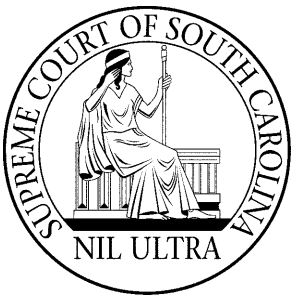

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 22, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Human Affairs Commission, Appellant,

v.

Zeyi Chen & Zhirong Yang, Respondents.

Appellate Case No. 2018-001879

Appeal from Charleston County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
The Honorable J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 27988
Submitted October 15, 2019 – Filed July 22, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Randy Alexander Pate II and Lee Ann Rice, of South Carolina Human Affairs Commission, of Columbia; and Karl S. Bowers, of Bowers Law Office, LLC, of Columbia; for Appellant.

Zeyi Chen and Zhirong Yang, of Charleston, *pro se* Respondents.

CHIEF JUSTICE BEATTY: The South Carolina Human Affairs Commission (the Commission) brought this action against Zeyi Chen and Zhirong

Yang (Respondents), alleging they violated the South Carolina Fair Housing Law (Fair Housing Law)[1] by discriminating against a prospective tenant. The Commission appeals circuit court orders (1) denying the Commission's motion pursuant to Rule 43(k), SCRCP to enforce the parties' settlement agreement; (2) finding certain information was obtained by the Commission during the conciliation process and was, therefore, subject to orders of protection and inadmissible under S.C. Code Ann. § 31-21-120(A) (2007) of the Fair Housing Law; and (3) ultimately dismissing the Commission's action based on a finding section 31-21-120(A) is unconstitutional and the entire statute is void. We affirm in part, reverse in part, and remand.

I. FACTS

The Commission brought this action against Respondents in 2014 alleging discrimination based on familial status in violation of the state's Fair Housing Law.[2] The action was based on a complaint received from Stacy Woods, who reported that she responded to an ad on Craigslist for a rental residence in Mount Pleasant and was told it was not available. Woods maintained she was refused the rental property because she had a four-year-old daughter.

The property is a commercial building owned by Respondents that contains a skin care and acupuncture clinic. There are additional rooms over the business that Respondents offered for rent, although the rooms did not have full kitchens and bathrooms inside the premises. In several responses to the complaint (deemed "position statements" by the Commission), Respondents denied the allegation of discrimination. They stated the premises had already been rented when Woods came to view it, and Woods was informed of this fact. Respondents also advised the Commission that the rental property was not suitable for a young child due to the lack of ready access to facilities and the fact that it was above the clinic, where clients came for treatment in a quiet atmosphere.

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[1] S.C. Code Ann. §§ 31-21-10 to -150 (2007 & Supp. 2019).

[2] *See* S.C. Code Ann. § 31-21-30(6)(a) (2007) (defining "familial status" to mean one or more individuals who are under the age of eighteen and domiciled with a parent, another person having legal custody, or a designee); *id.* § 31-21-40(2) (providing it is unlawful to discriminate against any person in the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin).

The parties agreed to engage in mediation pursuant to the South Carolina Alternative Dispute Resolution Rules (SCADR). On March 24, 2016, the parties entered into a settlement agreement.[3] Respondents did not admit liability but agreed to comply with the Fair Housing Law in the future, participate in one free training session on fair housing principles, display a Fair Housing Law poster on their rental property, and pay $9,500 to the Commission. The settlement agreement, which was prepared by the mediator, further provided, "These terms will be reduced to a formal Consent Order to be executed by all of the parties, which shall be a public document." A separate signature page was attached containing lines for four signatures: the Commission, Woods (the aggrieved person), Respondent Chen, and Respondent Yang, all of whom signed (one of the Commission's attorneys signed on behalf of the Commission). There was no signature line for Respondents' counsel, who did not sign the agreement.

The mediator promptly filed a Proof of ADR or Exemption form with the circuit court, indicating the matter had been settled in full and that the parties would soon be filing a consent order. The Commission prepared a consent order and emailed it to Respondents' counsel for counsel's signature. In a series of emails, the Commission followed up several times, and one of Respondents' attorneys stated he was reviewing the proposed order and would be back in touch. However, Respondents' counsel thereafter informed the Commission in a telephone call that "he was having difficulty getting his clients [Respondents] to comply with the settlement agreement."

When Respondents' counsel failed to execute the consent order, the Commission filed a motion to compel enforcement of the settlement agreement pursuant to Rule 43(k), SCRCP. The circuit court (Judge Benjamin H. Culbertson presiding) denied the motion in an order filed November 15, 2016.

In 2017, the Commission moved for partial summary judgment on two of the claims pending in the circuit court, (1) that Respondents discriminated in the terms, conditions, or privileges of the rental of a dwelling on the basis of familial status; and (2) that Respondents made, printed, published, or caused to be made, printed, or

[3] In addition to the mediator, those present included attorneys Lee Ann Rice and Alex Pate for the Commission; Woods; Respondents; and Respondents' then-counsel, Ian R. O'Shea and Jim Leffew.

published, any notice, statement, or advertisement with respect to the rental of a dwelling with an intention to make a preference, limitation, or discrimination based on familial status. *See* S.C. Code Ann. § 31-21-40(2), (3) (2007).

A hearing on the Commission's motion for partial summary judgment was held in the circuit court in October 2017 (Judge J.C. Nicholson Jr. presiding). Respondents made a motion for a protective order on the basis the Commission's memorandum supporting summary judgment contained confidential and inadmissible information from conciliation efforts that could not be made public or used as evidence based on section 31-21-120(A) of the Fair Housing Law, which provides "[n]othing said or done" during informal endeavors such as conciliation may be disclosed without the consent of the parties. *See* S.C. Code Ann. § 31-21-120(A) (2007) ("If the commission decides to resolve the complaint, it shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. . . . *Nothing said or done in the course of the informal endeavors may be made public or used as evidence* in a subsequent proceeding under this chapter without the written consent of the persons concerned. An employee of the commission who makes public any information in violation of this provision is guilty of a misdemeanor punishable by a fine of not more than two hundred dollars or imprisoned for not more than thirty days." (emphasis added)). The Commission sought clarification of what information was to be protected on the basis it was "said or done" in the course of conciliation, and the parties were given the opportunity to submit logs of what they believed fell within the confines of the statutory conciliation process.

The circuit court subsequently denied the Commission's motion for partial summary judgment in a form order filed November 8, 2017. After reviewing the document logs submitted by the parties, the circuit court filed a Sealed Protective Order on February 8, 2018, protecting certain materials deemed to be conciliation materials from public disclosure and/or use at trial.

Both the Commission and Respondents filed motions for reconsideration. Upon further review of the materials, the circuit court *sua sponte* requested additional memoranda from the parties as to whether the statute itself, section 31-21-120(A), and/or the manner in which the Commission administered it violated Respondents' rights to due process. The circuit court held a hearing on the motions for reconsideration in April 2018. At that time, the parties presented arguments

regarding which of the materials they believed were related to conciliation and the court's question regarding due process.

On May 15, 2018, the circuit court issued an order substantially expanding the scope of its original protective order. The circuit court found the Commission violated section 31-21-120(A) by having inconsistent interpretations of what constituted conciliation and by commingling its investigative and conciliation efforts. The circuit court stated although dismissal of the claims was not appropriate, "an unfavorable evidentiary ruling [was] necessary to deter future actions of this nature" and ruled the Commission was "barred from using or making public any material contained in its conciliatory file, its investigative file, the attached logs submitted by [Respondents], and any material covered by [the] previous Protective Order that is not covered by this Order." The circuit court stated the information was not admissible in any future hearings. However, it summarily found that "neither the statute nor the manner in which it was administered violated [Respondents'] rights to due process of law."

Respondents filed a second motion for reconsideration that pertained solely to the constitutional issues raised *sua sponte* by the circuit court. Respondents asked the circuit court to amend its order to address the unconstitutional vagueness of the statute, asserting the court did not fully address why it ruled neither the statute nor the Commission violated their due process rights. Respondents contended the circuit court's finding there was no violation of due process was inconsistent with its other determinations, and they asked the court to either declare the statute unconstitutionally vague or provide clarification as to its reasoning regarding due process.

The circuit court granted Respondents' motion for reconsideration. The circuit court acknowledged that it raised the constitutional concern *sua sponte* and ruled upon it for the first time in the order of May 15, 2018. It additionally acknowledged that, "[w]hile the matter [was] not positioned as a motion dispositive of the entire case, . . . the effect of rendering the statute [the Commission's] claims rely on void-for-vagueness would be dispositive of the case." Upon examining section 31-21-120(A), the circuit court found it was unconstitutionally vague and that the remainder of the statute could not operate without subsection (A), so all of section 31-21-120 was rendered void. As a result, the circuit court dismissed the Commission's action in its entirety.

II. DISCUSSION

The Commission argues the circuit court erred in issuing orders (1) denying its motion to enforce the settlement agreement under Rule 43(k), SCRCP; (2) finding extensive portions of the Commission's file was inadmissible because it was obtained from the statutorily prescribed conciliation process, and substantially expanding that exclusion in a second order; and (3) dismissing the Commission's action in its entirety after finding section 31-21-120(A) of the Fair Housing Law was unconstitutionally vague and the statute as a whole was void.

A. Order Denying Enforcement of Settlement Agreement

The circuit court denied the Commission's motion for enforcement of the settlement agreement after concluding the agreement did not satisfy the requirements for enforcement set forth in Rule 43(k), SCRCP. Specifically, the circuit court found Rule 43(k) requires the signatures of the parties *and* their counsel, but Respondents' counsel did not sign the agreement. The circuit court rejected the Commission's argument that strict compliance with Rule 43(k) was not required because the parties admitted the agreement was signed by them in the presence of counsel. The circuit court found Rule 43(k) provides several avenues for enforcement of a settlement agreement, and parties may withdraw their assent any time before one of the alternatives for obtaining enforcement is met. We agree with the circuit court's ruling.

Rule 43(k) provides in relevant part as follows:

> No agreement between counsel affecting the proceedings in an action *shall be binding unless* [1] reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or [2] unless made in open court and noted upon the record, or [3] *reduced to writing and signed by the parties and their counsel*.

Rule 43(k), SCRCP (emphasis added).

Rule 43(k) is applicable to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 535 (1995). "Like former Circuit Court Rule 14 on which it is based, Rule 43(k) is intended to prevent disputes

as to the existence and terms of agreements regarding pending litigation." *Id.* at 493–94, 458 S.E.2d at 534.

In a footnote in *Ashfort*, the Court stated, "The rule does not apply where the agreement is admitted or has been carried into effect." *Id.* at 494 n.1, 458 S.E.2d at 534 n.1. We subsequently held in *Farnsworth*, however, that the footnoted statement in *Ashfort* is "dictum" that "does not comport with the language of Rule 43(k)." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006). We explained that, "[i]n interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Id.* (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "The rule is plainly worded: 'No agreement . . . shall be binding unless' one of the [stated] requirements is met." *Id.* (omission in original). Thus, Rule 43(k) is applicable even if the agreement has been admitted. We observed that "an agreement is non-binding until a condition is satisfied," and "[u]ntil a party is bound, she is entitled to withdraw her assent."[4] *Id.* at 637, 627 S.E.2d at 725.

In *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006), we adhered to this interpretation. There, the parties (husband and wife) engaged in court-ordered mediation and signed an agreement. It was undisputed that the husband gave the wife a check for $5,000 and paid her a monthly sum of $1,500 from 1997 to 2003. However, the signed agreement was never formally entered in the family court record. Later, the agreement was not available for review, and the parties disputed the exact terms of their agreement. This Court affirmed the family court's denial of the husband's request to enforce the agreement under Rule 43(k), stating, "Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRCP, plainly provides that the agreement is unenforceable." *Id.* at 322, 635 S.E.2d at 78 (Rule 43(k) then provided these alternatives for enforcement).[5]

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[4] In *Farnsworth*, the plaintiff authorized her attorney to offer a written settlement agreement to the defendant, and the defendant's attorney accepted the offer in writing, but the plaintiff changed her mind and decided she wanted a trial before the agreement was entered in the record. 367 S.C. at 636, 627 S.E.2d at 725.

We rejected the husband's argument that Rule 43(k) should not apply where an agreement has been admitted or carried into effect, noting "we recently held that Rule 43(k)'s terms are *mandatory* and that *Ashfort*'s recitation was misguided dicta." *Id.* at 322 n.2, 635 S.E.2d at 78 n.2 (emphasis added) (citing *Farnsworth*). Consequently, "we adhere[d] to the view we adopted in *Farnsworth*." *Id.*

The Commission asserts the circuit court erred in failing to enforce the settlement agreement here because (1) the agreement would be enforceable under general contract principles, as it was signed by the parties, so it should be deemed binding; (2) equitable principles support enforcement, as it is clear the parties agreed to the settlement at the conclusion of mediation and Respondents later changed their minds before the consent order was entered on the record; and (3) public policy supports enforcement because to require strict compliance with the conditions in Rule 43(k) to secure enforcement could lead to mischief, as attorneys could intentionally fail to sign agreements to retain the strategic option of rescinding the agreement at a later date.

As a matter of public policy and to avoid disputes over settlements, Rule 43(k) sets forth several methods for making a settlement agreement binding and enforceable. In this case, the agreement was not yet embodied in a consent order or written stipulation signed by counsel and entered in the record, and it was not made in open court and noted upon the record. Thus, only the last option remained under Rule 43(k)—determining whether the agreement was "reduced to writing and signed by the parties and their counsel."

Where Rule 43(k) applies, this Court has held its terms are mandatory, which precludes a party from turning to contract or equitable principles (or counter public policy arguments) to vitiate those terms. Substantial compliance is not sufficient. The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty. In this case, the next step in the proceeding would have been the entry of a consent order, but Respondents withdrew their assent. The requirements of Rule 43(k) clearly were not met in the current matter for the reasons found by the circuit court. Consequently, we affirm the circuit court's order denying the Commission's motion to compel enforcement of the settlement agreement.

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[5] Rule 43(k) was amended in 2009 to add that a settlement agreement may be enforced if the agreement is reduced to writing and signed by the parties and their counsel. *See* Note to 2009 Amendment, Rule 43(k), SCRCP.

B. Orders of Protection Related to Conciliation Efforts

The Commission asserts the circuit court erred in its interpretation of section 31-21-120(A) by including purely factual information, including some discovery materials, within the scope of its protective orders after finding they were part of the conciliation process. The Commission contends the circuit court declined to give adequate consideration to comparable federal law to aid its decision and gave no deference to the Commission's interpretation. We agree.

This Court has previously held that where state law is based on a substantially similar federal counterpart, cases interpreting those federal provisions or procedures "are certainly persuasive if not controlling" in construing the state provisions. *See Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982) ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation. Thus, Title VII cases [that] interpret provisions or procedures essentially identical to those of the [South Carolina] Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law." (citations omitted)).

Our state's Fair Housing Law is based on a federal counterpart, Title VIII of the Civil Rights Act of 1968 (as amended), the federal Fair Housing Act:

> The federal Fair Housing Act and South Carolina Fair Housing Law prohibit discrimination in the rental of a dwelling based upon a person's race, color, religion, sex, familial status, or national origin. *See* S.C. Code Ann. § 31-21-40 (2007); 42 U.S.C. § 3604 (2012).

SPUR at Williams Brice Owners Ass'n v. Lalla, 415 S.C. 72, 89, 781 S.E.2d 115, 124 (Ct. App. 2015) (citing the United States Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2012); South Carolina Fair Housing Law, S.C. Code Ann. §§ 31-21-10 to -150 (2007 & Supp. 2014)).

Under the federal Fair Housing Act, the Office of Fair Housing and Equal Opportunity (FHEO) of the United States Department of Housing and Urban Development (HUD) is tasked with overseeing the elimination of housing discrimination. *See* 42 U.S.C. § 3608(a) (2012) ("The authority and responsibility for administering this Act shall be in the Secretary of [HUD]."); U.S. Dep't of Housing & Urban Dev., https://www.hud.gov (last visited Jan. 8, 2020)

(describing FHEO's mission to eliminate housing discrimination through the enforcement and administration of federal fair housing provisions).

