinated individuals by requiring them to wear masks when vaccinated individuals are exempt from that requirement. Despite the fact that the proviso is, as stated by the Attorney General, "inartfully worded" and "very poorly written," the proviso clearly does not prohibit a universal mask mandate.

Further, the Attorney General's contention that construing Proviso 117.190 along with other provisos concerning COVID-19 vaccinations and facemasks somehow evidences the legislative intent for Proviso 117.190 to prohibit universal mask mandates at state-funded colleges and universities is specious. We note Proviso

1.108 demonstrates the General Assembly is capable of drafting a provision prohibiting all mask mandates by stating:

> (SDE: *Mask Mandate Prohibition*) No school district, or any of its schools may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.[3]

(emphasis added). In contrast to Proviso 117.190, Proviso 1.108 clearly evinces the General Assembly's intent to prohibit the use of state funds to require any mask mandate in public K-12 schools. The fact that Proviso 117.190 uses different language than Proviso 1.108 leaves little doubt that Proviso 117.190 was not intended to prohibit all mask mandates at public institutions of higher education, but only, as its terms specifically provide, mask mandates for the unvaccinated.

As to the Attorney General's insistence that subsequent statements by individual legislators evidence the legislative intent to ban all masks mandates, this Court has held the Court may not look to the opinions of legislators or others concerned in the enactment of the law—expressed subsequent to enactment—to ascertain the intent of the legislature. *Kennedy*, 345 S.C. at 353–54, 549 S.E.2d at 250 (quoting *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942)); *Bowaters Carolina Corp. v. Smith*, 257 S.C. 563, 572, 186 S.E.2d 761, 764 (1972) (holding the testimony of members of the legislative delegation who authored the statute as to its meaning was inadmissible). It is well established that courts will disregard the subsequently expressed opinions of individual legislators as to the intent of the legislature as a whole when construing a statute. *See, e.g.*, *Bread Pol. Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) ("*[P]ost hoc* observations by a single member of Congress carry little if any weight." (quoting *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978))); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (noting statements of Appropriations Committee members "represent only the personal views of these legislators," and, "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage" (alteration in original) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974))); 419 U.S. at 132 (holding

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[3] https://www.scstatehouse.gov/query.php?search=DOC&searchtext=mask&category=BUDGET&year=2021&version_id=7&return_page=&version_title=Appropriation%20Act&conid=36818960&result_pos=0&keyval=46115&numrows=10

post-passage remarks of legislators cannot serve to change the legislative intent of Congress expressed before the Act's passage as those statements represent only the personal views of the legislators); *Pa. Dep't of Pub. Welfare v. United States*, 781 F.2d 334, 341 n.10 (3d Cir. 1986) ("[A] post hoc statement of a single legislator, even of the bill's author, is not entitled to probative weight in the determination of legislative intent." (citations omitted)); *Cummings v. Mickelson*, 495 N.W.2d 493, 499 n.7 (S.D. 1993) (holding the views of individuals involved with the legislative process as to intent is of no assistance in construing statutory provisions because: (1) it is the intent of the legislature that is sought, not the intent of the individual members; and (2) it is "universally held" that "evidence of a . . . draftsman of a statute is not a competent aid to a court in construing a statute" (quoting *Coop. Wool Growers of S.D. v. Bushfield*, 8 N.W.2d 1, 3 (1943))); *Cogan v. City of Wheeling*, 274 S.E.2d 516, 518 (W. Va. 1981) (holding a court cannot consider the individual views of members of the legislature offered to prove the intent and meaning of a statute after its passage and after litigation has arisen over its meaning and intent). *See generally* Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 48.16 (7th ed. 2014) (citing cases in numerous jurisdictions holding courts should not consider testimony about legislative intent by members of the legislature that enacted a statute). Accordingly, even if the proviso were ambiguous, we would not consider any post-passage statements by individual legislators or groups of legislators as to the intent of the proviso.

Because the language of the proviso is clear and unambiguous as to whether the proviso prohibits a universal mask mandate, we need not resort to rules of statutory construction to determine legislative intent. *See Smith*, 419 S.C. at 556, 799 S.E.2d at 483 (holding only where the language of a statute gives rise to doubt or uncertainty as to legislative intent may this Court search for that intent beyond the borders of the act itself); *Miller*, 364 S.C. at 307, 613 S.E.2d at 366 (holding where a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning). We declare the terms of Proviso 117.190 clearly and unambiguously prohibit a state-supported institution of higher education from discriminating against unvaccinated students,

faculty, and staff by requiring them to wear masks. The proviso does not prohibit a universal mask mandate.[4]

JUDGMENT DECLARED.

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

[4] In reaching this conclusion, we are simply construing the proviso as it is written. Our holding is not an approval or disapproval of a mandate, nor is it an approval or disapproval of an attempt by the General Assembly to prohibit a mandate.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bradley Weller, Appellant,

v.

Gail Weller, Respondent.

Appellate Case No. 2018-000809

Appeal From Darlington County
Cely Anne Brigman, Family Court Judge

Opinion No. 5847
Heard December 8, 2020 – Filed August 18, 2021

AFFIRMED

Everett Guy Ballenger, of Barth, Ballenger & Lewis, LLP, of Florence; Allen Mattison Bogan, of Columbia, and Miles Edward Coleman, of Grenville, both of Nelson Mullins Riley & Scarborough, LLP, all for Appellant.

Nancy H. Bailey, of Law Office of Nancy H. Bailey, of Florence; and Marian Dawn Nettles, of Nettles Turbeville & Reddeck, of Lake City, both for Respondent.

WILLIAMS, J.: In this family matter, Bradley Weller (Husband) appeals the family court's order denying his request to terminate or modify alimony. Husband

argues the court erred in (1) finding he did not show a substantial change in circumstances justifying termination or modification of alimony, (2) relying on inadmissible and irrelevant facts in making its determination, and (3) awarding Gail Weller (Wife) attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on December 27, 1989, and they had two daughters. On January 21, 2004, after fifteen years of marriage, the family court granted the parties a divorce on the ground of one year's continuous separation.

In the family court's order (2004 Decree), the court approved and adopted the parties' written property and separation agreement (Agreement) "in each and every particular." Under the Agreement, Wife had sole custody of the parties' two daughters; Husband received visitation; Husband agreed to pay Wife $1,500 per month in child support; and Wife was entitled to twenty-five percent of Husband's annual bonus, up to a total of $10,000.00 each year.[1] The Agreement also provided Husband would pay Wife $2,000 each month in permanent periodic alimony and $400 per month in rehabilitative alimony for eighteen months.

Husband and Wife also submitted financial declarations to the court. Wife's 2004 financial declaration stated she had a monthly gross income of $2,120 and had $6,665.99 in monthly expenses. Wife's monthly gross income included her salary from teaching part-time and working at a local coffee shop part-time. Husband's 2004 financial declaration stated his monthly gross income was $13,080 and his monthly expenses were $4,683.50.

In its 2004 Decree, the family court stated Husband's $2,000 alimony obligation under the Agreement was predicated on Wife's income being $281 per month—the amount she earned each month working at the coffee shop—rather than the $2,120 she reported as her gross monthly income. According to the parties' testimony and the 2004 Decree, Wife's employment as a substitute teacher was only supposed to last a few months after the divorce. The 2004 Decree stated the following pertinent language:

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[1] Of this twenty-five percent, sixty percent was deemed alimony, and forty percent was deemed child support, both terminating upon the conclusion of Husband's respective obligations.

> [W]ife's financial declaration reflects that she earns $2,180.00 per month.[2] However, it was announced that the Agreement of the parties was based on the wife's income of $281.00 per month . . . . **The wife's monthly income and basis of the terms of this Agreement for any future actions between the husband and wife regarding the wife's income is income of $281.00 per month and no other income, or projected income**.

(emphasis added). On June 19, 2017, Husband filed a summons and complaint alleging a change in Wife's circumstances and seeking termination or a reduction of alimony. Husband's primary argument was that Wife was now employed full-time as a teacher and that her income substantially exceeded $281 per month.

On January 23, 2018, at the final hearing, Wife testified regarding her education and employment history. At the time the parties met, Wife was in school studying to obtain her Master's degree. She never achieved this degree because the parties married and Husband's employment relocated the family to Tacoma, Washington. At the time of this transfer, Wife was pregnant with the parties' first child, and she and Husband decided she would no longer work. Both parties testified Wife did not work during their fifteen-year marriage until after they separated. During the marriage, Husband's job relocated the family from Tacoma, Washington to Hartsville, South Carolina and then to the country of Belgium. Shortly after relocating to Belgium, Husband entered into an extramarital affair with a coworker and requested Wife and the children return to the United States.

Regarding her employment, Wife explained that she was approached about teaching at a college but was unqualified because she did not have her Master's degree. Back in Hartsville, Wife worked part-time at Trinity Collegiate School when the parties divorced, but her job eventually turned into full-time employment in 2006. She earned roughly $28,000 that year. Wife's salary increased annually, reaching approximately $37,000 in 2015. In 2016, Wife moved to Denver, Colorado, to be closer to a daughter from a previous marriage. In Denver, Wife worked as a full-time teacher at Saint Elizabeth's School, and her salary at the time

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[2] Wife reported $2,120 as her income in her 2004 financial declaration; the Agreement's reference to $2180 is a clerical error.

of the final hearing was approximately $28,000.[3] Wife testified "it would[not] be easy" to maintain her standard of living if alimony were terminated or decreased, "but it could be done." Moreover, Wife introduced evidence of Husband's extramarital affair and the family's several relocations due to Husband's job. Wife also sought to introduce a letter Husband wrote to his paramour. Husband's paramour sent the letter, along with a picture of herself with Husband, to Wife, gloating over the parties' divorce. The family court admitted the letter over Husband's objection.

The parties also filed updated financial declarations at the final hearing. In his 2018 financial declaration, Husband reported a monthly gross income of $21,770.69, and Wife reported a monthly gross income of $3,987.83, excluding her alimony. Wife's gross monthly income included $2,333.33 in wages, $187.50 in overtime and bonuses, and $1,467 in pension disbursements from Husband's pension.[4] The 2018 declarations also reported Husband had monthly expenses of $19,500.42 and Wife had monthly expenses of $4,962.80. Wife further reported that she had $9,000 in a personal savings account, $47,120.24 in a voluntary retirement account, and $74,791 of equity in real property.

In its final order (2018 Order), the family court found Husband failed to show Wife's circumstances had changed substantially or materially to warrant termination or a reduction of alimony. The family court specifically found the parties contemplated that Wife would return to full-time employment "because she . . . was employed at the time of the [2004 Decree]." The family court also awarded Wife $3,000 in attorney's fees. Husband filed a motion to alter or amend

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[3] Wife's employment agreement with St. Elizabeth's School stated she could earn $36,400 under a twelve-month teaching contract. She was guaranteed $28,000 for teaching fifth and eighth grade English. The remainder could be earned hourly through working in the school's extended day program.

[4] In his motion to alter or amend the judgment, Husband conceded that Wife's receipt of a portion of his pension benefits was contemplated in the Agreement. The Agreement states in pertinent part, "An appropriate Qualified Domestic Relation Order shall be issued which grants wife [fifty percent] ownership of [Husband's] retirement existing at the date of the filing of this lawsuit . . . through his employer."

the judgment pursuant to Rules 52, 59(e), and 60, SCRCP, which the family court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in finding Husband failed to show a substantial or material change in Wife's circumstances that justified terminating or modifying alimony?

II. Did the family court err in admitting evidence of Husband's extramarital affair, the family's several relocations, and Husband's letter to his paramour?

III. Did the family court err in awarding Wife attorney's fees?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). On appeal from the family court, this court reviews factual and legal issues de novo, with the exceptions of evidentiary and procedural rulings. *See Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 596, 813 S.E.2d 486, 486 n.2, 487 (2018) (per curiam). Therefore, this court may find facts in accordance with its own view of the preponderance of the evidence. *Posner v. Posner*, 383 S.C. 26, 31, 677 S.E.2d 616, 619 (Ct. App. 2009). However, this broad scope of review does not prevent this court from recognizing the family court's superior position to evaluate witness credibility and assign comparative weight to testimony. *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655. The appellant maintains the burden of convincing the appellate court that the family court's findings were made in error or were unsubstantiated by the evidence. *Posner*, 383 S.C. at 31, 677 S.E.2d at 619.

Evidentiary and procedural rulings are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2. "An abuse of discretion occurs when the family court's decision is controlled by some error of law or whe[n] the order, based upon findings of fact, is without evidentiary support." *Gartside v. Gartside*, 383 S.C. 35, 42, 677 S.E.2d 621, 625 (Ct. App. 2009).

LAW/ANALYSIS

I. Alimony Termination/Modification

Husband asserts the family court erred in failing to terminate or reduce alimony. Specifically, Husband contends Wife's income substantially exceeds the stipulated income of $281 imputed to wife for any future actions between the parties based on the Agreement. We disagree.

The purpose of alimony is to place the supported spouse in the same position he or she enjoyed during the marriage. *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). Permanent, periodic alimony is a substitute for support that is normally incidental to marriage. *Johnson v. Johnson*, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). However, alimony is subject to termination or modification upon a showing of changed circumstances. S.C. Code Ann. § 20-3-170 (2014); *Miles v. Miles*, 355 S.C. 511, 516, 586 S.E.2d 136, 139 (Ct. App. 2003). To justify termination or modification of a spouse's alimony, the change in circumstances must be substantial or material. *Miles*, 355 S.C. at 519, 586 S.E.2d at 140. Additionally, the change must be unanticipated. *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009). "Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse." *Miles*, 355 S.C. at 519, 586 S.E.2d at 40. "[T]he burden to prove entitlement to a modification [alimony] is a substantial one, the same burden applies whether the family court order in question emanated from an order following a contested hearing or a hearing to approve an agreement." *Miles v. Miles*, 393 S.C. 111, 121–22, 711 S.E.2d 880, 885 (2011).

Based on the parties' 2004 stipulation that Wife's income was $281 at that time and for all future actions, Wife has recognized an increase in income since the parties' divorce. This stipulation, however, is one consideration to weigh in this appeal and is not dispositive in our analysis. In determining whether a substantial and material change has occurred justifying the termination or modification of alimony, the appropriate focus is on the totality of Wife's and Husband's circumstances both at the time of their divorce and at the time of filing for termination or modification. *See Bailey v. Bailey*, 269 S.C. 1, 4, 235 S.E.2d 801, 802 (1977) (stating the

determination of alimony envelops all circumstances surrounding the case, including the financial condition of the supporting spouse and the need of the supported spouse); *Miles*, 355 S.C. at 519, 586 S.E.2d at 40 (finding the considerations relevant for the initial determination of alimony also relevant in the modification context). The totality of the circumstances include, but are not limited to, the payee's need for and the payor's ability to pay the current alimony. *See Pendergast v. Pendergast*, 354 S.C. 32, 38-39, 579 S.E.2d 530, 533 (Ct. App. 2003) (explaining when a mother's standard of living and income has remained unchanged and the father's income and ability to pay have substantially increased, a substantial change in circumstances does not exist justifying modification of alimony); *Johnson v. Johnson*, 296 S.C. 289, 302, 372 S.E.2d 107, 114 (Ct. App. 1988) (finding when a great disparity in the financial resources and earning capacities of the parties exists, the payor has the financial ability to meet his own needs while supporting the payee at the standard of living she enjoyed during the marriage, and the payee cannot sustain her marital standard of living on her own income at the end of a rehabilitative period, permanent and periodic alimony is mandated).

In the present case, the parties' 2004 stipulation of $281 as Wife's income does not provide a complete portrayal of Wife's 2004 financial circumstances or accurately reflect her pecuniary needs considered by the court at that time. After the parties' divorce, Wife continued to teach part-time, with her employment eventually evolving into a full-time position. Wife worked two jobs at the time of the divorce in addition to receiving child support and alimony to maintain financial stability. She continues to work full-time to support a financially stable lifestyle; one similar to her lifestyle at the time of the parties' divorce. Wife's overall standard of living has remained relatively constant since 2004, even after considering the income she has recognized over her stipulated income of $281. This increase in income, when compared to Wife's current circumstances, is insufficient to justify a modification or termination of alimony. *See Allen*, 347 S.C. at 184, 554 S.E.2d at 424 ("[A]limony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage."); *see also Bailey*, 269 S.C. at 4, 235 S.E.2d at 802 (stating the determination of alimony envelops all circumstances surrounding the case).

Moving to Wife's circumstances, her 2004 expenses were $6,665.99 and her 2018 expenses were $4,962.80—a decrease of roughly $1,700 per month. Wife's decrease in expenses correlates with her loss of child support following the

emancipation of the parties' daughters. The only items that were new or increased on Wife's 2018 Financial Declaration were expenses associated with her new home mortgage in Denver, an auto loan, incidentals, veterinary care for pets, cable, personal retirement contributions of $300 that are not associated with her employer, health prescriptions, a storage unit, and credit card payments. Although Wife saves $300 each month in a private retirement account, this sum is offset monthly by expenses related to her new home.

Comparing Wife's 2004 monthly income of approximately $5,620[5] to her 2018 income of approximately $5,987.83[6] indicates Wife's total monthly income and standard of living has remained relatively constant since 2004. While Wife nets approximately $988 dollars per month, she has a relatively low earning potential as a teacher and is now sixty-two years old. The record indicates she has lived a frugal, modest lifestyle since the parties' divorce and has relatively small retirement and savings accounts to maintain her standard of living. It would be inappropriate to restrict Wife to a lower standard of living now considering she sacrificed her education and career to raise children, allowing Husband to relocate the family and travel for work during their marriage. Without alimony, Wife would be required to live substantially below the standard of living Husband enjoys and would be disadvantaged by her sacrifices. *See Patel v. Patel*, 347 S.C. 281, 290–291, 555 S.E.2d 386, 391 (2001) (stating a spouse should not be required to live substantially below the husband's standard of living where the wife sacrificed her employment to further husband's career). It would also be inequitable to require Wife to invade her personal assets to support herself while Husband may save and continue to draw a large salary from his employment. *See Sweeney v. Sweeney*, 420 S.C. 69, 79–80, 800 S.E.2d 148, 153 (Ct. App. 2017) (finding a spouse is not required to invade her only assets to support herself to alleviate the husband's duty to pay alimony when the parties' current financial circumstances are vastly different and the husband continues to draw a substantial salary and dividends from his employment), *aff'g* 426 S.C. 229, 826 S.E.2d 299 (2019).

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[5] This amount is the sum of Wife's 2004 monthly income ($2,120), alimony ($2,000), and child support ($1,500).

[6] This amount is the sum of Wife's 2018 monthly wages ($2,333.33), monthly overtime ($187.50), her monthly share of Husband's pension ($1,467), and alimony ($2,000).

Finally, Husband does not dispute his ability to pay his alimony obligation. At the time of the divorce, Husband reported he had a monthly income of $13,080 and monthly expenses of $4,683.50. He also projected he had total assets of $252,325. When he filed for termination or modification of alimony, he reported an annual base salary of $245,000, a monthly salary of $21,770.69, and monthly expenses of $19,500.42, which included $3,000 a month in entertainment and travel. In his 2018 financial declaration, Husband reported total assets of $3,860,135.76. Further, Husband admitted his current wife earns between $200,000 and $210,000 annually and shares Husband's reported monthly expenses, reducing his share of expenses to approximately $10,000 a month. Husband also stated he included his current alimony obligation in his expenses, and after his monthly expenses, he had a surplus of $5,000 each month.

We find Wife has a need for $2,000 per month in alimony to enjoy life as she would have if she and Husband remained married because (1) Wife's income has remained relatively stable; (2) her expenses have not decreased outside those associated with raising two daughters; and, (3) her standard of living has remained relatively constant since 2004. *See Allen*, 347 S.C. at 184, 554 S.E.2d at 424 ("[A]limony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage."). Therefore, even though the parties stipulated that Wife's income would be $281 for any future action, we find the increase in Wife's income over the amount in the stipulation and all other changes in the parties' circumstances are not so substantial or material as to warrant the termination or modification of alimony. *See Miles*, 355 S.C. at 519, 586 S.E.2d at 140 ("To justify modification or termination of an alimony award, the changes in circumstances must be substantial or material."). Accordingly, we affirm the family court on this issue.

II. Evidence Pertaining to Husband's Adultery and the Family's Relocation

Husband argues the family court erred in admitting testimony related to Husband's extramarital affair, the family's several relocations due to Husbands employment, and a letter Husband wrote to his paramour during the affair. We find the only evidentiary issue preserved for appellate review pertains to the letter.

Regarding Husband's extramarital affair and the family's several relocations, we find these issues unpreserved for appellate review. "An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [family

court] to be preserved for appellate review." *Doe v. Roe*, 369 S.C. 351, 375–76, 631 S.E.2d 317, 330 (Ct. App. 2006). Husband failed to object to the questioning on these matters at trial and raised these issues for the first time in his appellant's brief. Therefore, Husband failed to safeguard these issues for appellate review, and we decline to address the merits.

As to the letter, we find the family court did not abuse its discretion in admitting the letter into evidence. *See Stoney*, 422 S.C. at 594 n. 2, 813 S.E.2d at 486 n.2 (stating evidentiary rulings are reviewed for an abuse of discretion). In the alimony modification context, statute and precedent clearly authorize the family court to consider the same factors initially considered to set alimony. *See* S.C. Code Ann. § 20-3-130(C) (2014); *Holmes v. Holmes*, 399 S.C. 499, 505, 732 S.E.2d 213, 216 (Ct. App. 2012) ("[T]he same considerations relevant to the initial setting of an alimony award may be applied in the modification context." (quoting *Miles*, 355 S.C. at 519, 586 S.E.2d at 140)). Among the factors the family court *must* weigh in initially setting alimony is "marital misconduct or fault." *See* § 20-3-130(C)(10) ("In making an award of alimony . . . , the court must consider and give weight in such proportion as it finds appropriate to *all of the following factors*: . . . marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce . . . ." (emphasis added)).

In accordance with the statute, the family court admitted the letter at the hearing and briefly mentioned Husband's marital misconduct in a factual recitation in the 2018 Order. Nothing in the record indicates the family court failed to accord the letter proper weight in making its determination. *See* § 20-3-130(C)(10) ("[T]he court must consider and give weight in such proportion as it finds appropriate to all of the following factors: . . . marital misconduct or fault . . . . "). Accordingly, we find the family court did not abuse its discretion in admitting the letter.