As part of this oversight, the federal Fair Housing Act requires HUD to engage in conciliation for all housing discrimination complaints to the extent feasible. *See* 42 U.S.C. § 3610(b)(1) (2012) ("During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary [of HUD], the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint."); *see also United States v. Hillman Housing Corp.*, 212 F. Supp. 2d 252, 253 (D.N.Y. 2002) (citing HUD's statutory directive to engage in conciliation when feasible). Conciliation is defined as "the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through *informal negotiations* involving the aggrieved person, the respondent, and the Secretary [of HUD]." 42 U.S.C. § 3602(*l*) (2012) (emphasis added).

The federal Fair Housing Act contains a prohibition on the use of conciliation materials that is nearly identical to the protection afforded "informal endeavors," including conciliation, in section 31-21-120(A) of our state's Fair Housing Law. *Compare* 42 U.S.C. § 3610(d)(1) (2012) ("Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned."), *with* S.C. Code Ann. § 31-21-120(A) (2007) ("Nothing said or done in the course of the informal endeavors may be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned."). Notably, Title VII of the Civil Rights Act of 1964 (as amended) also contains a similar prohibition on the disclosure of conciliation materials in cases of employment discrimination investigated by the Equal Employment Opportunity Commission (EEOC).[6]

Noting the scarcity of South Carolina law on this subject, the Commission cited this Court's pronouncement in *Orr* that federal decisions should be treated as persuasive if not controlling and provided federal authority discussing conciliation and the treatment of factual statements in a variety of contexts for the circuit court's

[6] *See* 42 U.S.C. § 2000e-5(b) (2012) ("Nothing said or done during and as a part of such informal endeavors [of conference, conciliation, and persuasion] may be made public by the Commission [EEOC], its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.").

consideration. *See, e.g.*, *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 193 (2d Cir. 1991) ("Factual statements regarding past events are distinguishable from offers of compromise . . . ."); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1477 (5th Cir. 1992) (holding a letter containing only supporting facts and a denial of the merits of the claim did not constitute conciliation evidence where the letter did not contain an offer of settlement nor a response to an offer of settlement; the court distinguished purely factual material related to the merits of the charge from proposals and counter-proposals made by the parties during an agency's attempt at conciliation). Included among the federal resources was Chapter 11 of HUD's *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* (2005, Version 8024.1 Rev-2), https://hud.gov/sites/documents/80241C11FHEH.PDF (hereinafter HUD Handbook), which contains detailed guidelines on all aspects of the conciliation process undertaken by HUD pursuant to the federal Fair Housing Act.

The circuit court acknowledged the Commission's assertion that the federal authority and state regulations appeared to support the agency's interpretation of conciliation as involving offers of compromise and counteroffers (responses to offers of compromise), but it indicated South Carolina law, not federal law, was most relevant, and it stated it did not believe factual matters were admissible without qualification, noting the HUD Handbook specified that statements made during conciliation were admissible only if they were also discovered outside conciliation. The circuit court disagreed with the Commission's contention that the reference to informal endeavors in section 31-21-120(A) was similar to Rule 408 of the South Carolina Rules of Evidence (SCRE) (regarding offers of compromise), expressing concern that the statute would have no efficacy if the issue was addressed by reference to the evidentiary rule. The circuit court also expressed concern that the Commission's position as to what constituted conciliation material had not been consistent and it had improperly commingled the conciliation and investigative stages in this case.

Federal authorities have drawn an analogy between conciliation and the federal evidentiary rule governing offers of compromise.[7] South Carolina's Rule

[7] *See, e.g.*, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880 & 881 n.6 (5th Cir. 1981) (stating "[t]he obvious purpose of the statute's [42 U.S.C. § 2000e-5(b) of Title VII] prohibition on revealing *statements made or actions taken* during the Commission's [EEOC's] conciliation efforts is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims" and noting

408, SCRE, is identical to the federal evidentiary rule, and it provides that evidence of offers of compromise or the acceptance of offers is generally inadmissible; further, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible," but "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." *See* Notes to Rule 408, SCRE ("This rule is identical to the federal rule.").

In our view, the reference in Rule 408, SCRE, to "conduct or statements made in compromise negotiations" is consistent with the federal statutory definition of conciliation as being informal negotiations among the agency, the aggrieved person, and the respondent to resolve a complaint (42 U.S.C. § 3602(*l*)), the federal statutory prohibition on the disclosure or use of anything "said or done in the course of conciliation" (42 U.S.C. § 3610(d)(1)), this state's statutory prohibition as to anything "said or done in the course of the informal endeavors" (section 31-21-120(A)), as well as the guidelines contained in the HUD Handbook.[8] We note the reference (see *supra* note 7) by the United States Court of Appeals for the Fifth Circuit to a prohibition on "statements made or actions taken" (whether oral or

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"[t]he purpose of the statute is similar to that embodied in the traditional evidentiary rule making offers of compromise and settlement inadmissible," citing Rule 408 of the Federal Rules of Evidence (emphasis added)); *Brooks v. Grandma's House Day Care Ctrs., Inc.*, 227 F. Supp. 2d 1041, 1042–44 (D. Wis. 2002) (ruling an attorney's letter in a Title VII action did not contain statements relating to compromise, settlement, or negotiation and was, therefore, not part of the informal endeavors; the court noted "Congress's intent in prohibiting statements during conciliation efforts was to encourage free and open communication in order to achieve negotiated settlements," and the prohibition "is similar to that embodied in the traditional evidentiary rule making offers of compromise and settlement inadmissible").

[8] *Cf. Mach Mining, LLC v. EEOC*, 575 U.S. 480, 494 (2015) (discussing the limited standard of review applicable to evaluating the EEOC's duty to engage in conciliation and stating due to "the statute's [Title VII's] non-disclosure provision, [] a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.,* statements made or positions taken) during those discussions").

written) during informal negotiations closely approximates the parameters of South Carolina's statute regarding anything "said or done" during the informal endeavors.

The HUD Handbook specifically refers to offers of compromise and counteroffers as part of the conciliation process. *See* HUD Handbook, at 11-6 ("If the parties or their representatives submit documents, which include a mix of conciliation matters and investigative evidence, HUD must make every effort to protect the confidentiality of the conciliation material. For example, if a portion of a complainant's supplemental statement, or a letter from the respondent's attorney *includes proposals or counteroffers of settlement*, the conciliator should mask-over the *conciliation-related passages* and photocopy the documents." (emphasis added)). The HUD Handbook explains that the prohibition on the use, without consent, of information obtained during conciliation does not apply if the same information is discovered outside the conciliation process. *See* HUD Handbook, at 11-3 ("For example, if a respondent makes an admission during conciliation negotiations, the investigator cannot use this admission in his/her recommendation. However, if the respondent makes this same admission in a later deposition, the investigator can use this admission in his/her recommendation.").

The state regulations cited by the Commission are comparable to federal authority discussing the conciliation process, which provide conciliation may occur at any stage in the processing of the complaint.[9] While we agree with the Commission that conciliation may occur at any stage, we note HUD procedures provide items related to conciliation must be properly identified and separated from other materials in order to safeguard the confidentiality of the protected items.

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[9] *See generally* S.C. Code Ann. Regs. 65-225(A)(1), (3) (2012) (stating during the period beginning with the initial filing of a complaint and ending with the filing of a complaint for hearing or dismissal, the Commission will, to the extent feasible, attempt to conciliate the complaint; and, where the rights of those concerned can be protected from improper disclosure, the investigator may suspend fact finding and engage in conciliation efforts); *id.* Regs. 65-225(E)(1) (the Commission may terminate conciliation efforts if it finds a voluntary agreement is not likely to result). These provisions echo the federal procedure. *See* 42 U.S.C. § 3610(b)(1); *see also* https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Informal_Resolution_and (noting HUD encourages the informal resolution of matters, so conciliation efforts may occur at any stage in the processing of the complaint).

The Commission maintains Respondents essentially rejected all attempts at conciliation after they withdrew their initial assent to the settlement agreement. Thus, most of the challenged items were not part of the informal negotiations to settle the claims and they were otherwise discoverable, so they should not have been the subject of the orders of protection and sealed.

We agree with the federal authority that conciliation consists of informal negotiations among the agency, the aggrieved party, and the respondent to resolve a complaint of discrimination. To summarize, offers of compromise and responses to offers are the focus of conciliation, although we caution that informal negotiations to resolve the complaint do not always result in a firm or successful offer, so it is the negotiation process, i.e., the conciliation, that is protected, not just a specific offer. Section 31-21-120(A) protects statements made (whether oral or written) and things done, i.e., conduct, during those informal negotiations in which the parties attempt to resolve the complaint. However, evidence arising through conciliation is not inadmissible if it is also discovered outside the conciliation process. The purpose of the statute is to encourage the resolution of complaints of discrimination without the need for formal litigation, but one may not use the conciliation process to insulate facts or documents that are otherwise subject to discovery through normal means.

We hold the circuit court committed an error of law by failing to give due consideration to comparable federal authority, as we indicated was appropriate in *Orr*, to define and identify conciliation materials, and by failing to give proper deference to the agency's interpretation before issuing multiple protection orders. *See generally City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011) ("An issue regarding statutory interpretation is a question of law."); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (observing an agency's interpretation of statutes entrusted to its administration and its own regulations is entitled to deference unless there are compelling reasons to differ). Moreover, the circuit court acknowledged that much of the material protected by the order of protection was not conciliation material.

While we understand the circuit court's frustration that the Commission's treatment of this case did not provide a model of clarity, the court did not apply an appropriate standard under section 31-21-120(A) and imposed an unwarranted restriction on the Commission's ability to present its case. Consequently, we reverse the orders of protection. The circuit court sealed many of the items challenged by Respondents, so our decision addresses a question of law as to the interpretation of

the statute and is not intended as a comment regarding the ultimate admissibility of any particular items.[10] Rather, the question of admissibility should be evaluated on remand, applying the appropriate standard.

C. Order of Dismissal Based on Constitutionality of Section 31-21-120(A)

The Commission asserts the circuit court erred in dismissing the Commission's claims against Respondents on the basis section 31-21-120(A) of the Fair Housing Law is unconstitutionally vague and the entire statute is void as a whole. We agree.

"This Court has a very limited scope of review in cases involving a constitutional challenge to a statute." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id.* "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* (citing *Westvaco Corp. v. S.C. Dep't. of Rev.,* 321 S.C. 59, 467 S.E.2d 739 (1995)). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Id.* "A possible constitutional construction must prevail over an unconstitutional interpretation." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (citation omitted).

The void-for-vagueness doctrine is primarily a criminal doctrine. *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014). "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Applying this standard, the [Supreme Court of the United States] has invalidated two kinds of criminal laws as 'void for vagueness': laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017).

[10] Because we are reversing the circuit court's order dismissing the action in the next section of this opinion, we have addressed the appeal of the orders of protection.

The Supreme Court has held the void-for-vagueness doctrine is also applicable to civil matters where the rule or standard is so vague and indefinite as to really be no rule or standard at all. *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967); *see also Seniors Civil Liberties Ass'n v. Kemp,* 965 F.2d 1030, 1036 (11th Cir. 1992) ("To find a civil statute void for vagueness, the statute must be 'so vague and indefinite as really to be no rule or standard at all.'" (quoting *Boutilier,* 387 U.S. at 123)). *But cf. In re Treatment of Mays v. State*, 68 P.3d 1114, 1117 (Wash. Ct. App. 2003) (stating "there is no distinction between the vagueness tests applicable to civil and criminal proceedings").

"A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) (citation omitted). "[A]ll the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *Id.* (alteration in original) (citation omitted). "The requirement that statutory language must be reasonably certain is satisfied 'by the use of ordinary terms which find adequate interpretation in common usage and understanding,' or if the term can be given meaning by reference to other definable sources." *Id.* (quoting *In re Maricopa Cty. Juvenile Action Nos. JS-5209 & JS-4963*, 692 P.2d 1027, 1034 (Ariz. Ct. App. 1984) (internal citation omitted by court)).

The Supreme Court has observed that "[t]he precise point of differentiation in some instances is not easy of statement, but" as a general rule, decisions upholding statutes as having sufficient certainty have "rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, or, . . . 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'" *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391–92 (1926) (citations omitted)).

At the hearing in this matter, the circuit court stated that what it meant by its request to address due process and the vagueness of the statute was "the failure to distinguish or set up any guidelines on how you handle conciliation and how you handle investigations separating the two." The circuit court opined there was no way

for the public to know what conciliation means, so its "concern [was] how you administer this statute."

In its written order ruling section 31-21-120(A) was unconstitutional, the circuit court found, in relevant part, that the statute fails to adequately define terms and provide standards as to the statute's application, and "[a] person of common intelligence cannot understand the statute's meaning and application if the Court, attorneys, and [the] agency vested with the statute's enforcement differ in opinion so vastly as to the statute's meaning and application." The court stated it would not defer to the agency's interpretation, finding it was arbitrary, capricious, or manifestly contrary to the statute.

We hold Respondents have not met their heavy burden of proving the statute is unconstitutionally vague. *See Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) ("The party challenging the statute bears the heavy burden of proving that 'its repugnance to the constitution is clear and beyond a reasonable doubt.'" (citation omitted)); *City of Beaufort v. Baker*, 315 S.C. 146, 154, 432 S.E.2d 470, 475 (1993) (stating "the burden rests upon the party challenging constitutionality").

The fact that the attorneys and the circuit court had difficulty agreeing on the meaning of conciliation is not a proper test for determining whether the statute is unconstitutionally vague. As we found in the preceding section of this opinion, the circuit court committed an error of law in failing to give due consideration to the comparable federal cases and guidelines addressing conciliation, as well as the agency's interpretation. The subjective opinions of the parties and the court in this case and the difficulties they encountered in defining conciliation and its parameters are not a sufficient basis for advancement of a constitutional challenge. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535 n.6, 737 S.E.2d 830, 838 n.6 (2012) ("A statute's constitutionality is judged on an objective, not subjective, basis."); *Briggs v. Greenville Cty.*, 137 S.C. 288, 295, 135 S.E. 153, 155 (1926) ("A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its proper construction will not justify us in disregarding it." (citation omitted)). Moreover, the constitutional challenge to the conciliation statute fails under any circumstances in light of federal authority and HUD guidelines on

conciliation that assist in constructing its meaning and application.[11] *Cf. Seniors Civil Liberties Ass'n*, 965 F.2d at 1036 ("Even if the most stringent scrutiny is applied, the statute has the constitutionally required degree of specificity.").

Our finding on this point is dispositive of the constitutional issue, so we need not address the Commission's remaining contentions.[12] Accordingly, we reverse the circuit court's order dismissing the Commission's action based on its findings section 31-21-120(A) is unconstitutional and the statute as a whole is void, and we remand the matter to the circuit court.

III. CONCLUSION

We affirm the circuit court's denial of the Commission's motion to compel enforcement of the parties' settlement agreement. We reverse the circuit court's orders of protection, as well as its order dismissing the Commission's claims, and we remand the matter to the circuit court for further proceedings.

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[11] The circuit court did not specify whether it considered the statute to be criminal or civil, but it appeared to apply the criminal, rather than the higher civil, standard of analysis. Section 31-21-120(A) imposes a criminal penalty on Commission employees for violation of the statute, but it does not specify a penalty for other persons. No issue has been raised in this regard, so we need not consider it further as the constitutional challenge clearly fails under either standard.

[12] The Commission asserts, *inter alia*, that the void-for-vagueness doctrine is not applicable because Respondents were not entitled to due process during the agency's investigative process. Because the high threshold for rendering a statute unconstitutional under the void-for-vagueness doctrine clearly has not been met, we need not address the Commission's remaining contentions. *See generally Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (observing an appellate court need not address remaining issues when the determination of another point is dispositive).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

JUSTICE KITTREDGE: I concur in part and dissent in part. I view the trial court proceedings differently concerning the admissibility dispute over conciliation efforts. In addition, I would vacate the trial court's finding that section 31-21-120(A) of the South Carolina Code (2007) is unconstitutional, but unlike the majority, I would not reach the merits of the constitutional challenge.

I concur with Section II.A concerning the analysis and resolution regarding Rule 43(k), SCRCP. I also concur in result with Section II.B regarding admissibility of evidence related to conciliation efforts. I believe, however, the trial court's analysis was faithful to applicable law concerning the admissibility of conciliation efforts, including the HUD Handbook, which is prominently featured in the majority opinion.

The proceedings below were marked by inconsistency and confusion. The blame falls largely on the South Carolina Human Affairs Commission (the Commission). For example, during one deposition, Commission counsel objected to any discussion pertaining to a document, stating, "I'm going to object to this *in its entirety* in as much as it contains information related to conciliation. . . . [A]nything related to conciliation is only germane to conciliation." (Emphasis added.) Respondents' counsel readily agreed with Commission counsel. Commission counsel then changed course before the trial court and attempted to more finely parse which portions of documents were not part of conciliation. The Commission's changing positions concerning what documents and statements properly fell within the ambit of conciliation efforts caused confusion and frustration for everyone. The trial court nevertheless understood that if information "first obtained during conciliation . . . turns out [to] . . . fall[] within the scope of the standard set forth in Rule 26, then the requesting party [(i.e., the Commission)] is still entitled to production of that information subject to the provisions of this order."

I agree with the majority's decision to remand the matter, but I would require Respondents' motion for a protective order to be vetted further to determine

what constitutes conciliation material and if the conciliation material is otherwise discoverable. If—as the trial court already explained in its order—evidence is discovered outside the conciliation process, it is admissible.

Finally, I note that the trial court *sua sponte* raised the constitutional challenge to section 31-21-120(A) in an order denying reconsideration of the denial of summary judgment. This last-minute timing of the constitutional challenge foreclosed an in-depth review by the trial court. In fact, the majority opinion conducts a far more thorough analysis of the constitutional issue than occurred in the trial court. While the majority may ultimately be correct on the merits, and as explained above, I would vacate the finding of the statute's unconstitutionality and remand for further proceedings as to the scope of the protective order. Under my proposed disposition of this appeal, Respondents may prevail without reaching the issue of the statute's unconstitutionality. On remand, if it becomes necessary to reach the merits of the constitutional challenge, the issue should be more thoroughly examined and addressed *de novo*, unconstrained by the majority's disposition.

For these reasons, I concur in part and dissent in part.

FEW, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Steven K. Alukonis, Appellant/Respondent,

v.

Wayne K. Smith, Jr., Respondent/Appellant.

Appellate Case No. 2017-001441

Appeal From Spartanburg County
Phillip K. Sinclair, Family Court Judge

Opinion No. 5745
Heard February 11, 2020 – Filed July 22, 2020

REVERSED AND REMANDED

Richard H. Rhodes and William Hardwick Rhodes, both of Burts Turner & Rhodes, of Spartanburg, for Appellant/Respondent.

Meliah Bowers Jefferson and Wallace K. Lightsey, of Wyche Law Firm, both of Greenville, for Respondent/Appellant.

Angela Johnson Moss, of the Seventh Circuit Public Defender's Office, of Spartanburg, Guardian ad Litem, pro se.

HUFF, J.: This matter involves cross-appeals over the custody of a minor child (hereinafter, Child) between Steven K. Alukonis, the maternal grandfather (hereinafter, Grandfather), and Wayne K. Smith, Jr., the natural father of Child (hereinafter, Father), following the death of Katelyn Alukonis, Child's natural mother (hereinafter, Kate). Grandfather challenges the family court's award of primary custody to Father and the award of $10,000 in attorney's fees to Father. Father appeals the award of joint custody to Grandfather and the family court's failure to award him all fees and costs expended in this litigation. We reverse the award of primary custody to Father, reverse and remand the award of attorney's fees to Father, and remand for the family court to set a visitation plan for Father.

FACTUAL/PROCEDURAL BACKGROUND

This is a very sad case stemming from a custody action brought about after Child's mother, Kate, committed suicide. Child was born on July 1, 2010, to Kate and Father. The two were never a couple, and Kate travelled back and forth with Child between South Carolina, where Father lived, and her family home in Florida—living in both states for various periods of time. Kate had mental health issues and worked only sporadically. While in both South Carolina and Florida, Grandfather provided financial support for Kate and Child, and also provided emotional and hands on support at all times while the two were in Florida. Grandfather, Kate's sisters, and Kate's step-mother were all very involved in Child's life. Prior to Kate's death, it appears Father engaged in limited interaction with Child, and then only when Child was present in South Carolina. Child was cared for, at times, by Father or his family members while in South Carolina, most often staying at Child's great-grandmother's home. When Kate committed suicide on August 18, 2015, in South Carolina, Father assumed custody of Child. After several encounters with Grandfather and/or his family, Father's family feared they would try to take Child back to Florida and refused to allow Kate's family any contact with Child. Grandfather brought this action and, a few months after Kate's death, he was awarded temporary custody of Child. Following this order, Child lived in Grandfather's home for another nineteen months.

A final hearing on the matter was held March 20-30, 2017. Following the submission of extensive testimony and evidence, the family court noted the amount

of time Child spent living in Florida and in South Carolina.[1] It stated that when Kate and Child resided in Florida, Grandfather provided them with support, care, and a place to live. It found Grandfather would often parent Child when they lived in Florida because Kate was unable to do so. The family court found Grandfather financially supported Kate, and thus indirectly supported Child, while they were in South Carolina as well as in Florida. In addition, Grandfather provided direct financial support for Child while they resided in Florida when Kate was unable to care for Child. Therefore, the court ruled there was "clear and convincing evidence that [Grandfather] is a de facto custodian of . . . [C]hild, as there were periods that [Grandfather] was the primary caregiver for and financial supporter of . . . [C]hild, and that . . . [C]hild resided with [Grandfather] (and . . . [C]hild's mother) for a period of one year or more."

The family court next examined whether Father was unfit to parent Child, citing *Kay v. Rowland*, 285 S.C. 516, 331 S.E.2d 781 (1985), for the proposition that our courts recognize superior rights of a natural parent in a custody dispute with a third party and "[o]nce the natural parent is deemed fit, the issue of custody is decided." The court found Father had a civil, working relationship with the mother of his second child. Although the court noted the status of Father's relationship with the mother of his third child was questionable and his unsettled living arrangement was a concern, it determined this did not render Father unfit as a parent. The court found Father and his family had been involved with Child from shortly after Child's birth to the present. The court recognized Father did not visit Child or send any direct support or gifts to Child while he was in Florida. However, it found even when Kate and Child were in Florida, Father provided health insurance for Child and listed him as a beneficiary on his life insurance policy. It noted Father did not do much in the way of contact or support while Child was in Florida with Kate but found, once Child returned to South Carolina, Father was involved in his life and provided support and contact. The family court observed the text messages between Father and Kate demonstrated Father and his family were involved with Child and that Father provided support and care for Child. Although the court acknowledged Father's delay in responding to Kate was due to the

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[1] The family court initially found that at the time of the filing of this action, Child had spent half his life in Florida and half in South Carolina, but it subsequently amended such to provide Child had spent thirty-five months in Florida and twenty-eight months in South Carolina prior to the filing of this action. This finding is not challenged on appeal.

dynamics of their relationship in that Father was not interested in having a relationship with Kate as she desired, it held Kate and Father "maintained a civil, working relationship for the sake of [Child]." The court discounted the Guardian Ad Litem's (GAL) concerns that Father was not present during Child's birth and did not visit Child while he was in the hospital,[2] explaining Father was unsure of Child's paternity. It similarly found the GAL's concern regarding Child's absence from Kate's memorial service did not impact Father's parental fitness, as this was due to Grandfather's filing of a custody action in Florida and a text message from Kate's sister refusing to assure Father that she and Grandfather did not want to "take" Child, such that Father was fearful Child would not return from Florida. The family court, therefore, concluded Father was a fit and proper parent to Child and found primary custody of Child should be awarded to Father.

The court, however, also found compelling circumstances existed to warrant making both parties joint custodians of Child, with Father the primary custodian and Grandfather the secondary custodian. The family court granted Father final decision-making authority with respect to Child, and noted Grandfather's designation as secondary custodian did not infringe on that decision-making authority. It set an extensive visitation schedule and ordered Father to take Child to grief counseling. The court ordered Grandfather to pay $10,000 of Father's requested $97,210.50 in attorney's fees and costs. It also ordered the parties to pay equal shares of the GAL's fees. Following a hearing on Grandfather's motion for reconsideration and to alter or amend, the family court refused to alter its ruling that Father was a fit parent and denied Grandfather's request for primary custody of Child, explaining, "The Court finds that its determination of compelling circumstances entitles [Grandfather] to expanded visitation with [Child], but does not overcome the superior custody rights of a fit natural parent." These cross-appeals followed.

ISSUES

Grandfather challenges the family court's award of primary custody to Father asserting: the family court erred in finding that Father was a fit parent for custody; the priority of a natural parent to custody of a child over a third party is now a

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[2] There were complications with Child's birth and he developed pneumonia, resulting in a nine-day stay in a neonatal intensive care unit at two different hospitals.

rebuttable presumption; and Grandfather qualified as a psychological parent or de facto custodian such that Child's best interests were for Grandfather to be awarded custody. Grandfather also appeals the award of $10,000 in attorney's fees to Father asserting that he should have prevailed on the custody award and, even assuming the family court properly awarded custody to Father, the subject action was required by Father's refusal to allow Grandfather any contact with Child. Father appeals the award of joint custody to Grandfather asserting: upon finding him to be a fit parent, the family court should have ended its inquiry; and the family court failed to provide an analysis of compelling circumstances that existed to warrant joint custody. Father also appeals the family court's failure to award him all fees and costs expended in this litigation since he prevailed on the issue of custody.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). Thus, this court "has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). "However, this broad scope of review does not require the appellate court to disregard the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Tomlinson v. Melton*, 428 S.C. 607, 611, 837 S.E.2d 230, 232 (Ct. App. 2019). "Therefore, the appellant bears the burden of convincing the appellate court that the family court committed error or that the preponderance of the evidence is against the court's findings." *Id.* at 611-12, 837 S.E.2d at 232.

LAW/ANAYSIS

I. Primary Custody

Grandfather argues the family court erred in denying him primary custody of Child. He asserts that while Father can support Child and safely monitor him during weekend or summer visitation, Father is not fit to be the primary custodian. Grandfather further asserts that even if Father is fit, Grandfather has rebutted the presumption that custody should be with the natural parent. He maintains Father only spent time with Child when it was convenient and showed a lack of interest in Child when Child was in Florida; Father is aloof to Child's emotions and needs and

indifferent to his education and overall development; Father's testimony about his financial support of child is not credible; and there are inconsistencies in Father's and his witnesses' testimonies. Grandfather argues he is the psychological parent of Child and granting him primary custody would be in Child's best interests. He asserts he has been directly involved with the caring and nurturing of Child since birth and Child is very bonded with him. He contends he possesses the ten characteristics of a good parent as set forth by his expert, Dr. Jonathan Gould.

We agree with Grandfather that the family court erred in awarding primary custody to Father. First, the family court may have committed an error of law by relying solely on its finding that Father was a fit parent and, thereafter, failing to consider other compelling circumstances and the best interest of Child in making the primary custody determination. At any rate, in our de novo review, we find clear and convincing evidence of compelling circumstances to warrant our conclusion the family court erred finding Father should receive primary custody over Grandfather.

Without a doubt, a natural parent has superior rights in a custody dispute with a third party. *Kay*, 285 S.C. at 517, 331 S.E.2d at 782. Our supreme court in *Kay* held, "[W]e recognize[] the superior rights of a natural parent in a custody dispute with a third party. Once the natural parent is deemed fit, the issue of custody is decided." *Id*. The court in *Kay* "placed a substantial burden on any third party attempting to take custody over a biological parent." *Moore v. Moore*, 300 S.C. 75, 79, 386 S.E.2d 456, 458 (1989). Additionally, "[g]enerally, there exists a *rebuttable presumption* that the right to custody of a minor child automatically reverts to the surviving parent when the custodial parent dies." *Dodge v. Dodge*, 332 S.C. 401, 410, 505 S.E.2d 344, 348 (Ct. App. 1998) (emphasis added). However, our courts have, since *Kay*, "also recognized that in all custody controversies, including those between natural parents and third parties, the best interest of the child remains the primary and controlling consideration." *Id.* "Indeed, the superior rights of the natural parent must yield where the interest and welfare of the child clearly require alternative custodial supervision." *Id. See also* S.C. Code Ann. § 63-15-230(A) (Supp. 2019) ("The court shall make the final custody determination in the best interest of the child based upon the evidence presented.").

The following criteria should be considered by the courts in determining custody when the claim of a natural parent is involved:

> 1) Whether or not the parent is fit, able to properly care for the child and can provide a good home;
>
> 2) The amount of contact in the form of visits, financial support or both, which the parent had with the child while it was in the care of the third party;
>
> 3) The circumstances under which temporary relinquishment of custody occurred; and
>
> 4) The degree of attachment between the child and the temporary custodian.

Hogan v. Platts, 312 S.C. 1, 3-4, 430 S.E.2d 510, 511 (1993) (citing *Moore*, 300 S.C. at 79-80, 386 S.E.2d at 458). "The rebuttable presumption standard requires a case by case analysis." *Moore*, 300 S.C. at 80, 386 S.E.2d at 458.

Our courts have sanctioned the award of custody to paternal grandparents over a fit parent based upon the best interests of the child. In *Cook v. Cobb*, 271 S.C. 136, 245 S.E.2d 612 (1978), our supreme court emphasized that the best interest of a child is paramount to the legal rights of a parent, stating as follows:

> The rule that obtains in this and practically all jurisdictions at the present day is, that the well-being of the child is to be regarded more than the technical legal rights of the parties, so that, following this rule, it is generally held that the child will not be delivered to the custody of either parent where it is not to its best interest. The right of the parent is not absolute and unconditional. The primary consideration for the guidance of the Court is what is best for the child itself. This is declared not only in specific terms by our statute . . . but it has been so declared time and again by the Court.

Id. at 140-41, 245 S.E.2d at 614-15 (quoting *Driggers v. Hayes*, 264 S.C. 69, 70, 212 S.E.2d 579, 579-80 (1975)). The court "base[d] [its] conclusion affirming custody in the grandparents, not on any inherent or statutory right that they might

have to the custody of grandchildren, but rather on what i[t] regard[ed] to be in the best interests of the child under the facts of th[e] case." *Id.* at 143, 245 S.E.2d at 616.

This court first announced a four-prong test to determine "how a party establishes that he or she is the psychological parent to a child of a fit, legal parent" in *Middleton v. Johnson*, 369 S.C. 585, 595, 633 S.E.2d 162, 168 (Ct. App. 2006). That case involved an action by a non-biological third party seeking visitation of a child. 369 S.C. at 591-92 n.1, 833 S.E.2d at 166 n.1. The facts revealed that Middleton took an active role in the child's life from the time that he was three months old, believing initially that they were biologically related. *Id.* at 589, 833 S.E.2d at 164. When the child was around one year old, Middleton learned he was not the biological father. *Id.* Nonetheless, he continued to love and care for the child with the blessing of the mother, and Middleton and mother essentially entered into a joint custody arrangement. *Id.* When the child was nine years old, the mother terminated all contact between the child and Middleton. *Id.* at 589, 591, 833 S.E.2d at 164, 166. This court reversed the denial of visitation to Middleton, finding overwhelming evidence to reverse the family court's finding that Middleton was not the child's psychological parent. *Id.* at 604, 833 S.E.2d at 172. However, we also cautioned that the decision in *Middleton* did not "automatically give a psychological parent the right to demand *custody* in a dispute between the legal parent and psychological parent," and stated "[t]he limited right of the psychological parent cannot usually overcome the legal parent's right to control the upbringing of his or her child." *Id.*

In *Marquez v. Caudill*, our supreme court affirmed the family court's award of custody of a child to the child's stepfather over the maternal grandmother after the natural mother committed suicide. 376 S.C. 229, 233-34, 656 S.E.2d 737, 739 (2008). In doing so, the court noted our courts recognized the notion of a psychological parent in *Moore*. *Id.* at 241, 656 S.E.2d at 743. The court further approved this court's adoption of the four-prong test in *Middleton* for determining whether a person has become a psychological parent. *Id.* at 241-42, 656 S.E.2d at 743.

> The four-prong test states that, in order to demonstrate the existence of a psychological parent-child relationship, the petitioner must show:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner[']s formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and]
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. at 242, 656 S.E.2d at 743 (quoting *Middleton*, 369 S.C. at 596-97, 633 S.E.2d at 168).