III. Attorney's Fees

Husband asserts this court should reverse or modify Wife's attorney's fee award in the event it reverses or modifies the family court's order. Because we affirm the findings of the family court, we also affirm the award of attorney's fees to Wife.

CONCLUSION

Based on the foregoing, the family court's order is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Jordan, Appellant,

v.

Melissa Postell, Respondent.

Appellate Case No. 2018-001024

Appeal From Charleston County
Alice Anne Richter, Family Court Judge

Published Opinion No. 5848
Heard March 1, 2021 – Filed August 18, 2021

AFFIRMED IN PART AND REVERSED IN PART

Justin M. McGee, of McGee Law Firm, LLC, of Charleston, for Appellant.

Donald Jay Budman, of Solomon Budman & Stricker, LLP, of Charleston, for Respondent.

GEATHERS, J.: In this divorce action, John Jordan (Husband) argues the family court erred by (1) finding a house purchased by Melissa Postell (Wife) eight years before the marriage was not transmuted into marital property; (2) incorrectly calculating Husband's special equity interest in said property; (3) finding a different house sold to Husband by Wife's father three weeks before the marriage was marital property; (4) not distributing the parties' retirement accounts equally; (5) failing to award Husband alimony; (6) failing to find that the parties were jointly responsible for their respective 2016 state and federal income tax liabilities—and jointly entitled

to any refunds; and (7) failing to award Husband attorney's fees. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

The principal issue in this matter concerns the house located at 864 Harbor Place Drive in Charleston (Harbor Place). Eight years before her marriage to Husband, Wife purchased Harbor Place from her father on April 28, 1995, for $92,800.[1] Wife initially refinanced the mortgage in 1998 before refinancing it again on December 31, 2002. The mortgage balance owed as of that date was $108,000. Then, on June 18, 2003, Wife opened a Home Equity Line of Credit (Home Equity Loan), secured by Harbor Place, in an amount not to exceed $40,250. The parties married shortly thereafter, on November 2, 2003.

Also relevant to the divorce action is Husband's purchase of the house located at 694 Ponderosa Drive in Charleston (Ponderosa). On October 8, 2003—three weeks before his marriage to Wife—Husband purchased Ponderosa from Wife's father for $125,550. Wife's father included the phrase "LOVE AND AFFECTION FOR MY SON-IN-LAW" in the deed transferring the property as consideration for the sale to Husband. From its initial purchase to the present, the parties used Ponderosa exclusively as a rental property.

After almost thirteen years of marriage, Husband filed for divorce on April 1, 2016. Additionally, Husband filed a motion for temporary relief requesting financial assistance from Wife for his rental costs, attorney's fees, and an advance of the equitable distribution of the parties' marital assets. On May 2, 2016, a hearing was held before the family court on the motion for temporary relief. The family court issued its temporary order on the motion shortly thereafter. The order required the parties to attend mediation, denied both parties spousal support, denied Husband's request for an advance on his portion of the marital assets, and held the issue of attorney's fees in abeyance. The parties attended mediation on June 28, 2016, but the mediation was unsuccessful. The final hearing on the matter was held on July 11 through 13, 2017.

On October 9, 2017, the family court issued its Final Order and Decree of Divorce, finding the following: (1) Wife was the sole owner of Harbor Place and it did not transmute into marital property; (2) Husband had an $18,000 special equity

[1] Wife's father, who is a residential builder and developer, sold the home to Wife at a discounted price. The home was valued at $102,000 at the time of the purchase.

interest in Harbor Place based on the $30,000 value of the home improvements he made; (3) Ponderosa was transmuted into marital property, therefore, Husband was required to pay Wife $19,200 for her interest in the property, but could retain exclusive ownership and possession of the property; (4) each party was entitled to 45% of the other party's retirement; (5) Husband was not entitled to alimony; (6) each party was responsible for their own tax obligations; and (7) Husband was not entitled to attorney's fees.

On October 23, 2017, Husband filed a motion to reconsider, alter, or amend the family court's order, challenging the aforementioned findings by the court, save for the court's ruling on alimony. On May 2, 2018, the family court filed an amended final order and decree, acknowledging the fact that the Home Equity Loan was indeed marital property. All other findings of the family court remained intact. This appeal from Husband followed.

ISSUES ON APPEAL

1. Did the family court err by finding that Husband failed to present sufficient evidence to establish transmutation of Harbor Place?

2. Did the family court err in its calculation of Husband's special equity interest in Harbor Place?

3. Did the family court err by finding that Wife provided sufficient evidence to establish transmutation of Ponderosa?

4. Did the family court err in its apportionment of the parties' respective retirement accounts?

5. Did the family court err by denying Husband alimony?

6. Did the family court err by finding the parties were responsible for their own individual tax returns?

7. Did the family court err by not awarding Husband attorney's fees?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Therefore, the proper standard of review in family

court matters is de novo. *Stoney v. Stoney*, 422 S.C. 593, 594, 813 S.E.2d 486 (2018). Accordingly, "[o]n appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Polite*, 391 S.C. 275, 279, 705 S.E.2d 78, 80 (Ct. App. 2011). However, "this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses." *Wilburn v. Wilburn*, 403 S.C. 372, 380, 743 S.E.2d 734, 738 (2013). "Additionally, the de novo standard does not relieve the appellant of the burden of identifying error in the family court's findings." *Id.* "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by th[e appellate] court." *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012).

LAW/ANALYSIS

I. Harbor Place

Husband argues Harbor Place is transmuted marital property because (1) Harbor Place was used exclusively for marital purposes during the marriage; (2) the parties are jointly liable for the Home Equity Loan debt secured by the property; (3) the parties, working together, caused a $108,000 reduction in mortgage indebtedness during the marriage through the use of marital funds; (4) the funds used for Harbor Place and borrowed against Harbor Place were commingled and are incapable of being traced; (5) Husband personally did significant work to maintain and improve the property; and (6) the Home Equity Loan was used almost exclusively for Husband's benefit. We disagree.

Property acquired by either party before the marriage is generally nonmarital property. S.C. Code Ann. § 20-3-630(A)(2) (2014). "Nevertheless, '[p]roperty that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or 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.'" *Pittman v. Pittman*, 407 S.C. 141, 148, 754 S.E.2d 501, 505 (2014) (quoting *Wilburn*, 403 S.C. at 384, 743 S.E.2d at 740). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Id.* at 149, 754 S.E.2d at 505 (quoting *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1998)). "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.* (quoting *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001)).

We find Husband did not present sufficient evidence of Wife's intent to transmute Harbor Place into marital property. Wife purchased the house eight years prior to the marriage, she never put Husband's name on the title or mortgage, and the funds used to pay the mortgage were not so commingled as to make them untraceable. *See Pittman*, 407 S.C. at 148, 754 S.E.2d at 505; *Ray v. Ray*, 296 S.C. 350, 353, 372 S.E.2d 910, 912 (Ct. App. 1988) ("[T]he mere use of nonmarital 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."). At the final hearing on the matter, Wife testified that she always referred to Harbor Place as "my house" and always considered it as such. Husband provided no evidence or testimony to the contrary. *See Pittman*, 407 S.C. at 149, 754 S.E.2d at 505 ("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." (quoting *Jenkins*, 345 S.C. at 98, 545 S.E.2d at 537)).

Husband argues the fact that Wife used marital funds to discharge the mortgage indebtedness, which, by his estimation, she would not have been able to do without his financial contributions to the household, provides further support for transmutation. However, this fact alone does not evince Wife's intent to relinquish sole ownership of her home. *See Pittman*, 407 S.C. at 148, 754 S.E.2d at 505 ("As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case."); *Fitzwater v. Fitzwater*, 396 S.C. 361, 368–69, 721 S.E.2d 7, 11 (Ct. App. 2011) (finding the use of marital funds to pay a nonmarital property's mortgage insufficient to transmute the property); *see also* Roy T. Stuckey, *Marital Litigation in South Carolina* 337 (5th ed. 2020) ("If I use my paycheck (marital funds) to pay the mortgage so my family does not lose its home (how else am I supposed to pay the mortgage?), that is not evidence of my intent to give up sole ownership of the property."). The mere fact that Husband contributed financially to the marriage by paying various utility bills and providing food to his Wife and children does not sufficiently show that the mortgage was discharged through the parties' *joint efforts*. *See Wyatt v. Wyatt*, 293 S.C. 495, 496–97, 361 S.E.2d 777, 779 (Ct. App. 1987) (finding that a mobile home purchased prior to a marriage was transmuted in part because the husband "contributed to the remaining mortgage payments"); *id.* at 497, 361 S.E.2d at 779 ("In the instant case, the wife acquired legal title to the mobile home prior to the marriage, but paid off only one half of the mortgage. The remainder of the debt was discharged through the *joint efforts* of the husband and wife."

(emphasis added)); *Nestberg v. Nestberg*, 394 S.C. 618, 624, 716 S.E.2d 310, 313 (Ct. App. 2011) (finding property purchased by the husband before the marriage was transmuted into marital property in part because the wife paid the mortgages on the property for several years after the husband lost his job); *id.* ("[The husband] agreed he relied on [the wife]'s income and credit cards to develop the land . . . and that, 'to a degree,' [the wife] 'had been carrying the majority of the income for five years.'"). As aforementioned, the uncontroverted evidence shows that Wife personally made *all* of the mortgage payments with her wages. In fact, Husband did not even know how much was due on the mortgage each month. By Husband's own admission, his wages earned were used to pay for household living expenses and maintaining the house. As such, we find the mere fact that Wife paid her mortgage during the marriage with marital funds does not evince Wife's intent to transmute Harbor Place.

Moreover, Husband cites *Frank v. Frank*[2] as standing for the proposition that "when both spouses assume responsibility for debt secured by nonmarital property, this is likely conclusive evidence of an intent to transmute the property into marital property." We disagree with Husband's characterization of *Frank*. In *Frank*, the wife was given a home by her parents three years before the marriage. 311 S.C. at 455, 429 S.E.2d at 824. The home had a $21,000 mortgage at the time the wife received it. *Id.* at 455–56, 429 S.E.2d at 824. Two years into the parties' marriage, they separated, and the wife refinanced the house to consolidate bills. *Id.* at 456, 429 S.E.2d at 824–25. Subsequently, the parties reconciled, started living together again, and obtained home equity loans of $30,000. *Id.* at 456, 429 S.E.2d at 825. The parties obtained the loans jointly and used them almost exclusively for furnishing and remodeling the house at issue. *Id.* at 456–57, 429 S.E.2d at 825. The court held that, "to the extent that the husband is liable for the home improvement loan, the marital home is transmuted." *Id.* at 457, 429 S.E.2d at 825. Here, the evidence shows that Wife obtained the Home Equity Loan alone and the funds were used primarily for Husband's personal affairs. The record contains no evidence that the Home Equity Loan was intended as a means to build equity in Harbor Place. *See Johnson*, 296 S.C. at 295, 372 S.E.2d at 111 (stating the use of marital funds to build equity in the property may provide objective evidence showing that the parties themselves regarded the property as the common property of the marriage).

Based on the foregoing, we conclude the family court correctly found that Harbor Place was not transmuted into marital property.

[2] 311 S.C. 454, 429 S.E.2d 823 (Ct. App. 1993).