The court in *Marquez* observed that this court in *Middleton* considered the first factor critical "because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child." *Id.* at 242, 656 S.E.2d at 744. The court further stated, "[t]his factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced." *Id.* As to the second prong, the court observed "the requirement that the psychological parent and the child have lived together further protects the legal parent by restricting the class of third parties seeking parental rights." *Id.* at 243, 656 S.E.2d at 744. The court further noted that the last two prongs of the test were the most important of the four prongs "because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child." *Id.* In discussing these prongs, the court declared that the psychological parent must undertake the obligations of parenthood by being affirmatively involved in the child's life, the psychological parent must assume caretaking duties and provide emotional support for the child, and such duties must be done for reasons other than financial gain, thereby guaranteeing that

a paid babysitter or nanny could not qualify as a psychological parent. *Id.* Finally, the *Marquez* court observed this court "noted that when both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life." *Id.*

Utilizing the four-prong test, the *Marquez* court found the child's stepfather met the requirements of a psychological parent and concluded the family court appropriately determined it was in the child's best interest for the stepfather to have custody of him over the maternal grandmother. *Id.* at 245, 656 S.E.2d at 745. Importantly, however, the court recognized that *Marquez* was a custody action between a stepfather and a grandmother and did not involve custody rights of a natural parent. Accordingly, there was no reason to recognize the superior rights of a natural parent. *Id.* Further, the court found the grandmother could not step into her daughter's place, and the grandmother was merely a third party seeking custody. *Id.*

In 2006, our legislature adopted section 20-7-1540 of the South Carolina Code, which has since been replaced by section 63-15-60. S.C. Code Ann. §§ 20-7-1540 (2006) and 63-15-60 (2010). This section is titled "De facto custodian" and provides in pertinent part as follows:

> (A) For purposes of this section, "de facto custodian" means, unless the context requires otherwise, a person who has been shown by clear and convincing evidence to have been the primary caregiver for and financial supporter of a child who:
>
> (1) has resided with the person for a period of six months or more if the child is under three years of age; or
>
> (2) has resided with the person for a period of one year or more if the child is three years of age or older.
>
> Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child must not be included in determining whether the

> child has resided with the person for the required minimum period.
>
> (B) A person is not a de facto custodian of a child until the court determines by clear and convincing evidence that the person meets the definition of de facto custodian with respect to that child. If the court determines a person is a de facto custodian of a child, that person has standing to seek visitation or custody of that child.
>
> (C) The family court may grant visitation or custody of a child to the de facto custodian if it finds by clear and convincing evidence that the child's natural parents are unfit or that *other compelling circumstances exist*.

S.C. Code. Ann. § 63-15-60 (2010) (emphasis added).

While the de facto custodian statute provides for the best interests of the child to prevail by allowing visitation and custody rights to third parties when justified, it recognizes the superior rights of natural parents by requiring of third parties seeking these rights a high standard of proof—clear and convincing evidence[3]—that a natural parent is unfit or there are other compelling circumstances warranting the same. Father does not contest the family court's finding Grandfather was a de facto custodian. Therefore this finding is the law of the case. *See Dixon v. Dixon*, 336 S.C. 260, 264, 519 S.E.2d 357, 359 (Ct. App. 1999) (holding an unappealed finding in a custody matter was the law of the case, as an unchallenged ruling, right or wrong, is the law of the case).

Regardless, under our de novo review, we find clear and convincing evidence that Grandfather is Child's de facto custodian. The record demonstrates Child resided over half his life with Grandfather prior to the commencement of this action and Grandfather was his primary caregiver during this time. When Child was a baby,

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[3] "Clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of 'preponderance of the evidence,' used in most civil cases, and the higher standard of 'beyond a reasonable doubt,' which is required in criminal cases." *Wise v. Broadway*, 315 S.C. 273, 282, 433 S.E.2d 857, 862 (1993) (Toal, C.J., dissenting).

Grandfather helped with whatever Kate needed, changing diapers, bathing Child, administering nebulizer treatments, getting up with Child in the middle of the night, feeding Child, and teaching Kate how to be a parent to Child. When Kate and Child were in Grandfather's home in Florida and Kate was mentally and physically very fragile, Grandfather cared for both Child and Kate. Additionally, when Kate and Child were in South Carolina, Grandfather remained in frequent contact with Kate by way of phone calls and text messages and continued to provide financial support.

Although not required to obtain custody under the de facto custodian statute, we find the evidence also establishes Grandfather was the psychological parent of Child. Turning to the facts of this case, we address the four-prong test adopted by this court in *Middleton*—and affirmatively approved by our supreme court in *Marquez*—used in determining whether a psychological parent-child relationship exists between Grandfather and Child.

The first prong to consider is whether the biological or adoptive parent consented to and fostered the alleged psychological parent's formation and establishment of a parent-like relationship with the child. *Marquez*, 376 S.C. at 242, 656 S.E.2d at 743. We find Kate consented to and fostered Grandfather's parent-like relationship with Child. When Child was a newborn in the hospital, Kate asked Grandfather to be in charge of decision making for Child and Grandfather orchestrated the transfer of Child from one hospital to the other. Once Kate and Child were home with Grandfather in Florida, Grandfather took on the role of primary caregiver. Grandfather's daughter, wife, his neighbors, his friends, and Child's pre-school teacher characterized Grandfather as the father figure for Child while they were in Florida. There is no evidence Father objected to Grandfather's extensive and sustained role in raising Child. Through his own absence from Child's life, Father acquiesced to Grandfather taking on this role. Accordingly, we find Father was "a participant in the creation of the psychological parent's relationship with the child." *Id.* at 242, 656 S.E.2d at 744.

Second, the court must consider whether the alleged psychological parent and the child lived together in the same household. *Id.* at 242, 656 S.E.2d at 743. The trial court found, and it is uncontested, that Child had spent thirty-five months in Florida and twenty-eight months in South Carolina. Thus, the record clearly demonstrates Child lived the majority of his life in Grandfather's home prior to the institution of this action.

Third, the court must look at whether the alleged psychological parent "assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation." *Id.* There is overwhelming evidence Grandfather provided financial support for Child while he was living with Kate in South Carolina and provided direct support while under his roof in Florida, all with no expectation of financial compensation. Further, the evidence is uncontested that Grandfather was often actively involved in the day to day care of Child from birth through the time this action was filed. Specifically, Grandfather was responsible for making medical decisions for Child, feeding, changing diapers, bathing, and potty training Child, administering nebulizer treatments to Child, and getting up with Child in the middle of the night. Grandfather also assumed Kate's responsibilities for Child in Florida when she faced her mental health crises and was unable to care for Child. Additionally, Grandfather took an active role in Child's education and provided emotional support for Child.

Last, the court must look at whether the alleged psychological parent "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature." *Id.* The evidence Grandfather meets this prong is also extremely strong. Testimony from numerous witnesses reveals that by the time this action was filed, Grandfather and Child had a very close relationship and a very clear bond of trust; while Kate and Child were living in Florida, Grandfather was the father figure for Child; Grandfather treated Child like the son he never had; and while Child was in prekindergarten, he verbally identified Grandfather as his father. Further, although Grandfather's expert, Dr. Gould, acknowledged he had not performed an analysis of the nature and quality of Grandfather's relationship with Child before Kate's death, he testified that a child's forming of attachment is a process that occurs over time, and it was unlikely such began at the time of Kate's death given the significant contact Child had with Grandfather. Dr. Gould also testified that he was "absolutely blown away by the quality of interaction and the way [Child] takes to his grandfather," and found the quality of the relationship between the two was "absolutely extraordinary."

Middleton and *Marquez* place greatest importance on the last two prongs, and we find Grandfather has more than demonstrated he met these prongs, undertaking the obligations of parenthood by being affirmatively involved in Child's life, assuming

the day to day caretaking duties, and providing emotional support for Child on a continuing basis. Additionally, we note, as stated in *Middleton* and *Marquez*, "when both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life." *Middleton*, 369 S.C. at 598, 633 S.E.2d at 169; *Marquez*, 376 S.C. at 243, 656 S.E.2d at 744. Because Father abdicated his parental role for much of Child's life prior to Kate's death, we believe he left a void there that was gladly and graciously filled by Grandfather.

If Father and Grandfather were on equal footing, we could resolve the case easily in Grandfather's favor. However, the law is very clear that the parties are not on equal footing. Whether Grandfather is a de facto custodian and/or a psychological parent to Child, Grandfather has a substantial burden to overcome in order to gain custody. *See Moore*, 300 S.C. at 79, 386 S.E.2d at 458 (observing our courts place a substantial burden on any third party attempting to take custody of a child over a natural parent). Father, as the natural parent, has superior rights to Child. *Hogan*, 312 S.C. at 3, 430 S.E.2d at 511. Additionally, there is a rebuttable presumption that the right to custody of Child automatically reverts to him as the surviving parent as a result of Kate's death. *See id.* ("There is a rebuttable presumption that the right to custody of their minor child automatically reverts to the surviving parent when the custodial parent dies."). The fact that one is determined to be a psychological parent does not, by itself, override the rebuttable presumption that it is in the best interests of a child to be in the custody of his biological parent. *See Moore*, 300 S.C. at 80-81, 386 S.E.2d at 459 ("Even though there may exist a psychological parent-child relationship, the mere existence of such a bond is inadequate ground to justify awarding permanent custody to a [non-biological parent]."); *Middleton*, 369 S.C. at 604, 833 S.E.2d at 172 (cautioning that our decision did not "automatically give a psychological parent the right to demand *custody* in a dispute between the legal parent and psychological parent," and stating "[t]he limited right of the psychological parent cannot usually overcome the legal parent's right to control the upbringing of his or her child"). Even so, this presumption is rebuttable, and it requires a case by case analysis. *Moore*, 300 S.C. at 80, 386 S.E.2d at 458. Further, section 63-15-60 makes clear that a de facto custodian *may* receive custody of a child over a natural parent, even if the natural parent is fit, when there are "other compelling circumstances." S.C. Code Ann. § 63-15-60(C) (2010). However, "the best interest of the child remains the primary and controlling consideration in child custody controversies." *Hogan*, 312 S.C. at 3, 430 S.E.2d at 511.

Our courts have identified the following criteria to be considered in determining custody when the claim of a natural parent is involved: (1) Whether or not the parent is fit, able to properly care for the child and can provide a good home; (2) the amount of contact in the form of visits, financial support or both, which the parent had with the child while the child was in the care of the third party; (3) the circumstances under which temporary relinquishment of custody occurred; and (4) the degree of attachment between the child and the temporary custodian. *Hogan*, 312 S.C. at 3-4, 430 S.E.2d at 511; *Moore*, 300 S.C. at 79-80, 386 S.E.2d at 458. While these factors have traditionally been considered in circumstances involving the temporary voluntary relinquishment of custody by a natural parent, we find them instructive in considering whether the presumption in favor of Father as the natural parent has been rebutted and compelling circumstances warrant awarding primary custody to Grandfather. First, while we believe Father may be fit and able to properly care for Child, we are concerned about his ability to provide Child a good home given the instability of Father's living arrangements at the time of the trial. Second, we find Father had very little to no contact with Child and provided limited financial support while Child was under Grandfather's care in Florida. Third, while Father did not technically relinquish custody of Child, he tacitly condoned Child living in Florida under Grandfather's roof for the majority of Child's life and offered no explanation as to why he did not attempt to assume custody or even seek visitation of Child during these times. Fourth, we find the evidence establishes an extremely strong degree of attachment between Child and Grandfather.

Additionally, the record shows Grandfather gladly has taken on the responsibilities of caring for Child, while Father shirked his responsibilities until the filing of this action. From Child's birth on, Grandfather has been the primary source of financial support. Even when Child was with Kate in South Carolina, Grandfather visited and communicated with them often. More importantly, Grandfather has been hands-on in the day to day tasks of caring for a young child while Child resided in his home. Grandfather fed, bathed, and dressed child and took him to school and doctor's appointments. He participated in extracurricular activities with Child such as soccer and Cub Scouts. He worked with Child to ensure his academic success and provided counseling to ensure Child's emotional well-being. For example, when Child initially enrolled in his Florida kindergarten after the November, 2015 temporary hearing, his teacher indicated Child may have to repeat the grade. Child's report card from that time reflected he was not meeting expectations and

had deficits in reading, writing, and mathematics. His teacher testified he was also very shy and withdrawn. However, with Grandfather's help, by May 2016, Child had made dramatic improvement in all areas. At the time of the final hearing, Child was reading above grade level, his math was above level, and he was excelling socially. In addition, Grandfather enrolled Child in a grief counseling program. Child's counselor stated when he began the program he was shy, tentative, and reticent to attend, but over the year he blossomed into a child who felt secure and comfortable and he has benefited from the program. Dr. Gould described the relationship between Grandfather and Child as "among the most extraordinarily positive and healthy I have observed."

On the other hand, Father was largely absent from Child's life during the time he lived in Florida. Father provided limited financial support and never visited him in Florida. Father was a part of Child's life when Child and Kate resided in South Carolina. However, his family seemed to take care of Child more than Father did. Father admitted Child stayed with him only two to three times during the two months Kate and Child lived in South Carolina before Kate's death. Even after Kate died, Child stayed with Father's grandmother—Child's great-grandmother—more than he stayed with Father. Also, tellingly, the text messages between Kate and Father during the last months of Kate's life reveal, while Kate often sought assistance from Father and his various family members in keeping Child, especially after Kate became employed, not one message showed Father actively sought to spend time with Child.[4]

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[4] We further note, although Father testified his disagreements with Kate did not detrimentally affect his co-parenting with her and he denied declining to spend any time with Child during this period, their text messages reflect the contrary. The text messages between Kate and Father reveal a contentious relationship between the two, with Kate displaying attempts to involve Father in her life as well as Child's life; Father often responding rudely, indifferently, or not at all; and Kate often responding to Father with anger. While Father made clear he was not interested in Kate's life and wanted her to only communicate with him regarding matters related solely to Child, the messages reveal Father's refusal to communicate was, at times, to the detriment of Child. In other words, Father put his need to avoid being involved in any way with Kate above the needs of Child. Though Father's affidavit submitted for the temporary hearing stated that he and Kate got along and co-parented Child from the beginning and, after Kate moved back to South Carolina in June 2015, they "continued to get along as always,

We recognize that since the filing of this action, it appears Father committed himself more to parenting Child. Even the GAL, who seemed to favor Grandfather, described Child as flourishing during her observation of Father and his family at a restaurant. She heard Child call Father "dad or daddy" for the first time and she observed Child crawl into Father's lap to watch a video on his phone. She stated "I saw more connection, emotional connection, and he just seems to be doing very well the way the situation is." However, the situation to which the GAL referred was one in which Grandfather had primary custody and Father had visitation. The GAL attributed the improved relationship between Father and Child to the time Child spent in Florida under the care of Grandfather.

We do not discount that Father is a natural parent to Child—whose custodial parent died—and Father qualifies as a fit parent. As previously noted, "[g]enerally, there exists a rebuttable presumption that the right to custody of a minor child automatically reverts to the surviving parent when the custodial parent dies." *Dodge*, 332 S.C. at 410, 505 S.E.2d at 348. Further, as this court observed in *Middleton*, 369 S.C. at 604, 833 S.E. 2d at 172, a psychological parent does not automatically have the right to demand custody in a dispute with a natural parent. Additionally, for a de facto custodian to obtain custody of a child of a fit parent, he must meet the rigorous burden of proving by clear and convincing evidence that compelling circumstances exist to warrant such. S.C. Code Ann. § 63-15-60(C) (2010). However, we must also keep in mind that "in all custody controversies, including those between natural parents and third parties, the best interest of the child remains the primary and controlling consideration," and "the superior rights of the natural parent must yield where the interest and welfare of the child clearly require alternative custodial supervision." *Dodge*, 332 S.C. at 410, 505 S.E.2d at 348.

We acknowledge that in most circumstances, a grandparent or other third party would find it an insurmountable obstacle to obtain custody of a child over a fit, natural parent. However, the record from the final hearing demonstrates that Grandfather established by clear and convincing evidence that compelling circumstances exist to award him primary custody of Child. Our review of the evidence persuades us there is overwhelming evidence primary custody with

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because [they] always did," and they "raised [their] son together," the text messages certainly show otherwise.

Grandfather is in the best interest of Child. Accordingly, we reverse the award of primary custody to Father and grant primary custody of Child to Grandfather.[5]

II. Attorney's Fees

Both Father and Grandfather appeal the award of $10,000 in attorney's fees to Father. Father challenges the sufficiency of the award, arguing the family court erred in failing to award him all fees and costs expended in this litigation since he prevailed on the issue of custody. Grandfather argues that if this court determines he should be awarded custody, the award of attorney's fees should be reversed. He additionally contends, regardless of this court's custody determination, we should reverse the attorney's fees award because Father made this action necessary by denying Grandfather all contact with Child. He also asserts he prevailed in receiving substantial visitation with Child.

"In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] 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). When determining the reasonableness of a fee award, the court should consider the following factors: "(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).

Father's argument that the fees were insufficient is not preserved. While the court recited the factors for deciding whether to award attorney fees, it did not discuss the parties' ability to pay their own fees, their respective financial conditions, or the effect of the fee on each party's standard of living. Further, Father did not file a

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[5] Based upon our determination that primary custody should be awarded to Grandfather, we need not reach Father's appeal of the award of joint custody to Grandfather. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

Rule 59 motion asking the family court to address these factors or asserting the award made was insufficient. Accordingly, we agree with Grandfather this issue is not preserved. *See Buist v. Buist*, 410 S.C. 569, 577, 766 S.E.2d 381, 385 (2014) (stating argument that the family court did not adequately apply the *Glasscock* or *E.D.M.* factors was not preserved when husband's argument in Rule 59(e) motion was not sufficiently specific); *Dodge*, 332 S.C. at 418, 505 S .E.2d at 352-53 ("The father's argument regarding the amount of the [GAL's] fee is not preserved for appeal inasmuch as the father failed to specifically raise the issue in his Rule 59(e), SCRCP, motion for reconsideration."). At any rate, in light of our decision to reverse the award of primary custody to Father, the basis for Father's request for additional fees fails.

Inasmuch as we reverse the family court's custody determination, we find it appropriate to reverse the award of attorney's fees to Father and remand the issue to the family court for consideration of the effects of this appeal. *See Sexton v. Sexton*, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993) (reversing and remanding the issue of attorney's fees for reconsideration when the substantive results obtained by counsel were reversed on appeal). We note, while the family court recited the *E.D.M.* factors in its order, it did not specifically address these factors or make any findings thereon. On remand, the family court should set forth its specific findings of fact as to each of the *E.D.M.* factors in considering an award of attorney's fees, if any, to Father.[6]

CONCLUSION

We hold, under our de novo review, Grandfather met the significantly higher burden required to show primary custody of Child should be placed with him over Father. He rebutted the presumption in favor of Father as the natural parent, and we find clear and convincing evidence that Grandfather is a de facto custodian and compelling circumstances warrant custody of Child being awarded to him. We therefore reverse the award of primary custody to Father and grant primary custody to Grandfather. We remand the case to the family court to set a visitation schedule for Father—in accord with the significant visitation Grandfather agreed in his testimony should be given to Father—as well as to consider Grandfather's testimony concerning his willingness to absorb many of the costs associated with

[6] For example, the family court may consider the expansive visitation awarded to Father, as well as Grandfather's absorption of visitation costs, in its analysis.

Father's visitation. We also reverse and remand the issue of attorney's fees to Father. In recognition of the need to bring stability to Child's living arrangement, we direct the family court to hold the remand hearing as expeditiously as possible.

REVERSED AND REMANDED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Casey Masters, Respondent,

v.

KOL, Inc. d/b/a Kia of Greenville, Appellant.

Appellate Case No. 2017-002259

Appeal From Greenville County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5746
Submitted May 8, 2020 – Filed July 22, 2020

REVERSED AND REMANDED

Bradford Neal Martin and Laura Wilcox Howle Teer, of Bradford Neal Martin & Associates, PA, of Greenville, for Appellant.

Jason James Andrighetti, of Culbertson Andrighetti, LLC, of Greenville, for Respondent.

GEATHERS, J.: In this breach of contract action, Appellant KOL, Inc. (Dealer) seeks review of the circuit court's order denying its motion to compel arbitration. Dealer argues the circuit court erred by declining to compel arbitration on the ground that Dealer's execution of certain contracts with Respondent Casey Masters (Purchaser) after Purchaser filed this action rendered the parties' April 10, 2017

arbitration agreement moot and unenforceable. We reverse and remand for an order compelling arbitration.[1]

FACTS/PROCEDURAL HISTORY

On April 10, 2017, Purchaser and Dealer entered into an agreement for the purchase of a new 2017 Kia Forte at a price of $21,049. The parties' agreement included Purchaser's $500 down payment and a $5,149 trade-in allowance for Purchaser's 2002 Chevrolet Cavalier. The purchase order, which was signed by both parties, included a provision allowing the Dealer to cancel the agreement if Dealer was unable to assign any accompanying retail installment sales contract (RISC) to a third-party lender. This provision also included Purchaser's acknowledgement that (1) Dealer was permitting Purchaser to take "conditional delivery and possession" of the vehicle, i.e., Purchaser's possession of the vehicle was conditioned on Dealer's ability to sell or assign any existing RISC to a third-party lender; (2) any material misrepresentation in Purchaser's credit application would allow Dealer to declare the entire balance under the purchase order immediately due and payable; and (3) "no one at the dealership" coerced Purchaser to provide false information.

Further, a statement near the top of the purchase order's first page indicates in bold, underlined print,

> **NOTICE: THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT ("FAA") 9 U.S.C. § 1, ET SEQ., OR IF AND ONLY IF THE FAA DOES NOT APPLY, THEN PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S.C. CODE ANN. § 15-48-10, ET SEQ. THE TERMS AND CONDITIONS OF ARBITRATION ARE CONTAINED IN THE DEALERSHIP'S ARBITRATION POLICIES AND PROCEDURES.**

[1] We decline to address Purchaser's additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

The last sentence in the Purchase Order states, "[Purchaser] hereby acknowledges that he/she has thoroughly read this Purchase Order[and] understands and agrees with its terms, including the fact [that] this agreement is subject to binding arbitration. [Purchaser] has received a completely filled in copy of this order and agreement."

The parties also signed a separate document entitled "Arbitration Agreement," which sets forth the scope of arbitrable claims, the method of selecting an arbitrator, the right to self-help remedies, the location and costs of arbitration, and conditions for seeking a new arbitration. The following language sets forth the scope of arbitrable claims:

> Any claim, counterclaim, third party claim, cross-claim, dispute or controversy between Dealer and [Purchaser], as well as between [Purchaser] and Dealer's employees, agents, affiliate companies or persons, successors and assigns, whether in contract, tort or otherwise, *which arise out of or relate to* [Purchaser's] credit application, purchase, lease, financing, condition of the vehicle, *or any resulting transaction or relationship* (including any such relationship with third parties who do not sign your purchase or finance contract), *or the validity, enforceability, or scope of this Agreement*, shall be resolved by neutral, binding arbitration.

(emphases added). The agreement also includes the following statements: "This Agreement evidences a 'transaction involving commerce' under the Federal Arbitration Act ('FAA'), 9 U.S.C. §§ 1-16[,] and shall be governed by the FAA. If and only if the FAA does not apply, then [this Agreement shall be governed] by any applicable state law concerning arbitration." The agreement also provided that it would "survive the termination of any and all of [Purchaser's] business with Dealer."

According to Purchaser, the parties executed a RISC to finance the purchase, and Dealer attempted to assign its interest in the RISC to Crescent Bank (Crescent). According to Richard Canova, Dealer's Finance and Insurance Manager, Purchaser was aware that completion of the purchase was contingent on "approval of financing." Subsequently, Dealer declined to finance the purchase because Dealer's attempt to assign its interest in the RISC to Crescent failed.

On May 25, 2017, Purchaser filed this action, alleging that Dealer misrepresented her income to Crescent, Crescent would not purchase the RISC, and Dealer breached the RISC. Purchaser also alleged that (1) an employee of Dealer lied to her about a recall of the 2017 Kia Forte; (2) approximately one week later, Dealer refused to return the car to Purchaser when she took it to Dealer for servicing; (3) Dealer rebuffed her demand for the return of her down payment and her trade-in vehicle; (4) Dealer offered Purchaser a loaner vehicle and required her to sign a test drive agreement; and (5) Dealer kept the personal belongings Purchaser had placed in the Kia Forte, including her copy of the RISC, and later returned all of the items except her copy of the RISC.

In her complaint, Purchaser asserted causes of action for breach of contract, breach of contract accompanied by a fraudulent act, fraud, conversion, trespass to chattel, violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act), violation of the South Carolina Unfair Trade Practices Act, violation of the South Carolina Consumer Protection Code, promissory estoppel, violation of the Truth in Lending Act, violation of the Fair Credit Reporting Act, and violation of the Equal Credit Opportunity Act. According to counsel, Purchaser served Dealer with the complaint on June 1, 2017.

According to Dealer, it later found a second lender, Global Lending (Global), to assist in financing the car purchase. The parties executed a second purchase order, a second RISC, and a second arbitration agreement on June 2, 2017—the second purchase order reflects a lower price, $15,456, than that reflected in the first purchase order (a difference of $5,593), but it is otherwise virtually identical to the first purchase order. The second arbitration agreement is identical to the one executed by the parties on April 10, 2017, except for the new date. Although Purchaser has alleged that Dealer did not return the identical Kia Forte to her, the vehicle identification number on both purchase orders is identical.

On July 26, 2017, Dealer filed a motion to stay and to compel arbitration, and the circuit court conducted a hearing on Dealer's motion on August 23, 2017. On that same date, Purchaser filed an affidavit in which she asserted the following: (1) After she filed her complaint, Dealer's representatives told her (a) they would refund her down payment, pay off the loan on her trade-in vehicle, and finance a new car for her; (b) her "new monthly payments would be lower than [her] current monthly payment"; and (c) she had to return "the loaner vehicle" to Dealer; (2) On June 2, 2017, Purchaser returned the loaner to Dealer and "was taken to an office to sign new documents to finance a new vehicle, where [she] learned that [her] down payment would not be refunded that day" and her monthly payments would be

"higher, not lower"; (3) She "was told that [she] had to sign the new contract if [she] wanted a car" and she "felt pressured to sign the documents they gave [her] because [she] had no way of getting home without a car[] and [her] children were with [her]"; (4) Over the next few days, Dealer's representatives notified her that they had given her "the incorrect documents on June 2," she "had to sign new documents," and her down payment refund was available; (5) She "was sick and distressed[] and went to the hospital on June 15 for hives and a severe rash" and her doctor was concerned about her stress level; (6) Dealer's representative continued to call her while she was at the hospital and told her they would return her down payment if she would "sign the new documents"; (7) After leaving the hospital, she signed "the new documents" while she was "under the influence of medicine that affected [her] ability to understand what [she] was doing"; (8) She did not know what she signed, and Dealer did not provide copies of the documents to her; and (9) She told Dealer's representatives that she wanted to speak with counsel first, "but they said they couldn't give [her] the refund check" if she wanted to speak with counsel.

On October 12, 2017, the circuit court filed an order denying Dealer's motion. In its order, the circuit court found that the parties "entered into a second contract for the purchase and financing of a car on or about June 2, 2017" and referenced an assertion that the parties "entered into a third contract regarding the disputes between the parties related to the first two contracts." The court concluded that the "execution of subsequent contracts, as alleged by [Dealer], renders the original agreement and its Arbitration Agreement[] moot and unenforceable." The circuit court later denied Dealer's motion to alter or amend the October 12, 2017 order. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err by declining to compel arbitration on the ground that the April 2017 arbitration agreement was moot and unenforceable?

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

LAW/ANALYSIS

Dealer argues the circuit court erred by declining to compel arbitration on the ground that the April 2017 arbitration agreement was moot and unenforceable. We agree.

Initially, we note there is nothing in the record indicating that Purchaser amended her May 2017 complaint, which references only the April transactions, to address the June transactions post-dating the complaint. Also, neither party has claimed that the June transactions formally settled this action. Yet, both the June purchase order and the June arbitration agreement include language that effectively created a novation between the parties. *See Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007) ("A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation." (quoting *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990))), *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). The June purchase order, like the April purchase order, includes the following language:

> This Purchase Order represents the *final* agreement between the parties related to the sale of the vehicle and *may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties*. Any Retail Installment Contract or other document executed by [Purchaser] in connection herewith is simply a means of satisfying [Purchaser's] obligations under this Purchase Order.

(emphases added). *Cf. Burgess v. Jim Walter Homes, Inc.*, 588 S.E.2d 575, 578 (N.C. Ct. App. 2003) (holding the parties entered into a novation when their 1999 contract superseded their 1997 contract through the use of the following language: "'This Building Contract, promissory note, deed of trust and the contract documents executed herewith *constitute the entire agreement* between the parties hereto with respect to the transactions contemplated herein, and this Building Contract promissory note, deed of trust and *the contract documents supersede all prior oral or written agreements, commitments or understandings* with respect to the matters provided for herein'"). Further, the June 2 arbitration agreement, like the April 10 arbitration agreement, states, "This Agreement constitutes the *entire* agreement of the parties with respect to its subject matter, is agreed to be the last Agreement

entered into with respect to its subject matter, and *supersedes all prior discussions, arrangements, negotiations and other communications*, if any, on dispute resolution." (emphases added).

In its order, the circuit court found that the parties "entered into a second contract for the purchase and financing of a car on or about June 2, 2017" and referenced an **assertion** that the parties "entered into a third contract regarding the disputes between the parties related to the first two contracts,"[2] attributing the assertion to Dealer.[3] The court concluded that the "execution of subsequent contracts, as alleged by [Dealer], renders the original agreement and its Arbitration Agreement[] moot and unenforceable." Because the circuit court's reasoning is obscure, we can only guess that the parties' novation served as the basis for the circuit court's conclusion that the "original agreement" and the April arbitration agreement, as opposed to the entire action, were moot and unenforceable.[4] We find this to be an incongruent, hyper-technical approach to resolving what may be left of the parties' dispute.[5] We conclude the correct approach is to compel arbitration.

"The policy of the United States and of South Carolina is to favor arbitration of disputes." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016). Therefore, "the party resisting

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[2] We see no evidence in the record of any such contract.

[3] The record shows that Purchaser's counsel, rather than Dealer, made this assertion, and he characterized this "third contract" as a release of Dealer from any liability to Purchaser.

[4] *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A *case* is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt. Where there is no actual controversy, this [c]ourt will not decide moot or academic questions." (emphasis added) (citations omitted)); *see also* Moot, Black's Law Dictionary (11th ed. 2019) ("moot adj. (16c) 1. *Archaic*. Open to argument; debatable. 2. Having no practical significance; hypothetical or academic <the question on appeal became moot once the parties settled their case>."); Merriam-Webster Online Dictionary, *Moot*, https://www.merriam-webster.com/dictionary/moot (April 15, 2020) ("1 a : open to question : debatable b : subjected to discussion : disputed 2 : deprived of practical significance : made abstract or purely academic").

[5] We express no opinion on the merits of any cause of action that may have survived the parties' novation.

arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).[6]

Here, the scope of both the first and second arbitration agreements covers not only their respective accompanying purchase orders and RISCs but also any resulting transactions or relationships:

> Any claim, counterclaim, third party claim, cross-claim, dispute or controversy between Dealer and [Purchaser], as well as between [Purchaser] and Dealer's employees, agents, affiliate companies or persons, successors and assigns, whether in contract, tort or otherwise, which arise out of or relate to [Purchaser's] credit application, purchase, lease, financing, condition of the vehicle, *or any resulting transaction or relationship* (including any such relationship with third parties who do not sign your purchase or finance contract), or the validity, enforceability, or scope of this Agreement, shall be resolved by neutral, binding arbitration.

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[6] The Federal Arbitration Act (FAA) provides, in pertinent part, that a written provision in any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2018). "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). Here, the parties' transaction involved the sale and financing of an automobile. Therefore, it involved interstate commerce and is governed by the FAA. *See United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (identifying automobiles as instrumentalities of interstate commerce, which are subject to regulation by Congress) (cited in *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013)); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) ("Generally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA." (citing 9 U.S.C. § 2)).

(emphasis added).[7] On the force of this provision alone, the April 2017 arbitration agreement applies to any cause of action in the present case that may have survived the novation to the extent that the June 2017 arbitration agreement does not apply. *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) ("The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, *at*

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[7] "Whether a party has agreed to arbitrate an issue is a matter of contract interpretation and '[a] party cannot be required to submit to arbitration any dispute [that] he has not agreed so to submit.'" *Landers*, 402 S.C. at 108, 739 S.E.2d at 213 (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). Nonetheless, while the parties' intent is "relevant," it bears repeating that "as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Id.* at 108–09, 739 S.E.2d at 213. This "'*heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration*.'" *Id.* at 109, 739 S.E.2d at 213 (emphasis added) (quoting *Am. Recovery*, 96 F.3d at 94).