II. Special Equity

Because the parties stipulated that Harbor Place was worth $300,000 at the time of filing and the balance owed on the Home Equity Loan was $26,891.36, the family court found that Harbor Place had approximately $273,000 in equity. As such, the family court concluded that Husband had an $18,000 special equity interest in Harbor Place based on the $30,000 value of the home improvements he made. These improvements included building the deck onto the back of the house, building a privacy fence in the back yard, and installing a dishwasher and microwave. The family court found that much of what Husband claimed as improvements that he contributed to the home was actually routine maintenance.

Husband argues that even if the family court correctly found that Harbor Place was not transmuted, the court erred in its calculation of his special equity interest in the home. He argues that he is entitled to half of the increase in value Harbor Place experienced during the marriage, or in the alternative, at least half of the increase in equity that resulted from the reduction in mortgage indebtedness. By his estimation, these figures come out to $106,500[3] and $54,000[4] respectively. He further argues that he is entitled to the $18,000 previously granted by the family court in addition to either of the aforementioned amounts.

"[A]ny increase in value in nonmarital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage[,]" constitutes nonmarital property. S.C. Code Ann. § 20-3-630(A)(5) (2014). "A spouse has an equitable interest in improvements to property to which he or she contributed, even if the property is nonmarital." *Calhoun v. Calhoun*, 331 S.C. 157, 172, 501 S.E.2d 735, 743 (Ct. App. 1998), *aff'd in part, rev'd in part*, 339 S.C. 96, 529 S.E.2d 14 (2000).[5] "The increase in the value of a nonmarital asset

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[3] Husband based this amount on Harbor Place's increase in value over the course of the marriage from $195,000 to $300,000 (+$105,000). He then added the discharge of $108,000 of mortgage principal to this appreciated amount and arrived at $213,000. Of which, his share would be $106,500.

[4] This amount is half of the $108,000 mortgage balance Wife paid throughout the marriage.

[5] The supreme court reversed the court of appeals' "finding that the petitioner [was] not entitled to post-judgment interest because it was not pled and because the Rule 59[, SCRCP] motion in which petitioner requested such relief was untimely."

resulting from the use of marital funds to reduce indebtedness on the asset constitutes marital property subject to equitable division." *Id.* at 171, 501 S.E.2d at 742.

First, we disagree with Husband that he is entitled to half the full appreciation in value of Harbor Place. The record contains no evidence that the full appreciation in the value of the home resulted from Husband's contributions. Passive increase in the value of nonmarital property as a result of inflation does not constitute marital property. *See* § 20-3-630(A)(5); *Calhoun v. Calhoun*, 331 S.C. at 173–74, 501 S.E.2d at 743–44 (finding the wife was not entitled to a special equity interest in the portion of the increase in the value of the husband's vacation home attributable to inflation). As mentioned in Section I, Husband did not personally make a single payment towards Harbor Place's mortgage, nor did he provide additional objective evidence that other than the $30,000 determined by the family court, the appreciation in value was due to any improvements he made.

However, based on this court's ruling in *Calhoun*, as affirmed by our supreme court, it is clear that the increase in the equity in a nonmarital asset resulting from the use of marital funds to reduce indebtedness on the asset constitutes marital property subject to equitable division. *See* 331 S.C. at 171, 501 S.E.2d at 742; *id*. at 174, 178, 501 S.E.2d at 744, 746 (finding a wife was entitled to special equity in the amount of 50% of the reduction in the mortgage indebtedness on a husband's vacation home, while finding the wife was not entitled an interest in the appreciation in the home's market value). The uncontroverted evidence shows that Wife used marital funds to reduce the mortgage indebtedness of Harbor Place by $108,000 over the course of the marriage. Therefore, we agree with Husband that the increase in the equity in the home due to the reduction of mortgage indebtedness should have been included in the marital estate. *See id.*; *cf. Wilson v. Wilson*, 270 S.C. 216, 222, 241 S.E.2d 566, 569 (1978) (finding a wife was entitled to the equitable ownership of a portion of the property purchased solely by the husband during the marriage because her efforts at remaining gainfully employed "plus the expenditure of her income for household expenses not only contributed to the material success of the family but also freed her husband's earnings for investment").

Because the $108,000 reduction in mortgage indebtedness should have been included in the marital estate, the family court erred in the amount of the special equity awarded to Husband. *See id.* Accordingly, we find Husband is entitled to

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Calhoun, 339 S.C. at 104, 529 S.E.2d at 19. The supreme court affirmed the court of appeals' other findings.

half this amount ($54,000), plus the $18,000 awarded by the family court for his efforts in improving Harbor Place ($72,000 in total).

III. Ponderosa

Husband argues the family court erred by finding Ponderosa transmuted into marital property. We disagree.

The family court found Wife submitted significant evidence that Ponderosa was transmuted. This evidence included documents showing that Husband bought the home from Wife's father three weeks before their marriage and Wife's testimony that the parties always intended to use the home as an investment property to generate income to support their children's college and the parties' retirement needs. Further, the court found that Husband ceded management duties of the property to Wife shortly after the marriage and Wife handled paying the mortgage for the house from a joint "relationship checking account." Having found Ponderosa was transmuted into marital property, the family court ordered Husband to pay Wife her equitable share of the property: $19,200.[6] Husband was granted exclusive ownership and possession of the property.

Husband conceded that the purpose of the rental property was to support the parties' retirement and their children's education. *See Pittman*, 407 S.C. at 148, 754 S.E.2d at 505 ("Property that is nonmarital when acquired may be transmuted into marital property if 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."). Further, Wife handled the majority of the tenant management duties, paid the mortgage on the house using the joint "relationship checking account," and used the Home Equity Loan to pay the home's mortgage when the parties did not have a tenant in the home. Furthermore, Wife's father essentially included as consideration for the sale of the home the fact that Husband was marrying his daughter[7]—providing further evidence that the purpose of the home was to support the marriage. The objective evidence shows that the only reason Ponderosa was in Husband's name and not Wife's (or both) is because the parties thought it would be most advantageous for him to purchase it as a first time homebuyer to receive the tax credit. Therefore, we find Wife provided sufficient evidence that the parties regarded the property as marital and Husband intended it as such. *Id.* at 149, 754 S.E.2d at 505 ("The spouse claiming

[6] The parties stipulated that the equity in the property was $48,000.

[7] Wife's father called Husband his "son-in-law" even though Husband was technically not his son-in-law at the time of the purchase.

transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."). Accordingly, the family court did not err in finding Ponderosa was transmuted.

IV. Retirement Account

Husband argues the family court erred by not dividing the parties' retirement accounts equally. We disagree.

The family court found that all of the funds in Husband's retirement account were acquired during the marriage, while most, but not all, of Wife's funds were acquired during this time. Because Wife had funds rolled over into her retirement account from a job she had prior to the marriage, the court found that the premarital portion of Wife's retirement was nonmarital. As such, the court found the value of Husband's retirement account subject to division was $17,366.49,[8] and Wife's was $185,000.

Further, the family court found that while Husband's availability due to shift work and periods of unemployment allowed Wife to work more and progress in her career to some extent, there was evidence that established Husband undertook more leisure activities than Wife during his free time and did side work in order to obtain benefits primarily for himself (fishing, hunting, etc.). Meanwhile, Wife worked overtime and used that income to cover shortfalls in marital expenses. As such, the court found that each party was entitled to 45% of the other party's retirement. This meant that Wife was entitled to 45% of husband's marital retirement, totaling $7,814.92, while Husband was entitled to 45% of Wife's marital retirement, totaling $83,250.00.[9]

"When distributing marital property, the family court should consider all fifteen factors set forth in the Code." *Craig v. Craig*, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). These factors are as follows: (1) the duration of the marriage; (2) marital misconduct or fault of the parties; (3) the parties' contributions; (4) the income of each spouse; (5) the health of each spouse; (6) each spouse's need for training or education; (7) the nonmarital property of each spouse; (8) the parties'

[8] The parties separated at the end of March 2016, and Husband filed for divorce on April 1, 2016.

[9] In its final order and amended final order, the family court erroneously wrote this figure as $82,350.00.

retirement benefits; (9) the existence of a spousal support award; (10) the use of the marital home; (11) any tax consequences; (12) the existence of any support obligations; (13) any lien or encumbrances on marital property; (14) child custody arrangements and obligations; and (15) such other relevant factors as the court enumerates in its order. S.C. Code Ann. § 20-3-620(B) (2014).

Here, the record reflects that the family court considered all factors set forth in the Code. In deviating from the standard 50% division, the court cited the fact that throughout the marriage, Husband failed to maximize his employment opportunities while Wife sacrificed possible leisure time to work overtime and advance in her career. We find the court did not err in its division of the retirement accounts. *See Fitzwater v. Fitzwater*, 396 S.C. 361, 370–71, 721 S.E.2d 7, 12 (Ct. App. 2011) (awarding a husband 60% of the marital estate because "[the w]ife brought in little to no money or assets during the marriage, while [the husband] provided the majority of income and assets").

V. Alimony

Husband argues the family court erred by denying his request for alimony, citing the fact that he is "crippled by significant debt." We disagree.

In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014).

In denying Husband's request for alimony, the family court noted the following relevant facts: (1) the twelve-year duration of the marriage; (2) both parties were in good health and able to support themselves through their work in the coming decades; (3) Wife possessed a nursing degree with twenty-three years of experience, while Husband had some college credits, a commercial driver's license, and boat mechanic certification; (4) both parties worked throughout the thirteen-year marriage, but Husband, having college credits and specialized training, failed to maximize his earning potential, such as failing to seek management positions in the

course of his employment;[10] (5) the parties enjoyed a middle-class standard of living during the marriage and were each able to maintain a standard of living similar to, albeit more modest than, that enjoyed during the marriage upon the divorce; (6) both parties were capable of supporting themselves financially into the future; (7) Husband had the expense of Ponderosa, which still carried a mortgage; (8) the parties each had a home—Harbor Place and Ponderosa; (9) although the parties were sharing custody of the children and Husband was paying child support, most of the burden of supporting the children on a daily basis would continue to fall on Wife; (10) there were no fault grounds pled and no evidence of fault for the breakdown of the marriage; (11) the division of property would not create any adverse tax consequences for either party; (12) neither party had prior support obligations; and (13) Husband testified that Wife was not responsible for many of the changes in his standard of living.

The record reflects that the family court considered all factors set forth in the Code. Further, Husband conceded at the final hearing that Wife was not responsible for his current financial predicament. Accordingly, we find the court did not err by denying Husband's alimony request.

VI. Tax Returns

Husband argues the family court erred in finding that each party is liable for their own 2016 income taxes. He contends that he "is entitled to, at least, one-quarter of the combined tax refund for 2016 received by Wife (or $3,122.75) and contribution from Wife for one-quarter of [his] 2016 combined tax obligation (or $940) in a total amount of $4,062.75." We disagree.

In its order, the family court found that the 2016 tax returns' liabilities and refunds were substantially accrued after the filing of the action and the evidence was insufficient to allow the family court "to determine each party's contribution to the accumulation of the assets or creation of the liability pre-filing." We agree with the family court that the filing of separate returns was appropriate. Husband chose to separate from Wife three months into the year. Considering the parties were separated for three-fourths of the year, it is logical that they would file separate returns. Husband presented no evidence that Wife was required to file a joint return

[10] The family court noted that "[h]ad [Husband] maximize[d] his certification as a boat mechanic[] to become a Master Mechanic, his income could have been as high as $85,000.00/year."

with him.[11] We find credible Wife's testimony that her accountant advised her that it would be more advantageous to file a separate return due to Wife's pay increase. Accordingly, the family court did not err.

VII. Attorney's Fees

Husband argues the family court erred by denying his request for attorney's fees.[12] We disagree.

In determining whether to award attorney's fees, the family court must consider "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). In determining what amount in attorney's fees is reasonable, a court should then consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In its order, the family court delineated its consideration of the *E.D.M.* and *Glasscock* factors, finding the following: (1) The nature, extent, and difficulty of the legal services rendered were not of a complex nature; (2) both parties devoted a great deal of time to the case; (3) both counsel in the case enjoyed good standing as legal professionals before the court and the local legal community; (4) neither party had entered into contingency fee arrangements with their respective counsel, and each party had accrued moderate fee amounts; (5) both parties obtained some beneficial results through the litigation; (6) neither party could pay the entire amount of attorney's fees charged by their counsel; however, both could afford to pay their own respective fees based on their income or income prospects; (7) the hourly rates charged by both counsel were customary for similar services; (8) both parties were capable of being gainfully employed, and although Husband was currently unemployed, given his age and experience in his industry, he had the ability to become professionally successful for the foreseeable future; and (9) awarding attorney's fees would affect each party's standard of living. The family court found that neither party was in a position to pay the total amount of their own attorney's

[11] Husband testified that he did not remember whether he verbally gave Wife the choice on how to file the tax return.

[12] Husband requested $41,334.63 in attorney's fees.

fees—let alone the other party's. As aforementioned, Husband conceded that his current financial situation resulted from events that occurred after he separated from Wife, and he conceded that Wife is not at fault for his change in his standard of living. Wife has physical custody of the parties' two children and, as such, is primarily responsible for providing for the children's care. Therefore, we find denying Husband's request for attorney's fees was proper in this matter.

CONCLUSION

Based on the foregoing, we affirm the family court's order on all issues with the exception of issue 2. We reverse the family court's order on issue 2 and find Husband is entitled to half of the reduction in mortgage indebtedness as special equity, in addition to the amount previously ordered by the family court.

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Property and Casualty Insurance Guaranty Association, Respondent,

v.

South Carolina Second Injury Fund, Appellant.

IN RE:

Michael Quarles, Employee/Claimant,

v.

Cryovac Sealed Air Corporation, Employer, and Lumbermens Mutual Casualty Company in Liquidation/South Carolina Property and Casualty Insurance Guaranty Association, Carrier/Defendants.

Appellate Case No. 2019-000020

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5849
Submitted June 1, 2021 – Filed August 18, 2021

AFFIRMED

Robert Merrel Cook, II, of The Robert Cook Law Firm, LLC, of Batesburg-Leesville, and Andrew F. Lindemann,

of Lindemann & Davis, P.A., of Columbia, both for Appellant.

Joseph Hubert Wood, III, of Wood Law Group, LLC, of Charleston, for Respondent.

THOMAS, J.: In this workers' compensation case, the South Carolina Second Injury Fund (the Fund) appeals from the circuit court's order affirming the decision of the South Carolina Workers' Compensation Commission (the Commission) to order the Fund to make reimbursements to the South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association) for workers' compensation benefits paid by the Guaranty Association for an insolvent insurer. The Fund argues the circuit court and the Commission erred in (1) ruling the Guaranty Association meets the statutory definition of insurer or carrier and is entitled to seek reimbursement from the Fund; (2) concluding the Guaranty Association paid assessments to the Fund and is eligible to seek reimbursement from the Fund; and (3) ruling the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund. We affirm.

FACTS

Michael Quarles was injured on the job on December 17, 1999. Pursuant to an agreement entered into between Lumbermens Mutual Insurance Company (Lumbermens) and the Fund, the Fund reimbursed Lumbermens for payments it made for Quarles' injury in numerous installments from November 25, 2003 through January 26, 2014.[1] Lumbermens was liquidated via an order of the Circuit Court of Cook County, Illinois, dated May 8, 2013. As a result, the Guaranty Association became responsible for Quarles' claim pursuant to the terms and provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act (the Guaranty Act). *See* S.C. Code Ann. § 38-31-10 et seq. (2015). Under the Guaranty Act, the Guaranty Association was considered the

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[1] The Fund was created by South Carolina Code section 42-7-310 (2015) for the purpose of reimbursing employers or carriers for paid compensation or medical benefits. The Fund was terminated on July 1, 2013, by South Carolina Code section 42-7-320 (2015).

insurer to the extent of its obligation on Quarles' covered claim and had all rights, duties, and obligations of Lumbermens, as if Lumbermens had not become insolvent. *See* S.C. Code Ann. § 38-31-60(b) (2015). According to the deposition testimony of the Guaranty Association's Executive Director, the Guaranty Association was responsible for and paying for Quarles' claim as a covered workers' compensation claim under the Guaranty Act.

On June 17, 2013, the Guaranty Association and the Fund entered into a settlement agreement and release of claims. The agreement stated it concerned the Guaranty Association's claims against the Fund for reimbursement from the Fund for payments on behalf of "certain insureds of Legion Insurance Company, in liquidation and its subsidiaries, including, but not limited to, Villanova Insurance Company" and "Reliance Insurance Company in liquidation, and its subsidiaries, including, but not limited to, Reliance National Indemnity Company, Reliance National Insurance Company, and United Pacific Insurance." The Fund agreed to pay the Guaranty Association $2,900,000 for claims pending against the Fund related to Legion and/or Reliance in exchange for a release of those claims.

The Guaranty Association submitted a claim to the Fund on December 8, 2016, seeking reimbursement for the workers' compensation benefits it paid on behalf of Lumbermens. *See* S.C. Code Ann. §§ 42-9-400, -410 (2015) (providing reimbursement from the Fund). The Fund denied the claim, asserting (1) the Guaranty Association was not statutorily authorized to seek reimbursement from the Fund; (2) the Guaranty Association did not directly participate in funding the Fund; and (3) the 2013 settlement and release between the parties barred the claim for reimbursement. The Single Commissioner ordered the Fund to reimburse the Guaranty Association in accordance with the terms of the previously-approved agreement between the Guaranty Association and the Fund.

The Fund filed a Form 30 Request for Commission Review of the Single Commissioner's order. The Appellate Panel affirmed the Single Commissioner's order in its entirety. The Fund then filed an appeal with the circuit court.[2] After a hearing, the circuit court affirmed the Commission's findings of fact, conclusions

[2] The date of accident pre-dated the amendment to South Carolina Code section 42-17-60 (2015), which provided for direct appeals from the Commission to this court.

of law, and order awarding reimbursement to the Guaranty Association. This appeal follows.

LAW/ANALYSIS

I. Statutory Definition

The Fund argues the circuit court and the Commission erred in ruling the Guaranty Association meets the statutory definition of insurer or carrier and is entitled to seek reimbursement from the Fund. We disagree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* When interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. "[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Statutory interpretation is a question of law, which this court is "free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

The Fund was established to make reimbursements to an employer or carrier. S.C. Code Ann. § 42-7-310. Section 42-7-310(d)(2) provides the term "carrier" as used in the section "includes all insurance carriers, self-insurers, and the State Accident Fund." Pursuant to the agreement entered into between Lumbermens and the Fund, the Fund agreed to reimburse Lumbermens for payments it made for Quarles' injury and did so through January 26, 2014. Although the Fund was terminated on July 1, 2013, by section 42-7-320[3], subsection 42-7-320(B)(3) specified "[i]nsurance carriers, self-insurers, and the State Accident Fund remain[ed] liable for [the Fund] assessments, as determined by the State Fiscal Accountability Authority, in order to pay accepted claims" and that the Fund "shall continue reimbursing employers and insurance carriers for claims accepted by the

[3] S.C. Code Ann. § 42-7-320.

[F]und on or before December 31, 2011." "[The] Guaranty [Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014). "The legislature has chosen to define a 'covered claim' as a claim arising from an insolvent insurer . . . ." *Id.*

The Commission noted that section 38-31-60(b) provides the Guaranty Association "is considered the insurer to the extent of its obligation on . . . covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Thus, the Guaranty Association is considered the insurer to the extent of its obligation on Quarles' covered claims, and the record established the matter involved a covered workers' compensation claim for which the Guaranty Association was responsible for paying the full amount under section 38-31-60(a). S.C. Code Ann. § 38-31-60(a)–(b). The Commission found it "self-evident that [the Guaranty Association] would not be responsible for paying this claim and would have no reason to be seeking reimbursement from [the Fund] if it was not so authorized." The Commission further found "one of Lumbermens' rights assumed by [the Guaranty Association] is the right to reimbursement from [the Fund] pursuant to, and in accordance with, the approved Agreement to Reimburse Compensation." Finally, the Commission concluded,

> [T]he terms and provisions of [South Carolina Code] § 38-31-90 and § 38-31-100 [(2015)] are not exclusive with regard to [the Guaranty Association's] rights of recoupment and setoff and do not abrogate the rights of an insolvent insurer under the Workers' Compensation Act which [the Guaranty Association] maintains pursuant to § 38-31-60(b).

The circuit court affirmed the Commission's order.

The Fund argues the General Assembly intended that the Guaranty Association should not be treated as a "carrier" for purposes of reimbursement by the Fund. In support, the Fund asserts section 42-1-560, titled "Right to compensation not affected by liability of third party," defined the term "carrier" to explicitly include an association:

> The respective rights and interests of the injured employee, or, in the case of his death, his dependents and any person entitled to sue therefor, and of the employer or person, association, corporation or carrier liable for the payment of compensation and other benefits under this title, hereinafter called the "carrier," in respect to the cause of action and the damages recovered shall be as provided by this section.

S.C. Code Ann. § 42-1-560(a) (2015). Thus, the Fund maintains the General Assembly did not intend for the Guaranty Association to be included in the definition of "carrier" with respect to reimbursement from the Fund. The Fund argues section 38-31-60(b) has limiting language that provides the Guaranty Association is considered an "insurer" only with respect to its "[o]bligations on covered claims," which consists of its liabilities to consumers and not its ability to file claims or seek reimbursement from third parties such as the Fund. Therefore, it asserts the Guaranty Association enjoys "all rights, duties, and obligations of the insolvent insurer" but only with respect to its liability for covered claims. Further, the Fund argues section 38-31-90(2) authorizes the Guaranty Association to recover the amount of any "covered claim" against certain insureds with a high net worth or against "an affiliate of the insolvent insurer" but does not include any other provision authorizing the Guaranty Association to recover the amount of any "covered claim" from any other entity, including the Fund. S.C. Code Ann. § 38-31-90(2) (2015). Finally, the Fund argues the Guaranty Association and the Fund are funded by assessments collected from the same workers' compensation carriers; thus, allowing the Guaranty Association to be reimbursed from the Fund "would be a circuitous action that is largely a meaningless exercise and a waste of resources that substantially originate from the same source."