Moreover, "[s]uch a presumption is strengthened when an arbitration clause is broadly written." *Id.* "Therefore, 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' arbitration must generally be ordered." *Id.* (quoting *Am. Recovery*, 96 F.3d at 92). For example, "[a] clause [that] provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Id.* "Courts have held that such broad clauses are 'capable of an expansive reach.'" *Id.* at 109, 739 S.E.2d at 214 (quoting *Am. Recovery*, 96 F.3d at 93).

Our supreme court and the Fourth Circuit Court of Appeals have held that sweeping language in broad arbitration clauses "applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* "Thus, the scope of the clause does 'not limit arbitration to the literal interpretation or performance of the contract*[, but] embraces every dispute between the parties having a significant relationship to the contract*.'" *Id.* at 109–10, 739 S.E.2d at 214 (emphasis added) (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)). "In applying this standard, th[e appellate c]ourt 'must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, *regardless of the legal label assigned to the claim*.'" *Id.* (emphasis added) (quoting *J.J. Ryan & Sons*, 863 F.2d at 319).

the time the contract was entered into. The court should put itself, as best it can, in the same position occupied by the parties *when they made the contract*. In doing so, the court is able to avail itself of the same light [that] the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." (emphases added) (citation omitted)); *U.S. Bank Tr. Nat. Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009) ("To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes *at the time the contract was entered*." (emphasis added)).

Further, both arbitration agreements provide that they "shall survive the termination of any and all of [Purchaser's] business with Dealer." This language expresses the parties' intent to retain the option of arbitration even after an event such as Purchaser's completion of all installment payments or Dealer's transfer of its right to collect payments to a third party. A novation of the underlying contract cannot nullify such an agreement. *See* 30 *Williston on Contracts* § 76:46 (4th ed.) ("[T]he parties may include within the original contract a provision that they intend to survive the termination of the contract, such as an arbitration clause; in such a case, the provision will survive not only the termination of the agreement, but also its novation and the substitution of a new contract."); *id.* at § 76:47 ("[A]n arbitration clause or other remedy contained in the original contract that the parties expressly agree will survive termination of the agreement will survive a novation as well, though such a clause has been held applicable only to issues arising in connection with the original contract, and not to affect the remedies of the parties arising from the subsequent agreement.").

Based on the foregoing, the parties' April 2017 arbitration agreement is neither moot nor unenforceable.

Finally, we note that both the first and second arbitration agreements express the parties' intent that even the **enforceability** of these arbitration agreements must be determined by an arbitrator, and Purchaser has not asserted a specific challenge to this particular provision:

> Any claim, counterclaim, third party claim, cross-claim, dispute or controversy between Dealer and [Purchaser], as well as between [Purchaser] and Dealer's employees, agents, affiliate companies or persons, successors and assigns, whether in contract, tort or otherwise, which arise out of or relate to [Purchaser's] credit application,

> purchase, lease, financing, condition of the vehicle, or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or finance contract), *or the validity, enforceability, or scope of this Agreement*, shall be resolved by neutral, binding arbitration.

(emphasis added). Thus, even the question of whether the June 2017 transactions rendered the April 2017 arbitration agreement "moot and unenforceable" was a question for an arbitrator to resolve. *See Landers*, 402 S.C. at 107, 739 S.E.2d at 213 ("The question of arbitrability of a claim is an issue for judicial determination *unless the parties provide otherwise*." (emphasis added) (quoting *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010))); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) ("A delegation clause gives an arbitrator authority to decide even the initial question [of] whether the parties' dispute is subject to arbitration."); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 69 n.1 (2010) (stating that parties "can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" provided that courts not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they intended to arbitrate these gateway questions); *In re Little*, 610 B.R. 558, 565 (Bankr. D.S.C. 2020) ("[W]hile it is the default procedure for the court to decide [the issues of whether a valid agreement to arbitrate exists and whether the specific dispute falls within the agreement's scope], the parties may delegate this determination to an arbitrator if the parties clearly and unmistakably agree to do so in their arbitration agreement."); *Rent-A-Ctr.*, 561 U.S. at 72 (concluding that unless the delegation provision is challenged specifically, the court must treat it as valid and enforce it, leaving any challenge to the validity of the arbitration agreement **as a whole** for the arbitrator). Therefore, the circuit court should have reserved any question concerning the enforceability of the arbitration agreements for an arbitrator.

CONCLUSION

Accordingly, we reverse the circuit court's order and remand for an order compelling arbitration.

REVERSED AND REMANDED.[8]

LOCKEMY, C.J., and HEWITT, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joey Lemmons d/b/a Rugs International, Appellant,

v.

Macedonia Water Works, Inc., Respondent.

Appellate Case No. 2017-002171

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

Opinion No. 5747
Submitted June 1, 2020 – Filed July 22, 2020

AFFIRMED

Christopher David Kennedy and N. Douglas Brannon, both of Kennedy & Brannon, P.A., of Spartanburg; and J. Falkner Wilkes, of Greenville, for Appellant.

Joseph L. Mathis and Joseph L.V. Johnson, both of Saint-Amand Thompson & Mathis, LLC, of Gaffney; and Lawrence Emile Flynn, III, of Pope Flynn, LLC, of Columbia, for Respondent.

GEATHERS, J.: Appellant Joey Lemmons, d/b/a Rugs International (Customer) seeks review of the circuit court's order granting summary judgment to Respondent Macedonia Water Works, Inc. (Utility) in Customer's action seeking a refund. Customer argues the circuit court erred in declining to enforce section 58-5-390 of the South Carolina Code (2015), which limits the fee a utility may charge for the

installation and maintenance of a fire sprinkler system. Utility seeks a dismissal of this appeal on the ground that Customer did not timely serve the notice of appeal. We deny the motion to dismiss and affirm the circuit court's order.

FACTS/PROCEDURAL HISTORY

In 1999, Customer purchased a commercial building in Cherokee County, near Gaffney, for his business, Rugs International.[1] At that time, a single tap onto Utility's water main supplied the water for the building's dual-purpose service line to a potable water system and a fire sprinkler system. The eight-inch line was accompanied by a four-inch bypass line to accommodate the variance in the volume of water flow—when the flow was low, a valve within the service line's compound meter assembly closed to force all of the water to flow through the assembly's four-inch meter, and when the flow increased to a certain point, the valve opened to allow the water to flow through the assembly's eight-inch meter. This assembly increased the accuracy of metering—a low flow could not be measured accurately by a large meter; therefore, the meter assembly compounded the readings between the eight-inch meter and the four-inch bypass meter.

Utility has billed its customers a certain monthly minimum charge based primarily on the size of the customer's water meter. The minimum charge has covered water usage up to 2,000 gallons, and a volumetric charge has been added for usage exceeding 2,000 gallons. Utility's water rate schedule (effective January 1, 2001) indicates that the minimum charge for an eight-inch meter is $650. Utility determined this amount to be the actual cost of providing an eight-inch line, explaining that this amount includes the cost of increased capacity in the event that a customer "decides to make maximum use of the volumes of water that are available to him at any time." On the other hand, the monthly charge for a service line that is dedicated exclusively to a fire sprinkler system is a flat rate of $50. These accounts

[1] In his affidavit, Customer references one building. However, in an exhibit attached to the affidavit, specifically, a letter from Utility to Customer, Utility contends, "In the case of the Rugs International facility, there are multiple facilities, services, and buildings [that] are supplied water service from a single water meter and tap." Nonetheless, we need not resolve this discrepancy for purposes of deciding the issues on appeal.

are charged much less than other accounts because "consumption virtually never occurs . . . unless there is a fire."[2]

In 2012, Customer became aware of section 58-5-390 of the South Carolina Code, which limits the fee a utility may charge for the installation and maintenance of a fire sprinkler system.[3] Customer believed that the statute applied to his water line and sought a refund of amounts he claimed Utility had overbilled him. Utility took the position that it had not overbilled Customer because his building did not have a service line dedicated exclusively to a fire sprinkler system. In March 2014, Customer added a new one-inch meter to his building to accommodate the potable

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[2] Jeffrey Walker, Customer's expert witness and general manager for a nearby water district that bills in the same manner that Utility bills its customers, made this statement in his August 10, 2016 letter to Utility's counsel.

[3] The legislation creating section 58-5-390 was passed in 2008. *See* Act No. 357, 2008 S.C. Acts 3601, effective June 25, 2008. This act was amended in 2010 to add subsection (C) to section 58-5-390. Section 58-5-390 states,

> (A) A publicly or privately owned utility may not impose a tap fee, other fee, or a recurring maintenance fee of any nature or however described for the installation and maintenance of a fire sprinkler system that exceeds the actual costs associated with the water line *to the system*.
>
> (B) For purposes of this section, actual costs include direct labor, direct material, the necessity of increased capacity, and other direct charges associated with the *separate* fire sprinkler line. The direct costs must be documented by either an invoice or work order that specifically assigns the costs to the *separate* fire sprinkler line. Nothing in this section may be construed as requiring a utility to provide service to support a private fire protection system.
>
> (C) Nothing in this section shall give the commission or the regulatory staff any power to regulate or interfere with public utilities owned or operated by or on behalf of any municipality, county, or regional transportation authority as defined in Chapter 25 of this title or their agencies.

(emphases added).

water system and dedicated the eight-inch meter to the fire sprinkler system. From that point forward, Utility charged Customer $50 per month for the line dedicated to the fire sprinkler system and a monthly minimum of $20 for the one-inch line to the potable water system.

On November 24, 2014, Customer filed this action seeking a refund based on section 58-5-390. In his complaint, Customer alleged that his former compound meter had included an eight-inch meter and a two-inch meter and regular water usage had flowed through the two-inch meter. Customer also alleged that the higher volume of water had flowed through the eight-inch meter only when a fire activated the sprinkler system and only fifteen gallons had passed through the eight-inch meter since it had been installed. After filing an answer to Customer's complaint, Utility filed a motion for summary judgment, and the circuit court conducted a hearing on the motion on January 6, 2017. In its order granting summary judgment to Utility, the circuit court concluded that section 58-5-390 did not apply to Customer's former dual-purpose line because it was not dedicated exclusively to a fire sprinkler system as contemplated by the statute. The circuit court later denied Customer's Rule 59(e) motion. This appeal followed. Utility did not file a separate motion to dismiss this appeal, but rather raised the issue of appellate jurisdiction for the first time in its appellate brief.

ISSUES ON APPEAL

1. Does this court have appellate jurisdiction over this action?

2. Did the circuit court err by interpreting section 58-5-390 to apply to only those lines dedicated exclusively to a fire sprinkler system?

3. Did Customer have a separate fire sprinkler line for purposes of section 58-5-390 during the period for which he seeks a refund?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further,

when a circuit court grants summary judgment on a question of law, such as statutory interpretation, the appellate court must review the ruling de novo. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019); *see Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) ("An issue regarding statutory interpretation is a question of law." (quoting *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005))).

LAW/ANALYSIS

I. Appellate Jurisdiction

Utility asserts that this appeal should be dismissed for lack of jurisdiction because Customer did not timely serve the notice of appeal.[4] *See* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); *Camp v. Camp*, 386 S.C. 571, 574–75, 689 S.E.2d 634, 636 (2010) ("Service of the notice of appeal is a 'jurisdictional requirement, and this [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.'" (quoting *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985))).

Specifically, Utility contends that Customer's Rule 59(e) motion did not stay the time for serving the notice of appeal because the motion was not served until after the ten-day deadline. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."); Rule 203(b)(1), SCACR (indicating that when a timely post-trial or post-hearing motion has been made, "the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion"); *see also* Rule 59(f), SCRCP ("The time for appeal for all parties shall be stayed by a *timely* motion under this Rule and shall run

[4] Utility actually employs the term "subject matter jurisdiction." However, late service of the notice of appeal deprives this court of appellate jurisdiction rather than subject matter jurisdiction. *See State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (holding that the failure to comply with the procedural requirements for an appeal divests a court of appellate jurisdiction but not of subject matter jurisdiction).

from the receipt of written notice of entry of the order granting or denying such motions." (emphasis added)).

Utility bases its argument on the premise that the time-stamp on the circuit court's e-mail providing the parties notice of the entry of its summary judgment order was the starting point for calculating the ten-day deadline, relying on *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018). In *Wells Fargo*, our supreme court discussed the thirty-day deadline for filing a notice of appeal and stated, "[A]n email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR[,] triggers the time to appeal *as long as the email is received from the court, an attorney of record, or a party*." 422 S.C. at 217, 810 S.E.2d at 859. The court explained that the notice of entry of the order being appealed does not have to be formally served by the court or an opposing party but rather "[a]ll that is required to trigger the time to appeal is that the parties *receive* such notice." *Id.* at 215–16, 810 S.E.2d at 858.

Notably, the *date* the appellants in *Wells Fargo* received the e-mail from the circuit court's administrative assistant was not in dispute. Rather, the appellants argued that their receipt of notice by e-mail rather than by regular mail or hand delivery could not trigger the time within which to file the notice of appeal. *Id.* at 215, 810 S.E.2d at 858. However, in the instant case, Customer challenges the date of receipt of the e-mail because there was no record created before the circuit court as to that critical date.

Customer maintains that the time-stamp on the e-mail is not always the starting point because the time-stamp does not conclusively determine the date a party receives the e-mail and the date of receipt determines the starting point for calculating the ten-day deadline. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after *receipt* of written notice of the entry of the order." (emphasis added)). Customer credibly asserts, "Emails, although commonly used, are nonetheless subject to unpredictable and unexplainable travels[and] delayed and sometimes failed delivery, just as are letters mailed through the postal system." *See* S.C. Code Ann. § 26-6-150(B) (2007) ("Unless otherwise agreed between a sender and the recipient, an electronic record is received when it: (1) enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; *and* (2) is in a form capable of being processed by that system." (emphasis added));[5]

[5] Section 26-6-150 was enacted in 2004. Act No. 279, 2004 S.C. Acts 2804.

S.C. Code Ann. § 26-6-150(G) (2007) ("If a person is aware that an electronic record purportedly sent pursuant to subsection (A), or purportedly received pursuant to subsection (B), was *not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law*." (emphasis added)).

Customer also maintains that when the circuit court was considering his Rule 59(e) motion, he did not have an opportunity to submit evidence of the date he actually received written notice of the entry of the summary judgment order because at that time, Utility presented neither an argument that the Rule 59(e) motion was late nor the AIS document on which it now relies to show when the circuit court's e-mail was sent.[6]

The question of whether the e-mail's time-stamp can be presumed to be the date of a party's receipt of the notice has not yet been addressed by our appellate courts. In the absence of our supreme court's pronouncement of such a presumption, this court must look to the Record on Appeal to determine the date of receipt of the circuit court's e-mail notice according to the standards of section 26-6-150(B). *See* § 26-6-150(B) ("Unless otherwise agreed between a sender and the recipient, an electronic record is received when it: (1) *enters* an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; *and* (2) is in a form capable of being processed by that system." (emphases added)).

Because Utility failed to present to the circuit court its argument that Customer's Rule 59(e) motion was late, the parties did not create a record establishing either the date that the circuit court's e-mail notice entered counsel's e-mail server or whether the e-mail notice was "in a form capable of being processed by" counsel's server. Therefore, we reject Utility's argument that Customer did not timely invoke this court's appellate jurisdiction.

II. Interpretation of section 58-5-390

Customer maintains the circuit court erred by interpreting section 58-5-390 to apply to only those lines dedicated exclusively to a fire sprinkler system. He argues

[6] In its brief, Utility asserts that the order granting summary judgment was sent to the attorneys of record via the Attorney Information System (AIS) at 12:00 p.m. on March 23, 2017. Utility also asserts that Customer served his Rule 59(e) motion on Utility via AIS on April 4, 2017.

that the legislative intent underlying section 58-5-390 was for the statute to apply to all fire sprinkler systems "without exception, even if the tap supplies other water uses." We disagree.