Our supreme court has said the Guaranty Association is an insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent, and Lumbermans became insolvent while it was paying for Quarles' covered claims. *See Hudson*, 407 S.C. at 124, 754 S.E.2d at 492 ("[The] Guaranty [Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent."). Thus, under the statutory authority, the Guaranty Association is considered the insurer to the extent of its obligation on Quarles' covered claims. Viewing the statute as a whole, we agree with the circuit court and the Commission that the Guaranty Association meets the

statutory definition of an insurer or carrier and is entitled to seek reimbursement from the Fund.

II. Assessments

The Fund argues the circuit court and the Commission erred in concluding the Guaranty Association paid assessments to the Fund and is eligible to seek reimbursement from the Fund. We disagree.

Section 42-7-310(d)(2) provides the continuing funding of the Fund would be made by "'equitable assessments upon each carrier, which . . . included all insurance carriers, self-insurers, and the State Accident Fund." Section 38-31-40 states the Guaranty Association is "a nonprofit unincorporated legal entity" and "all insurers defined as member insurers in section 38-31-20(8) are members of the [Guaranty Association] as a condition of their authority to transact insurance in [South Carolina]." S.C. Code Ann. § 38-31-40 (2015).

The Commission found the Fund never assessed the Guaranty Association, and pursuant to section 38-31-40, the Guaranty Association's workers' compensation member insurers paid assessments to the Fund. The Commission noted the Guaranty Association's member insurers paid assessments in accordance with a funding mechanism plan adopted by the State Fiscal Accountability Authority, and there was no indication that any of the member insurers were delinquent in their payment of assessments to the Fund. The Commission determined the Fund had assessed and would continue to assess the Guaranty Association's member insurers for its obligations on the claim. Therefore, the Commission found the Fund's assertion that the Guaranty Association's reimbursement claim was barred for failure to pay assessments was without merit and the Guaranty Association, as an unincorporated entity, effectively paid assessments to the Fund via the assessments paid by its member insurers. The Commission further determined Lumbermens was not in default or delinquent with respect to payment of its assessments and Lumbermens had paid all amounts assessed by the Fund. Finally, the Commissioner concluded:

> Lumbermens' non-participation in the assessment process subsequent to its liquidation [was] not material given that it [was] not in default or delinquent with respect to payment of its assessments; the fact that its assessments

> would go to zero once it went into liquidation and stopped paying claims and the assessments paid by [the Guaranty Association's] member workers' compensation insurers in accordance with the five year/$60,000,000 per year funding plan adopted by [the State Fiscal Accountability Authority] in connection with which [the Fund's] liability for reimbursement on this claim was considered and included.

The Fund argues the Guaranty Association does not qualify as an "insurance carrier" to whom reimbursement may be made because the Guaranty Association does not pay any assessments to the Fund. The Fund acknowledges the Guaranty Association's member insurers are sources of funding for the Fund, but it argues those insurers are paying the assessments because they individually qualify as "carriers" that are statutorily responsible to pay assessments to the Fund and are not paying the assessments for or on behalf of the Guaranty Association.

The Guaranty Association's member insurers paid assessments to the Fund pursuant to section 38-31-40, and there was no indication that any of the member insurers were delinquent in their payment of assessments to the Fund. Thus, we agree with the circuit court and the Commission that the Guaranty Association effectively paid assessments to the Fund via the assessments paid by its member insurers and is, thus, eligible to seek reimbursement from the Fund.

III. Prior Settlement Agreement and Release

The Fund argues the circuit court and the Commission erred in ruling the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund. We disagree.

"A release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). The primary objective in construing a contract is to ascertain and give effect to the intention of the parties. *Id.* "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Id.* (quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)). "To discover the intention of

a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Id.* at 498, 649 S.E.2d at 501. "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Id.* at 498, 649 S.E.2d at 502. "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). If the court decides the language is ambiguous, "evidence may be admitted to show the intent of the parties," and the determination of the parties' intent is a question of fact. *Id.* at 623, 550 S.E.2d at 303. However, if the language is clear and unambiguous, it is a question of law for the court. *Id.* Ambiguity of a contract is a question of law, which this court reviews de novo. *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020).

The Fund and the Guaranty Association entered into a settlement agreement and release on June 17, 2013. The agreement stated it concerned the Guaranty Association's claims against the Fund for reimbursement from the Fund for payments on behalf of "certain insureds of Legion Insurance Company, in Liquidation and its subsidiaries, including, but not limited to, Villanova Insurance Company" and "Reliance Insurance Company in liquidation, and its subsidiaries, including, but not limited to, Reliance National Indemnity Company, Reliance National Insurance Company, and United Pacific Insurance." The Fund agreed to pay the Guaranty Association $2,900,000 for claims pending against the Fund related to Legion and/or Reliance in exchange for a release of those claims. The agreement stated:

> The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the [Fund] is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential . . . .

The Commission found the plain, clear, and unequivocal language in the agreement reflected that beyond the Legion and Reliance claims as defined therein,

the settlement and release applied only to those claims on which the Fund was paying the Guaranty Association as of February 22, 2013. The Commission further found the record reflected that (1) Lumbermens was not liquidated until May 8, 2013; (2) the Guaranty Association was not paying the claim as of February 22, 2013; and (3) the Fund had not reimbursed the Guaranty Association in connection with the claim. Thus, the plain, clear, and unequivocal language in the settlement agreement and release, and any reasonable construction thereof, did not effectuate a bar to the Guaranty Association's reimbursement claim or release the Fund from its liability for reimbursement on the claim.

The Fund argues the agreement bars the Guaranty Association's claim for reimbursement or otherwise releases the Fund from its liability for reimbursement on the claim. The Fund contends the current claim for reimbursement of workers' compensation benefits paid to Quarles was included in that settlement, and thus, any liability by the Fund for reimbursement was fully released. The Fund asserts Lumbermens was ordered liquidated on May 8, 2013, and the Guaranty Association set up a claim and reserves for Quarles on June 4, 2013, both of which pre-dated the June 17, 2013 effective date of the agreement. It admits the Fund was not paying on Quarles' claim on February 22, 2013, but asserts the Commission erred in finding the release did not apply to that claim. The Fund asserts the Commission failed to recognize the parties' express intent that the release was "general and comprehensive in nature." Next, it asserts the Commission failed to give consideration to the language that the "Parties agree that the terms of this Settlement Agreement and Release are to be given the broadest meaning such that the interpretation and construction do substantial justice to the intent of the Parties." Finally, it asserts the Commission erred in focusing on the phrase, "on which the [Fund] is currently paying the Guaranty Association as of February 22, 2013," and concluding any other claims that existed or came into existence after that date were beyond the scope of the release and only claims already known to the Fund and on which payments were being made by February 22, 2013, fell within the scope of the release. The Fund argues that by interpreting the language in a limited manner, the Commission failed to apply the "broadest meaning" as the parties agreed was proper, which was that claims that were not even known or existing as of February 22, 2013, as well as claims on which payments were not being made as of that date, were intended to be included within the scope of the release.

Viewing the agreement as a whole, we find the plain, clear, and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims, the settlement and release applied only to those claims on which the Fund was paying the Guaranty Association as of February 22, 2013, and the Guaranty Association was not paying Quarles' claim as of that date. Thus, we agree with the circuit court and the Commission that the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Dent, Appellant.

Appellate Case No. 2018-001257

Appeal From Beaufort County
Alex Kinlaw, Jr., Circuit Court Judge

Opinion No. 5850
Heard February 11, 2021 – Filed August 18, 2021

REVERSED AND REMANDED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

WILLIAMS, J.: In this criminal matter, Charles Dent appeals his convictions for first degree criminal sexual conduct (CSC) with a minor and disseminating obscene material to a minor. We reverse and remand for a new trial.

FACTS/PROCEDURAL HISTORY

In August 2014, Dent was arrested at his home in Alabama for various charges stemming from alleged sexual abuse of his granddaughter (Victim).[1] At the time of the alleged abuse, Victim lived in South Carolina with her mother and brother, and Dent would periodically stay with them.

In May 2014, Mother began dating John Camelo. Thereafter, Victim made an initial disclosure of abuse by Dent to Camelo. Camelo notified Mother, and Mother reported the abuse to law enforcement. Thereafter, Victim underwent a forensic interview at Hopeful Horizons regarding her initial disclosure. Following the interview, Victim made a second disclosure of abuse by Dent to Camelo and subsequently completed a second forensic interview.

A Beaufort County grand jury indicted Dent with two charges of first degree CSC with a minor and two charges of disseminating obscene material to a minor. Following a trial in May 2018, a jury found Dent guilty of both dissemination charges and one charge of first degree CSC, and the trial court sentenced him to an aggregate term of thirty years' imprisonment. Dent moved for a new trial, and the court denied his motion. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews the underlying matter for an abuse of discretion, which occurs when the findings of the trial court lack evidentiary support or are controlled by an error of law. *State v. Hopkins*, 431 S.C. 560, 568–69, 848 S.E.2d 368, 372 (Ct. App. 2020).

LAW/ANALYSIS

Dent contends the trial court erred in failing to charge the jury with the requested circumstantial evidence instruction established by *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). We agree.

[1] Dent also faced charges in Alabama for child pornography.

In *Logan*, our supreme court held that trial courts "should" instruct the jury with the following circumstantial evidence charge when requested by the defendant. *Id.* at 99, 747 S.E.2d at 452.

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

Id. (emphasis added).

"When requested, the *Logan* charge *must be given* in cases based in whole or part on circumstantial evidence." *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020) (emphasis added).

> Over the years, the circumstantial evidence charge in South Carolina has evolved significantly. In relevant part, it was initially required that circumstantial evidence point conclusively to the guilt of the accused to the

> exclusion of every other reasonable hypothesis. Subsequently, in response to guidance from the Supreme Court of the United States, the [c]ourt removed this requirement, instead ordering trial courts to instruct juries that circumstantial evidence must be given the same weight and treatment as direct evidence (the *Grippon*[2] charge).
>
> However, in *Logan*, the [c]ourt posited that there are different approaches used to analyze direct and circumstantial evidence. . . . Therefore, we held the trial court "should" give the specific charge provided in the *Logan* decision, . . . , when requested.

Id. at 371–72, 845 S.E.2d at 502 (citations and footnotes omitted). "Th[e *Logan*] holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* . . . . However, trial courts *may not exclusively rely* on that charge over a defendant's objection." *Logan*, 405 S.C. at 100, 747 S.E.2d at 452–53 (emphasis added).

"Notwithstanding the mandatory language in *Logan*, erroneous jury instructions remain subject to an appellate court's authority to 'consider[ ] the trial court's jury charge as a whole and in light of the evidence and issues presented at trial.'" *Herndon*, 430 S.C. at 371, 845 S.E.2d at 501–02 (alteration in original) (quoting *Logan*, 405 S.C. at 90, 747 S.E.2d at 448). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003).

During the charge conference, Dent requested the trial court use the *Logan* charge for the instruction on circumstantial evidence. However, the court failed to do so, charging the jury as follows:

> Now, there are, also, two sources—or two types of evidence, rather. And I'm talking about now is there's direct evidence and circumstantial evidence. Direct

[2] *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997).

> evidence is the testimony of someone who claims to have direct and actual knowledge of a fact, such as an eyewitness. Direct evidence is evidence that if it is believed immediately establishes a fact.
>
> Circumstantial evidence. Circumstantial evidence is indirect evidence. Put another way, circumstantial evidence is proof of a chain of facts from which you could find that another fact exists, even though it has not been proven to you directly.
>
> The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. You may consider both kinds. And there's not a greater degree of certainty required for one over the other.

Following the charge, Dent objected and requested the trial court recharge the jury with the *Logan* instruction. The trial court overruled Dent's objection, finding the charge was sufficient.

We find the trial court erred in failing to grant Dent's request to charge the jury with the *Logan* instruction on circumstantial evidence. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452 ("[D]efendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction."). The evolution of this charge is apparent in our jurisprudence, and our supreme court has unambiguously directed trial courts to use the instruction if requested. *See Herndon*, 430 S.C. at 371, 845 S.E.2d at 501 ("When requested, the *Logan* charge must be given in cases based in whole or part on circumstantial evidence."). Although it is not error for trial courts to use previous iterations of a circumstantial evidence charge, rather than utilizing the *Logan* instruction verbatim, it is mandatory for the trial court to update the charge as necessary. *See Logan*, 405 S.C. at 100, 747 S.E.2d at 452–53 ("Th[e *Logan*] holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* . . . . However, trial courts *may not exclusively rely* on that charge over a defendant's objection." (emphasis added)). Therefore, the trial court additionally erred in failing to supplement the charge, after Dent's renewed objection, to include reference to the requisite connection of circumstantial facts necessary for a

conviction. There was no physical evidence, and the State spent substantial time in summation explaining to the jury that the case was "about circumstantial evidence." Further, the State read part of the trial court's planned charge on circumstantial evidence to the jury, noting that Dent "didn't want to read out the [planned] definition of circumstantial evidence." Considering the circumstantial nature of the evidence, we find these errors prejudiced Dent.[3]

CONCLUSION

Accordingly, we reverse the trial court and remand the matter for a new trial.

REVERSED AND REMANDED.

HILL, J., concurs.

THOMAS, J., dissenting: I respectfully dissent. I find the trial court erred in failing to supplement the jury charge, after Dent's renewed objection, with the requested circumstantial evidence instruction established by *Logan*. However, I find the error committed by the trial court was ultimately harmless. The State's case consisted of direct and circumstantial evidence. While the amount of direct versus circumstantial evidence presented was close, the evidence was not "almost exclusively circumstantial" like in *Herndon*. *See Herndon*, 430 S.C. at 373, 845 S.E.2d at 500-03 (holding the trial court's failure to give the requested *Logan* charge was not harmless error when the State's case against the defendant was "almost exclusively circumstantial"). I also find the trial court's instruction, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 ("A jury charge is correct if, when read as a whole, the charge adequately covers the law."). In *State v. Jenkins*, 408 S.C. 560, 572-73, 759 S.E.2d 759, 766 (Ct. App. 2014), this court found no reversible error in the trial court's jury instruction on circumstantial evidence, applying the harmless error analysis and explaining, "Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary." The *Jenkins* court also found "any

[3] Because this finding is dispositive, we decline to address Dent's remaining issues on appeal. *See State v. Hepburn*, 406 S.C. 416, 428 n. 14, 753 S.E.2d 402, 408 n. 14 (2013) (declining to review remaining issues when its determination of a prior issue was dispositive of the appeal).

error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law." *Id.* at 572-73, 759 S.E.2d at 766; *see Logan*, 405 S.C. at 94 n. 8, 747 S.E.2d at 449 n. 8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)); *see also State v. Drayton*, 411 S.C. 533, 545-46, 769 S.E.2d 254, 261 (Ct. App. 2015) (determining there was no reversible error in the trial court's failure to include the "reasonable hypothesis" language in its circumstantial evidence jury charge when the trial court's instruction "as a whole, properly conveyed the applicable law"), *aff'd in result and vacated in part on other grounds by State v. Drayton*, 415 S.C. 43, 780 S.E.2d 902 (2015); *State v. Lynch*, 771 S.E.2d 346, 358, 412 S.C. 156, 178 (Ct. App. 2015) (finding the trial court did not commit reversible error in refusing Lynch's requested circumstantial evidence charge because his requested charge was based on the "reasonable hypothesis" language, which the supreme court found unnecessary in *Logan*). Therefore, I would affirm the trial court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Xavier Geter, Appellant.

Appellate Case No. 2018-001647

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5851
Heard June 7, 2021 – Filed August 18, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Tommy Evans, Jr., and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

KONDUROS, J.: In this criminal case, Robert Xavier Geter appeals his convictions for the murder of James Lewis (Decedent) and the attempted murder of

Clarence Stone. The events in the case stem from a bar fight between Geter and Decedent. Geter maintains the circuit court erred in charging the jury on transferred intent in relation to the attempted murder charge and in allowing certain testimony from Investigator Joseph Clarke. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

On the night of March 7, 2015, Stone was at a pool room/restaurant, Culler's Pool Hall, located on Monticello Road in Richland County. Stone acted as something of a bouncer for the business, watching out for arguments or other types of trouble or disturbances. According to Stone, he was playing a game of pool when he heard a commotion and went to investigate. He found Decedent and Geter on the floor fighting. Stone broke up the fight and took Decedent outside on a deck behind the building. Decedent wanted to go back inside to get his chain, and Stone indicated he would retrieve it for him. As Stone was preparing to go back inside, Geter came out onto the deck, approaching Decedent and asking "we good?" Then, Geter swung at Decedent and Stone was caught in between the two while attempting to break up the altercation. Geter had a knife and stabbed and killed Decedent. Geter also struck Stone, stabbing him in the eye, causing permanent blindness in that eye.

Geter was indicted on one count of murder and one count of attempted murder. At trial, in opening statements, Geter's attorney indicated Geter had acted in self-defense after several men, including Decedent and Stone, had attacked and beaten him.

Investigator Joseph Clarke, of the Richland County Sheriff's Office, testified after Stone in the State's case and indicated he was the on-call homicide investigator on the night of the stabbing. He testified as follows regarding his investigation of the incident.

> [STATE]: And you were here in opening statements, correct?
>
> [CLARKE]: Yes.
>
> [STATE]: Is that the first time you heard that story?

[CLARKE]: No. Oh, that story?

[STATE]: Yes, the story that he gave about – in opening statements?
[GETER]: Your Honor. I object. Openings are not evidence, so.

THE COURT: Overruled.

[STATE]: His scenario of the facts that Mr. Geter's attorney is now saying happened, is that the first time you have ever heard that?

[CLARKE]: Yes.

. . .

[STATE]: You confirmed that Clarence Stone was also a victim?

[CLARKE]: I did.

[STATE]: And you spoke with him as well?

[CLARKE]: I did. I took a statement at his home.

[STATE]: And he gave a statement of what occurred?

[CLARKE]: He did.

[STATE]: You saw him testify again today?

[CLARKE]: I did.

[STATE]: And was that exactly what he told you?

[GETER]: Objection. Your Honor. Improper vouching.

THE COURT: Overruled. You are asking about the testimony that he gave?

[STATE]: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

[STATE]: The same thing he told this jury happened to him is what he told you?

[CLARKE]: Seems absolutely consistent. Correct.

At the close of the State's case, Geter moved for a directed verdict arguing the State had offered no evidence Geter specifically intended to kill Stone as required by the attempted murder statute. The State contended the necessary intent to establish the attempted murder charge could be transferred based on Geter's intent to kill Decedent. The circuit court agreed and denied the directed verdict motion.

Geter testified in his own defense and indicated he had accidentally stepped on Decedent's foot and when confronted by Decedent, he apologized. While doing so, Stone came over and interfered in their conversation by hitting Geter in the back of the head. Then, according to Geter, Stone and Decedent were beating him pretty severely and he believed several other men were also attacking him. To defend himself, he pulled out his knife and while brandishing it, Decedent and Stone were injured.

At the close of all testimony, Geter renewed his motion for directed verdict which the circuit court denied. Geter objected to the circuit court charging on the doctrine of transferred intent. The circuit court denied the objection and charged the jury as follows:

> Ladies and gentlemen, we'll next talk about the doctrine of transferred intent. If the [d]efendant with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, the law considers that the [d]efendant still had the intent to kill. Intent to kill is a mental state. It exists in the mind. So, if the State proves that a [d]efendant acting with malice

> had the intent to kill one person, but mistakenly injured another, the intent to kill is merely transferred from the original person the [d]efendant attempted to kill to the actual person injured.
>
> Pursuant to the transfer[red] intent doctrine, if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal intent toward the second applies to the third as well.

The circuit court also charged the jury on self-defense. Geter was convicted of murder and attempted murder and sentenced to forty years' imprisonment and twenty years' imprisonment, respectively, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (*quoting Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Likewise, the admission or exclusion of evidence is subject to the discretion of the circuit court. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013). Additionally, any abuse of discretion related thereto is subject to a harmless error analysis. *Id*. at 362, 737 S.E.2d at 501.

LAW/ANALYSIS

I. Transferred Intent and Attempted Murder

Geter argues the circuit court erred in charging the jury on the doctrine of transferred intent to support the attempted murder charge. We agree.

The South Carolina Court of Appeals has twice-answered the first question presented in this appeal—whether the doctrine of transferred intent applies to

attempted murder which requires specific intent.[1] In *State v. Williams*, 422 S.C. 525, 539, 812 S.E.2d 917, 924 (Ct. App. 2018), *aff'd in part as modified, vacated in part*, 427 S.C. 148, 829 S.E.2d 702 (2019), the court concluded "the doctrine of transferred intent is proper to convict a defendant of attempted murder regardless of whether a victim, intended or unintended, suffers an injury." In that case, Williams had fired shots into a trailer in which his intended target and two other people were located. *Id*. This court found:

> Williams misconstrues the attempted murder statute to the extent he argues the statute requires the specific intent to murder specific victims. Williams specifically argues the transferred intent charge erroneously allowed the jury to find Williams guilty of attempted murder of Ycedra and Wrighton without requiring the State to prove (1) Williams knew they were in the [r]esidence and (2) Williams specifically intended to kill Ycedra and Wrighton [unintended targets], in addition to Young. We disagree.

Id.

However, the Supreme Court of South Carolina, based on preservation grounds, vacated the portion of *Williams* that decided the transferred intent question. *State v. Williams*, 427 S.C. 148, 150, 829 S.E.2d 702, 703 (2019). Because the defendant had not appealed the erroneous jury charge indicating attempted murder was a *general* intent crime, the court declined to weigh in. *Id*. "Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred intent and leave for another day the determination of whether the doctrine applies to attempted murder." *Id*. at 157-58, 829 S.E.2d at 707. In spite of declining to address the merits of the issue, the court offered more insight in a footnote to the opinion.

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[1] "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).

> [W]e find the doctrine of transferred intent unnecessary to sustain the convictions for the attempted murders of Young and Wrighton. Petitioner was alleged to have specifically intended to kill Young the night of the shooting, and to have shot at the door where Wrighton stood, intending to kill the figure in the doorway. It matters not that Petitioner may have been unaware it was Wrighton in the door, rather than Young. Simply put, Petitioner *intended* to shoot the person (Wrighton) who appeared in the doorway. As a result, we alternatively sustain Petitioner's convictions for the attempted murders of Young and Wrighton without resort to the doctrine of transferred intent. Because Petitioner was sentenced to three concurrent twenty-year sentences, reversing his conviction for the attempted murder of [Ycedra[2]] would have no effect on the length of Petitioner's term of imprisonment, and we decline to do so, particularly given that the case was tried as if attempted murder was a general-intent crime.