Section 58-5-390 states,

> (A) A publicly or privately owned utility may not impose a tap fee, other fee, or a recurring maintenance fee of any nature or however described for the installation and maintenance of a fire sprinkler system that exceeds the actual costs associated with the water line *to the system*.
>
> (B) For purposes of this section, actual costs include direct labor, direct material, the necessity of increased capacity, and other direct charges associated with the *separate* fire sprinkler line. The direct costs *must* be documented by either an invoice or work order that *specifically assigns* the costs to the *separate* fire sprinkler line. Nothing in this section may be construed as requiring a utility to provide service to support a private fire protection system.
>
> (C) Nothing in this section shall give the commission or the regulatory staff any power to regulate or interfere with public utilities owned or operated by or on behalf of any municipality, county, or regional transportation authority as defined in Chapter 25 of this title or their agencies.

(emphases added).

"In interpreting statutes, the [c]ourt looks to the plain meaning of the statute and the intent of the Legislature." *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009). "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." *Id.* Therefore, "[i]n interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011).

> Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous

> statute. Where the statute's language is plain, unambiguous,[7] and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citation omitted). Further, "[t]he intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994).

First, the plain language of the statute as a whole reflects the legislature's intent to isolate the costs "associated with" a line to a fire sprinkler system to a separate line dedicated to only that system. Subsection (A) limits the utility's fee to "the actual costs associated with the water line to the system." Next, subsection (B) fleshes out the terms "actual costs" and "associated with" by not only itemizing those costs but also requiring utilities to document costs and to do so in a manner that assigns them to a line dedicated solely to the fire sprinkler system: "The direct costs *must* be documented by either an invoice or work order that *specifically assigns* the costs to the *separate* fire sprinkler line." § 58-5-390(B) (emphases added); *see Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("[U]se of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

The use of this mandatory language rules out the possibility that the legislature simply left unaddressed the question of how costs could be calculated on dual-purpose lines to existing fire sprinkler systems, which would have created a latent ambiguity in the statute. *See Barth v. Barth*, 293 S.C. 305, 309, 360 S.E.2d 309, 311 (1987) ("The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. 'The fact is . . . that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question [that] is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point [that] was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.'" (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 14–14 (Yale University Press 1921))).

[7] "If a statute is susceptible to two reasonable interpretations, it is ambiguous." *S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008).

Nonetheless, even if the statute may be reasonably interpreted in more than one way so as to render it ambiguous, applying the rules of statutory construction to section 58-5-390 underscores the reality that it is not feasible to determine all of the "actual" costs associated with a line to a fire sprinkler system if the line is also used for other purposes. The only way to stay true to the requirement to charge only the actual costs is to isolate those costs through the separation of the line to the fire sprinkler system from any water line serving other building systems. If the legislature had deemed it sufficient for a utility to extrapolate the costs of a water line to a fire sprinkler system from the costs of a dual-purpose line, it would not have included the word "actual" in subsections (A) and (B) or the word "separate" in subsection (B). *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e read the statute *as a whole* and in a manner consonant and in harmony with its purpose." (emphasis added)); *id.* ("In that vein, we must read the statute so 'that no *word*, clause, sentence, provision or part shall be rendered *surplusage, or superfluous*,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, *or the legislature would not have enacted it into law*.'" (emphases added) (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008) ("*Sweat I*"), *aff'd as modified on other grounds*, 386 S.C. 339, 688 S.E.2d 569 (2010) ("*Sweat II*"))); *Sweat I*, 379 S.C. at 376, 665 S.E.2d at 650 ("A statute as a whole must receive a *practical*, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (emphasis added)); *Sweat II*, 386 S.C. at 351, 688 S.E.2d at 575 ("Courts will reject a statutory interpretation [that] would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); *id.* ("Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." (quoting *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993))).

Customer relies on the language stating the statute's purpose, i.e., "[I]t is the purpose of this act to create meaningful incentives for the installation of fire sprinkler systems,"[8] to support his argument that the legislature intended for the statute to apply to all fire sprinkler systems. However, the statute's purpose contemplates the installation of new fire sprinkler systems into buildings that did not already have them on the statute's effective date and provides fair notice to utilities that they must document actual costs only by installing a separate line dedicated exclusively to a fire sprinkler system. *See CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 ("[W]e read the

[8] Act No. 357, Preamble, 2008 S.C. Acts 3602, effective June 25, 2008.

statute as a whole and in a manner *consonant and in harmony with its purpose*." (emphasis added)); *Sweat I*, 379 S.C. at 376, 665 S.E.2d at 650 ("A statute as a whole must receive a practical, reasonable, and fair interpretation *consonant with the purpose, design, and policy of the lawmakers*." (emphasis added)); *cf. Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 321, 785 S.E.2d 600, 609 (Ct. App. 2016) ("[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." (quoting *Edwards v. State Law Enf't Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011))).[9] The owners of buildings with fire sprinkler systems already in place when section 58-5-390 was enacted did not need the incentive created by the statute. Therefore, the statute's incentive-creating purpose was not fulfilled by existing fire sprinkler systems. Hence, we see no incongruity in excluding from the class of the statute's beneficiaries those owners of fire sprinkler systems that were already existing on the statute's effective date and were served by a dual-purpose line.

Further, we note that Act No. 357 also created or amended several other statutes to serve the purpose of creating incentives for installing fire sprinkler systems. For example, section 2 of the Act added section 12-6-3622 to the South Carolina Code. Act No. 357, 2008 S.C. Acts 3603–04; S.C. Code Ann. § 12-6-3622 (2014 & Supp. 2019). Section 12-6-3622 allows a property tax credit, under certain conditions, for the installation of a fire sprinkler system in a business or residence. Further, section 3 of the Act amended section 12-37-3130 of the South Carolina Code (2014) to exclude the voluntary installation of a fire sprinkler system from the definition of "additions" or "improvements" in determining the fair market value of real property for tax purposes, provided the utility and function of the structure remains unchanged. Act No. 357, 2008 S.C. Acts 3604–05. Moreover, section 5 of the Act amended section 12-37-220 of the South Carolina Code (2014 & Supp. 2019) to add a property tax exemption for fire sprinkler system equipment until the building in which the system is installed undergoes an "assessable transfer of interest." Act No. 357, 2008 S.C. Acts 3605. In light of these additional incentives, we do not believe that limiting the fire sprinkler systems governed by section 58-5-390 to those that have a separate connection to a utility's main significantly detracts from the Act's purpose of creating incentives for the installation of these systems.

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[9] *Id.* ("A statute is remedial whe[n] it creates new remedies for existing rights unless it violates a contractual obligation, creates a new right, or divests a vested right." (quoting *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 106, 713 S.E.2d 650, 655 (Ct. App. 2011))); *id.* ("[A] statute that limits a right is generally not procedural." (quoting *Edwards*, 395 S.C. at 580, 720 S.E.2d at 467)).

Based on the foregoing, we affirm the circuit court's conclusion that section 58-5-390 applies to only those lines dedicated exclusively to a fire sprinkler system.

III. Separate Line

Customer argues that he presented at least a scintilla of evidence that his building had a separate fire sprinkler line for purposes of section 58-8-390 before he added his one-inch line and, therefore, summary judgment was inappropriate. *See Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Customer contends that the circuit court improperly weighed the evidence because "[a] simple examination of the two meters along with [Customer's] testimony was more than sufficient to require the court to deny summary judgment in this case." *See S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact."). Customer also argues that the circuit court failed to view the evidence in the light most favorable to him. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 455–56, 578 S.E.2d 711, 714 (2003) ("In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party."). We disagree.

"[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror." *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E. 1064, 1067 (1908) (emphasis added). "[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative." *Bass v. Gopal, Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011). The circuit court "is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a *genuine* issue of fact remaining for trial." *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190–91 (Ct. App. 2014), *aff'd*, 414 S.C. 109, 777 S.E.2d 379 (2015) (emphasis added) (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)).

Here, Customer asserts that an examination of his meter assembly shows two separate lines running to two separate meters. However, in determining whether a factual issue is genuine, a true understanding of certain evidence requires the court to move beyond a cursory examination to acknowledge existing expertise on the matter. *See Crosby*, 81 S.C. at 31, 61 S.E. at 1067 ("[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror." (emphasis added)); *Main*, 281 S.C. at 527, 316 S.E.2d at 407 (stating that the circuit court "is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine"). Further, viewing the evidence in the light most favorable to the party opposing summary judgment does not change this reality.

Turning to the opinions of both parties' experts in the present case, a reasonable juror could not escape the conclusion that during the period for which Customer seeks a refund, the building did not have a separate line dedicated to the fire sprinkler system. After examining these opinions, we agree with Utility's assessment that during the period for which Customer seeks a refund, the eight-inch line was not limited to fire service only as it served the entire building and water capacity was available to Customer at any time and for any purpose. Utility's engineering expert, William H. Bingham, Jr., prepared a report to formalize the findings he made during his site visit on November 1, 2013, and to provide the basis for his opinion regarding the service to the Rugs International facility.[10] Bingham described Customer's water meter as an eight-inch compound water meter with a four-inch bypass meter. Bingham explained the nature of this meter in the following manner:

> Since this style of water meter is used on both separate fire lines and dual purpose service lines, a determination of the type of water service for a given customer cannot be made *simply by observing* whether the meter assembly is comprised of a single meter or a compound meter. The use of two meters in the compound meter assembly is purely for improvement in the measurement of flow in the system and has no bearing on whether the water is used for fire sprinklers or other water consumption. *Compound*

[10] Mr. Bingham conducted a subsequent site visit on May 12, 2015, to collect additional information needed for his report.

> *meters on dual-purpose service lines have no capability to differentiate between the volume of water consumed by the commercial usage of a facility from the volume of water consumed by the fire sprinkler system*. There can be no assumption that the smaller meter reads the commercial water consumption and the larger diameter meter only reads the fire sprinkler consumption.

(emphases added).

Additionally, in his August 10, 2016 letter to Utility's counsel, Customer's own expert, Jeffrey Walker, General Manager for the Inman-Campobello Water District (ICWD), gave the following opinion after reviewing the report of Utility's expert:

> [S]ince all of the water for this customer flowed through this meter assembly and therefore, this was not a connection dedicated to fire protection only, the ICWD would not consider this a private fire protection line. At the ICWD, a private fire protection line is solely dedicated to fire protection and *consumption virtually never occurs with these types of connections, unless there is a fire. For this reason, accounts of this type are charged much less than accounts that are not solely dedicated to fire protection*.
>
> Therefore, given the same meter and the same or a similar industry, the ICWD would bill the customer the minimum bill for an 8-inch meter plus any consumption that exceeded the amount that is included in the minimum charge. Even though the meter assembly is comprised of two meters, it is still considered an 8-inch meter. The smaller meter is in place to capture lower flows that the 8-inch meter cannot detect.

(emphasis added).[11]

[11] Walker acknowledged that the ICWD bills in the same manner that Utility bills its customers.

Based on the foregoing, the circuit court properly granted summary judgment to Utility. *See* Rule 56(c), SCRCP (providing that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Wright*, 426 S.C. at 211, 826 S.E.2d at 290 ("The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001))).

CONCLUSION

Accordingly, we deny the motion to dismiss and affirm the circuit court's order.

AFFIRMED.[12]

LOCKEMY, C.J., and HEWITT, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Corona Campbell as Personal Representative of the Estate of Ann M. Blandin, Respondent/Appellant,

v.

City of North Charleston, Appellant/Respondent.

Appellate Case No. 2017-001628

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5748
Heard May 14, 2020 – Filed July 22, 2020

AFFIRMED

John E. Parker and William Franklin Barnes, III, both of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton; and Lawrence C. Kobrovsky, of Law Offices of Lawrence C. Kobrovsky, of Charleston, all for Respondent/Appellant.

Robert H. Hood, of Hood Law Firm, LLC, of Charleston; Deborah Harrison Sheffield, of Columbia; J. Brady Hair and Derk Van Raalte, IV, both of Law Offices of J. Brady Hair, of North Charleston, all for Appellant/Respondent.

LOCKEMY, C.J.: In this cross-appeal, the City of North Charleston (the City) appeals the circuit court's denial of its motion to set aside an entry of default, and Ann M. Blandin[1] appeals the master-in-equity's default judgment order capping Blandin's award at $300,000 under the South Carolina Tort Claims Act (the Act).[2] Blandin argues the master erred in capping her award because the cap was an affirmative defense that had to be pled. The City argues the circuit court abused its discretion in denying the City's motion because the City proved its failure to respond was due to inadvertence. We affirm both the circuit court's order denying the City's motion and the master's order capping Blandin's award.

FACTS/PROCEDURAL HISTORY

On June 12, 2015, Blandin commenced this action against the City, alleging that while operating her vehicle, she was struck by a city police car, which was travelling at a high rate of speed. In her complaint, Blandin alleged the City was a political subdivision subject to suit pursuant to the Act. On June 30, 2015, Blandin served Sandy Brown, the administrative assistant to the Clerk of Council, who was authorized to accept service on behalf of the City's mayor. The City did not respond. On November 9, 2015, the Clerk of Court entered default against the City pursuant to Rule 55, SCRCP. On April 5, 2016, the circuit court referred the matter to the master to determine damages.

On May 17, 2016, the City received notice of the damages hearing scheduled for July 7, 2016. Two days later, the City filed a Rule 55(c), SCRCP, motion to set aside the entry of default and to file a late answer. In its written motion, the City argued the failure was "based on exceptional circumstances surrounding the employees in the City's Risk Department." The City admitted its risk manager, Leslie Mitchum, sent the complaint to the City's claims and insurance coordinator, Karen Helms, instead of the City's liability claims handler, as was the City's standard protocol. Helms received the e-mail containing the complaint, and the e-mail remained unopened in her inbox. The City argued these were "unprecedented circumstances" and that after it learned of the suit, it worked diligently to respond. The City claimed it had a meritorious defense because

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[1] Ann M. Blandin passed away during the pendency of this appeal, and her daughter, Corona Campbell, was substituted as a party.

[2] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2019).

Blandin drove through a stop sign prior to being struck, she would not be prejudiced by the setting aside of the entry of default, and setting aside the entry of default would serve the interests of justice because otherwise, innocent taxpayers would be left with the financial burden.

At the motions hearing, the City argued Helms's failure to send the complaint to the South Carolina Reserve Insurance Fund was a good-faith mistake and it was good public policy for the State of South Carolina to be heard on the merits.

The circuit court denied the City's motion to set aside the entry of default, and the City filed a Rule 59(e), SCRCP, motion. The circuit court denied the motion, stating, "[The] failure to forward an e-mail d[id] not amount to good cause shown for failure to timely file an Answer. In addition, the [City wa]s not a state agency under . . . Rule 55(e), [SCRCP]."

Following the damages hearing, Blandin argued the statutory cap set forth in section 15-78-120(a) of the Act did not apply because it was an affirmative defense, which was "waived or lost" upon an entry of default. She further argued this court erred in *Parker v. Spartanburg Sanitary Sewer District*,[3] when we held the statutory cap was self-executing and not an affirmative defense. The circuit court had awarded Blandin $1,000,000 in medical expenses and $4,250,000 for pain and suffering and permanent injury; however, the court ordered the cap was self-executing and capped her recovery at $300,000. The City did not file a Rule 60(b), SCRCP, motion.

ISSUES ON APPEAL

1. Did the circuit court abuse its discretion by denying the City's Rule 55(c), SCRCP, motion to set aside the entry of default?

2. Did the master err by reducing the judgment to the limitation of liability contained in the Act because the cap is an affirmative defense?

[3] 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005).

STANDARD OF REVIEW

"A motion under Rule 55(c) is addressed to the sound discretion of the trial court." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). The circuit court's decision to set aside an entry of default or a default judgment "will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal[,] conclusions[] is without evidentiary support." *Id.*

The question of whether the Act's statutory cap applies is a question of law, which this court reviews de novo. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

I. The City's Rule 55(c) Motion

The City argues the circuit court abused its discretion by denying its motion to set aside the entry of default because it made the requisite showing of good cause. Specifically, the City contends Helms's failure to forward an e-mail to its risk manager was an administrative "mistake from inadvertence," which satisfies the "mere" good cause standard. The City further argues it satisfied the *Wham*[4] factors because it filed its motion immediately upon notice of default, it had a meritorious defense, and Blandin would not be prejudiced by the setting aside of the entry of default. We disagree.

"For good cause shown[,] the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)[, SCRCP]." Rule 55(c), SCRCP.