Id. at 158 n.9, 829 S.E.2d at 707 n.9.

In *State v. Smith*, 425 S.C. 20, 32, 819 S.E.2d 187, 193 (Ct. App. 2018), *rev'd and remanded*, 430 S.C. 226, 845 S.E.2d 495 (2020), the court of appeals was again presented with the opportunity to consider the doctrine of transferred intent and attempted murder. The court concluded the doctrine of transferred intent could provide the specific intent to support the charge. *Id*. at 32, 819 S.E.2d at 193. It stated "[t]he foregoing evidence shows Appellant's unjustified, specific intent to kill at least one of the three men he encountered. Further, the State showed specific intent *as to Victim* [not one of the three men] through the doctrine of transferred intent." *Id*. As it had done in *Williams*, the supreme court declined to adopt the court of appeals' position on the issue. The supreme court stated:

> Smith also contends the court of appeals erred in finding the doctrine of transferred intent applied to attempted

[2] We refer to the third person in the trailer, Ycedra Williams, as Ycedra to avoid confusion with the defendant.

> murder because it is a specific-intent crime. In particular, Smith argues the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person.* Smith points out the "State elected to prosecute [him] for the attempted murder of [the victim] instead of the attempted murder of [the men in the rival group]," and he "was not tried (nor has ever been tried) for any crime related to [the rival group]." We need not address this issue because the prior issues are dispositive. *Nonetheless, we note the State indicated that—were the [c]ourt to reverse Smith's convictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and, thus, there would be no question on remand as to the applicability of the doctrine of transferred intent.*

Id. at 234, 845 S.E.2d at 499 (emphasis added)(citation omitted).

Jurisdictions are split over whether transferred intent can be applied in attempted murder cases. In jurisdictions finding transferred intent applies in attempted murder cases, the rationale is largely based in public policy and reflects the logical extension of the of transferred intent doctrine in murder cases. In other words, if transferred intent applies to convict a killer of an unintended murder, why should a bad actor have lesser consequences simply because the unintended victim did not die? *See e.g. People v. Ephraim*, 753 N.E.2d 486, 496 (Ill. App. Ct. 2001) ("It is well established that in Illinois, the doctrine of transferred intent is applicable to attempted murder cases where an unintended victim is injured."); *State v. Gilman*, 69 Me. 163, 171 (1879) (applying transferred intent to ensure defendants are punished for their actions not the results); *Ochoa v. State*, 981 P.2d 1201, 1205 (Nev. 1999) (finding no reason not to apply transferred intent in case where intended victim died and unintended victim was wounded because although charges differed the intent was the same); *State v. Ross*, 115 So. 3d 616, 621 (La. App. 2013) ("Applying the doctrine of transferred intent to the facts of this case, Mr. Ross's specific intent to shoot Ms. Cloud was transferred when he accidentally also shot Ms. Peters and Mr. Newman" and the extent of their injuries was

inconsequential); *State v. Fennell*, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.").[3]

On the other hand, some jurisdictions require a specific, intended victim to support an attempted murder charge. Those jurisdictions generally maintain that a person cannot be guilty of "attempting" to do an act he did not intend to do [injuring B while attempting to kill A] and public policy did not require extending the doctrine to punish or deter bad actors. *See Cockrell v. State*, 890 So. 2d 174, 181 (Ala. 2004) ("Applying the foregoing rules of construction, we conclude that the statute defining 'attempt' does not clearly evince a legislative intent to apply the doctrine of transferred intent—applicable only to the completed crime of murder—to punish as attempted murder the consequences of an unintended, nonfatal result."); *Ramsey v. State*, 56 P.3d 675, 681 (Alaska Ct. App. 2002) (finding the jury would have to conclude the defendant intended to kill the injured victim to convict her of attempted murder and could not rely upon transferred intent); *People v. Falaniko*, 205 Cal. Rptr. 3d 623, 631 (2016) ("[B]ecause '[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences,' the shooter who fails to kill the unintended victim cannot be convicted of attempted murder under a theory of

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[3] In *Fennell*, 340 S.C. 266 at 277, 531 S.E.2d at 518, the court found transferred intent applied to a charge of assault and battery with intent to kill (ABWIK). ("We hold that the doctrine of transferred intent may be used to convict a defendant of AB[W]IK when the defendant kills the intended victim and also injures an unintended victim."). However, ABWIK was a general intent crime. *See State v. Foust*, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) ("As this [c]ourt has recognized that a specific intent is not required to commit murder, the logical inference is that, likewise, a specific intent is not required to commit AB[W]IK."). Therefore, the analysis in *Fennell* cannot be considered determinative of this issue as the court has specified attempted murder is not the codification of ABWIK and does require specific intent. *State v. King*, 422 S.C. 47, 63-64, 810 S.E.2d 18, 26-27 (2017) ("Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element.").

transferred intent." (quoting *People v. Bland*, 48 P.3d 1107 (Cal. 2002)); *State v. Hinton*, 630 A.2d 593, 602 (Conn. 1993) ("[T]he rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder."); *State v. Brady*, 903 A.2d 870, 882-83 (Md. 2006) (finding "if a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply");.

After considering South Carolina jurisprudence, as well as that from other jurisdictions, we conclude the circuit court erred in charging transferred intent as to the attempted murder charge.[4] To support that charge, the State must demonstrate Geter attempted to kill Stone, and that was not the State's theory of the case. So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim. Furthermore, from a public policy standpoint, the supreme court has strongly suggested in both *Williams* and *Smith* that the lesser offense of ABHAN in cases such as this would serve as an appropriate punishment for the accused.

Based on all of the foregoing, we conclude the circuit court erred in charging transferred intent in this case, and we reverse Geter's conviction for attempted murder.

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[4] We recognize this court has essentially drawn the same conclusion in the recent case of *State v. James Caleb Williams*, Op. No. 5835 (S.C. Ct. App. filed July 14, 2021) (Shearouse Adv. Sh. No. 24 at 21). However, certain facts in the two cases are distinguishable. Because Williams was acquitted of attempting to murder his "target," the majority in *Williams* concluded no intent existed that could be transferred to the unintended recipient of Williams's bullet. In the case sub judice, Geter was convicted of Decedent's murder. Therefore, because disposition of this case is *wholly* dependent on finding the transferred intent charge *never* applies to sustain an attempted murder charge, we conduct a full analysis rather than exclusively relying on *Williams*, even though much of the analysis follows the same rationale.

II. Testimony of Investigator Clarke

Geter contends the circuit court erred in allowing Investigator Clarke to testify that Geter's opening statement to the jury was the first time he had heard the defense's "scenario of the facts" and that Stone's pretrial statement and testimony were "consistent." We agree in part.

The objection to Investigator Clarke's statement that he first heard Geter's scenario of the facts during opening statements is not preserved for our review. Geter did not object to the question on the ground of bolstering but only noted opening statements are not evidence. Consequently, the point is not preserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal.").

The second statement—that Stone's prior statement to Investigator Clarke was consistent with his trial testimony—is troubling. In *State v. Chappel*, 429 S.C. 468, 837 S.E.2d 496 (2000), our supreme court outlined the elements to be examined when determining whether a witness is improperly bolstering another witness's testimony. This court decided the testimony of a witness is improper bolstering if:

> (1) the witness directly states an opinion about the [other witness]'s credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the [other witness]'s credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth.

Id. at 77, 837 S.E.2d at 501.

"Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Investigator Clarke did not *directly* comment on the veracity of Stone's testimony. By definition, consistent does not necessarily mean truthful, but it does mean "free from variation or contradiction,"[5] thus creating the impression of accuracy and truthfulness. The question serves no other purpose than to bolster Stone's trial testimony and puts an improper imprimatur on Stone's testimony as truthful. Notably, Stone's prior statement would not have been admissible to prove it was consistent with this trial testimony unless Geter had suggested Stone's trial testimony was a recent fabrication.[6] Therefore, it was inappropriate for Investigator Clarke to opine as to the consistency of Stone's testimony with his prior statement.

Nevertheless, any error in allowing Investigator Clarke's testimony is subject to a harmless error analysis. *See State v. Reyes*, 432 S.C. 394, 405-06, 853 S.E.2d 334, 340 (2020) (conducting a harmless error analysis in an appeal premised on improper vouching); *see also State v. Kelly*, 343 S.C. 350, 369-70, 540 S.E.2d 851,

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[5] *See* Merriam-Webster.com/dictionary/consistent (defining consistent as "marked by harmony, regularity, or steady continuity; free from variation or contradiction").

[6] To admit a prior consistent statement at trial:

> (1) the declarant must testify and be subject to cross-examination,
> (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
> (3) the statement must be consistent with the declarant's testimony, and
> (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001); *see id.* (explaining Rule 801(d)(1)(B), SCRE, changed South Carolina's common law to make a prior consistent statement admissible as substantive evidence).

860-61 (2001) (conducting a harmless error analysis after finding a witness had improperly vouched for another witness and suggested an imprimatur from the State) *rev'd and remanded on other grounds*, 534 U.S. 246, (2002). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial. [O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *Reyes*, 432 S.C. at 406, 853 S.E.2d at 340 (citations omitted).

In this case, all of the eyewitnesses' testimony was consistent and the forensic evidence in the case matched a version of events in which Geter was the final aggressor outside on the deck that evening, acting out of revenge rather than self-defense. Additionally, the circuit court instructed the jury that it was charged with determining the credibility of the witnesses in the case. It charged "[n]ecessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth." This instruction did not nullify Investigator Clarke's improper statement but mitigated its impact. *See id*. at 408-09, 853 S.E.2d at 342 (explaining any bolstering of a minor witness's credibility was cured by, among other things, the court's instruction that the jury was the sole arbiter of credibility). Accordingly, we find even though the circuit court erred in allowing Invesitgator Clarke's statement, the error was harmless.

CONCLUSION

Based on the foregoing, we find the circuit court erred in charging the jury on transferred intent. This finding mandates the reversal of Geter's conviction for attempted murder. Additionally, we conclude the circuit court erred in admitting Investigator Clarke's statement regarding the consistency of Stone's testimony with his prior statement. However, this error was harmless under the facts of this case. Nevertheless, we caution the State against eliciting such improper testimony. Because the reversible error in this case pertains only to Geter's conviction for attempted murder, his conviction for Decedent's murder is sustained.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MCDONALD, J., concurs.

GEATHERS, J., concurring in part and dissenting in part: I agree with the majority that the challenged testimony of Investigator Clarke did not contribute to the verdict and, therefore, its admission was harmless beyond a reasonable doubt. However, I respectfully depart from section I of the majority's analysis concerning the status of our state's jurisprudence as to transferred intent. This court previously addressed this status in *State v. Smith*, 425 S.C. 20, 32–34, 819 S.E.2d 187, 193–94 (Ct. App. 2018), *rev'd on other grounds*, 430 S.C. 226, 845 S.E.2d 495 (2020). While our supreme court reversed our decision to affirm Smith's attempted murder conviction on other grounds, there is nothing to indicate that the court rejected our interpretation of its jurisprudence as to transferred intent. Therefore, I stand by that interpretation. Accordingly, I would affirm not only Geter's murder conviction but also his attempted murder conviction.