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[4] *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989) (providing a court must consider the following factors when deciding a Rule 55(c), SCRCP, motion: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the complainant if relief is granted).

> The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the [defaulting party] has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.

Sundown Operating Co., 383 S.C. at 607-08, 681 S.E.2d at 888 (citations omitted).

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Id.* at 608, 681 S.E.2d at 888. "[T]he standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), and . . . an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment." *Id.* at 607, 681 S.E.2d at 888. Rule 60(b)(1), SCRCP, provides, "On motion[,] and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." "The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show 'good cause.'" *Id.* at 608, 681 S.E.2d at 889.

Initially, we reject Blandin's contention that the City was required to file a Rule 60(b) motion for relief from default judgment in order to challenge the entry of default on appeal. *See Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 122-23 (Ct. App. 1987) (holding the denial of a motion under Rule 55(c) to set aside an entry of default is not appealable until after final judgment). Here, the City moved pursuant to Rule 55(c) to set aside the entry of default prior to the entry of the default judgment, and the circuit court ruled upon the motion as well as the City's subsequent Rule 59(e) motion to reconsider. Therefore, the issue of whether the court erred by refusing to set aside the entry of default is properly before this court.

On the merits, we hold the circuit court did not abuse its discretion by finding the City's failure to forward an internal e-mail was not a good cause warranting the court to set aside the entry of default.

In *Roche v. Young Bros. of Florence*, our supreme court held the failure to forward a summons and complaint after receiving it does not constitute inadvertence or excusable neglect sufficient to put aside a default judgment. 318 S.C. 207, 210-12, 456 S.E.2d 897, 899-901 (1995). In *Roche*, the vice president of the defendant company placed the summons and complaint on his secretary's desk, and the summons and complaint never reached the company's registered agent. *Id.* at 209, 456 S.E.2d at 899. The company failed to respond, resulting in a Rule 55(a) entry of default and a default judgment. *Id.* Our supreme court affirmed the trial court's ruling that default from the failure to forward a summons and complaint "was not the result of inadvertence or excusable neglect." *Id*. at 212, 456 S.E.2d at 900. We recognize *Roche* was based on a Rule 60(b) motion and this is a Rule 55(c) motion, which is governed under a more lenient standard. *See Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 889 ("The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show 'good cause.'"). Because the City specifically argues the good cause of their failure was inadvertence, *Roche* is instructive only insofar as to what constitutes inadvertence.

Here, the City does not dispute that it was properly served and admitted it failed to forward the complaint, which remained in Helms's inbox unopened. Helms provided no explanation for her failure to open or forward the e-mail and only stated it was "out of character." We hold the circuit court did not abuse its discretion by finding the failure to forward or open an e-mail did not satisfy the good cause standard articulated in Rule 55(c), SCRCP. *See Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178-79, 463 S.E.2d 636, 638-39 (Ct. App. 1995) (affirming the trial court's finding that the defendant's failure to recognize a deadline did not constitute good cause to set aside the entry of default); *cf. Nelson v. Coleman Co.*, 41 F.R.D. 7, 9-11 (D.S.C. 1966) (finding the failure to timely forward a complaint within a company's internal departments was not good cause to warrant relief from default).[5]

[5] Because the City has failed to put forward a satisfactory explanation, we need not address the *Wham* factors. *See Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888 (providing that "[*o*]*nce* a party has put forth a satisfactory

II. Damages Cap

Blandin argues the City could not assert the cap because it was in default and the Act's limitations upon liability are affirmative defenses. We disagree.

The Act governs all tort claims against government entities and is the exclusive civil remedy "for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (2005). "The provisions of [the Act] establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity." *Id.*

> For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
>
> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

S.C. Code Ann. § 15-78-120(a) (2005). In *Parker*, this court held the liability cap was not an affirmative defense and was self-executing. 362 S.C. at 285, 607 S.E.2d at 716. The plaintiff brought a personal injury action against the defendant following an automobile accident. *Id.* at 279, 607 S.E.2d at 713. On the first day of trial, the defendant moved to file an amended answer that included the statutory cap, and the trial court denied the motion. *Id.* at 279-80, 607 S.E.2d at 713. The jury awarded Parker $450,000, and the trial court denied the defendant's motion to reduce the award to $300,000 in accordance with the Act. *Id.* at 280, 607 S.E.2d at 713. On appeal, this court held "that the liability cap articulated within the . . . Act is **NOT** an affirmative defense and the failure to plead the specific limitation on the amount of recovery allowed under the . . . Act is **NOT** a waiver of the cap." *Id.*

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explanation for the default, the trial court must also consider" the *Wham* factors (emphasis added)); *see also Wham*, 298 S.C. at 465, 381 S.E.2d at 501-02.

at 289, 607 S.E.2d at 718. In addition, this court found the defendant was not required to plead the Act's "statutory cap as an affirmative defense" when the plaintiff had conceded the Act applied to her claim. *Id.* at 282, 607 S.E.2d at 715. This court stated,

> There is absolutely no verbiage articulated within the [Act] mandating that a governmental entity plead the monetary statutory cap included within section 15-78-120. The . . . Act is imbued with public policy considerations limiting and qualifying liability of governmental entities. We conclude that the monetary statutory cap is *self-executing* and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000.

Id. at 285, 607 S.E.2d at 716 (emphasis added).

We reiterate our holding in *Parker* that the plain meaning of the statute indicates this cap must be executed regardless of whether a defendant has filed a responsive pleading raising this cap as a defense. The statute expressly states the liability "shall" not exceed the Act's limits and this damages cap does not require any special findings that would affect the proof at trial,[6] which establishes the application of the cap is mandatory and self-executing. *See Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) ("Where the statute's language is plain and unambiguous[] and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the [c]ourt has no right to impose another meaning."); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The term 'shall' in a statute means that the action is mandatory."); § 15-78-120(a) (providing "[f]or any action or claim for damages brought under the provisions of this chapter, the liability *shall not* exceed" the limits set forth therein (emphasis added)). We hold that under the plain meaning of section 15-78-120(a), courts must apply the statutory cap to actions brought pursuant to the Act.

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[6] *Cf. James v. Lister*, 331 S.C. 277, 284, 500 S.E.2d 198, 202 (Ct. App. 1998) (holding that any liability limits affecting the proof at trial must be pled as an affirmative defense).

Here, Blandin brought her cause of action pursuant to the Act. We find Blandin is bound by her pleadings, and having asserted the complaint was authorized by the Act, she cannot now argue this court should not apply the Act's self-executing cap. *See Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party who conceded in his complaint that his cause of action was under the Act could not argue on appeal that the Act did not apply); *Parker*, 362 S.C. at 285, 607 S.E.2d at 716 (holding the Act's monetary cap is self-executing). For the foregoing reasons, we hold the master did not err by applying the statutory cap because it is not an affirmative defense and is self-executing.

CONCLUSION

We hold the circuit court did not abuse its discretion by finding the City failed to put forth an adequate explanation to obtain relief from the entry of default, and we therefore affirm the circuit court's order denying the City's Rule 55(c), SCRCP, motion to set aside the entry of default. Further, we find the statutory cap found in section 15-78-120(a) is self-executing, and therefore, the master did not err in applying the $300,000 damages cap. Accordingly, the rulings of the circuit court and master are

AFFIRMED.[7]

GEATHERS and HEWITT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Steven Louis Barnes, Appellant.

Appellate Case No. 2017-002140

Appeal From Edgefield County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5749
Heard May 5, 2020 – Filed July 22, 2020

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

GEATHERS, J.: This appeal is the latest in the eighteen-year narrative of Steven Louis Barnes. Barnes appeals his conviction of murder for which he was sentenced to life imprisonment without the possibility of parole. Barnes argues the circuit court erred in refusing to dismiss his indictment because (1) the State violated his state and federal rights to a speedy trial and (2) the State did not comply with the Interstate

Agreement on Detainers Act (the "IAD"), S.C. Code Ann. §§ 17-11-10 to -80 (2014).[1] We affirm.

FACTS

In January 2002, Barnes was arrested following a multi-state investigation into a series of events that began in Georgia and ended with the execution-style killing of a sixteen-year-old young man in Edgefield, South Carolina.[2] Following Barnes's arrest in Georgia, a South Carolina arrest warrant was issued on January 25, 2002, and the Governor of South Carolina requested Barnes's extradition on February 27, 2002. On April 17, 2002, a hearing was held in Georgia and Barnes waived extradition. A few days later, a formal order was issued authorizing Barnes's extradition to South Carolina, but he remained in Georgia to stand trial for unrelated charges of armed robbery, kidnapping, burglary, terroristic threats, and pandering prostitution. In December of 2003, Barnes was convicted of his Georgia charges and sentenced to an aggregate term of life imprisonment. In January 2004, Barnes was transferred to the Georgia Department of Corrections.

Thereafter, the Edgefield County Solicitor received a document postmarked on February 12, 2005, requesting the final disposition of Barnes's pending charges

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[1] *See* § 17-11-10, Art. I ("[T]he purpose of this agreement [is] to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints."); *State v. Hill*, 409 S.C. 50, 58, 760 S.E.2d 802, 807 (2014) ("The central purpose of the IAD is to allow participating states to uniformly and expeditiously dispose of charges pending against prisoners held out of state."); *State v. Patterson*, 273 S.C. 361, 363, 256 S.E.2d 417, 418 (1979) ("The goal of promoting prisoner rehabilitation is achieved by requiring the receiving state to proceed to trial within 180 days.").

[2] Because Barnes challenges his conviction on speedy trial and IAD grounds, we focus only on the procedural timeline of his prosecution. However, our supreme court explored the underlying facts of the case in Barnes's first appeal. *See State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014) (hereinafter *Barnes I*). Additionally, the supreme court discussed the underlying facts in an appeal involving one of Barnes's co-defendants, Alexander Hunsberger. *See State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016).

pursuant to the IAD.[3] The solicitor then arranged for Barnes to be brought to South Carolina, and Barnes was extradited on May 18, 2005. After Barnes's extradition, his case proceeded under the following timeline:

- May 25, 2005 – In response to his IAD filing, a hearing was held before the Honorable William P. Keesley; at the hearing, the State discussed its intent to seek the death penalty.
- May 27, 2005 – Judge Keesley issued an order acknowledging the case would likely be tried as a capital case and finding good cause to continue Barnes's trial beyond the deadlines established by the IAD.
- June 6, 2005 – O. Lee Sturkey appointed to represent Barnes.
- August 10, 2005 – The Edgefield County Grand Jury formally indicted Barnes for kidnapping.
- September 1, 2005 – Robert Harte appointed as lead counsel for Barnes, replacing O. Lee Sturkey.
- September 8, 2005 – Barnes filed a motion to represent himself; Barnes also attempted to renew his IAD objection in a written *pro se* motion filed with the Edgefield County Clerk of Court and served on the State.
- September 14, 2005 – Barnes filed a letter with the Edgefield County Clerk of Court requesting that his attorney move for a speedy trial and dismissal pursuant to the IAD.
- October 31, 2005 – The South Carolina Supreme Court issued an order vesting the Honorable J. Cordell Maddox, Jr. with exclusive jurisdiction over the case.
- November 16, 2005 – Barnes filed a letter with the Edgefield County Clerk of Court requesting that his attorney oppose any continuance motions.
- December 6, 2005 – The Edgefield County Grand Jury formally indicted Barnes for murder.
- December 13, 2005 – Barnes served with the State's notice of intent to seek the death penalty.
- February 8, 2006 – David Tarr appointed as co-counsel for Barnes.
- May 16, 2006 – The circuit court held a hearing and scheduled Barnes's trial for January–February 2007.

[3] Pursuant to section 17-11-10, Art. III(b), Barnes submitted his request for final disposition to the warden of the prison in Georgia where he was incarcerated. The warden then forwarded the request to the Edgefield County Solicitor.

- April 17, 2008 – The circuit court issued an order setting Barnes's capital trial for June 2008.
- May 13, 2008 – The circuit court issued an order continuing the case from the June 2008 term upon Barnes's request for a continuance.
- January 25, 2010 – The supreme court issued an order vesting the Honorable R. Knox McMahon with exclusive jurisdiction over the case.

Barnes's trial was conducted on November 8–13, 2010. Following the trial, Barnes was convicted of murder and kidnapping and sentenced to death. Barnes appealed, and our supreme court reversed the convictions on October 16, 2013. On January 15, 2014, the supreme court withdrew its opinion and issued a substituted opinion reversing Barnes's convictions solely on the ground that he was improperly denied the right to self-representation. *See Barnes I*, 407 S.C. at 37, 753 S.E.2d at 550. Additionally, the supreme court expressly addressed Barnes's IAD claim, holding Barnes waived his rights under the Act. *See Barnes I*, 407 S.C. at 37, 753 S.E.2d at 551. Barnes's case was remitted to the circuit court on January 31, 2014.

On June 9, 2014, the Honorable Diane S. Goodstein was vested with exclusive jurisdiction of the case for retrial. Thereafter, the circuit court appointed Jeffrey P. Bloom and William S. McGuire to represent Barnes, and the State moved to have Barnes's convictions reinstated, arguing Barnes conceded that his convictions were constitutionally obtained by requesting counsel. When the motion was denied, the State filed a common law petition for writ of certiorari in the supreme court's original jurisdiction.[4] On July 1, 2015, the supreme court issued an opinion affirming the

[4] *See City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 534, 131 S.E.2d 705, 708 (1963) ("At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal. (2) As an auxiliary process to enable the [c]ourt to obtain further information with respect to some matter already before it for adjudication." (citation omitted)); *id*. ("[T]o the extent that the subject matter of the proceeding brought before the appellate court will not be reinvestigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding." (citation omitted)); *cf*. *State v. Isaac*, 405 S.C. 177, 189 n.8, 747 S.E.2d 677, 683 n.8 (2013) (Pleicones, J., concurring) (explaining that because a pretrial order denying a criminal defendant immunity under the Protection of Persons and Property Act is not immediately appealable, "an individual in that position may []seek relief by filing a common law petition for writ of certiorari in th[e supreme c]ourt's original jurisdiction").

denial of the State's motion to reinstate Barnes's convictions. *See State v. Barnes*, 413 S.C. 1, 774 S.E.2d 454 (2015) (hereinafter *Barnes II*). The State filed a petition for rehearing on July 14, 2015, and the supreme court denied the petition on August 6, 2015. The case was remitted to the circuit court on August 10, 2015.

During the pendency of the State's petition for rehearing, the supreme court placed one of Barnes's attorneys, William McGuire, under an order of protection from July 2015 until December 2016 due to his involvement in a high profile criminal trial. On July 7, 2017, the circuit court held a status conference in which the State withdrew its notice of intent to seek the death penalty and served Barnes with its intention to seek life without the possibility of parole. Additionally, the court set the trial date for October 9, 2017. Thereafter, on August 14, 2017, Barnes filed motions to dismiss, alleging violations of his speedy trial rights under the IAD and the state and federal constitutions.

On October 4, 2017, the Edgefield County Grand Jury reindicted Barnes for murder. Barnes's second trial was conducted on October 9–13, 2017. Prior to the start of trial, the circuit court ruled on several pre-trial motions, including Barnes's motions to dismiss for violations of his speedy trial rights under the IAD[5] and the state and federal constitutions.

First, the circuit court addressed Barnes's IAD claim. Barnes conceded that the supreme court disposed of this issue in *Barnes I* but argued that the circuit court should rule on the issue because all of the documents relevant to Barnes's claim were not included in the record on appeal presented to the supreme court. The State argued the circuit court was precluded from ruling on Barnes's IAD motion because the supreme court had already disposed of the issue, thus making its ruling the law of the case. Ultimately, the circuit court denied Barnes's motion to dismiss the indictment under the IAD, finding the supreme court fully disposed of the issue in *Barnes I*. Additionally, the circuit court noted that no new IAD detainer action had been commenced following *Barnes I*.

Turning to the speedy trial claim, the circuit court was presented with the question of whether the period of delay for its speedy trial analysis began at the time Barnes's first arrest warrant was issued in 2002 or at the time the supreme court

[5] *See* § 17-11-10, Art. III(a) (requiring that a defendant incarcerated in another state be brought to trial in the prosecuting state within 180 days of the defendant's request for a final disposition).

remitted the case to the circuit court in 2014 following *Barnes I*. In analyzing this question, the circuit court noted "that the assertion of speedy trial rights after a conviction has been entered and then overturned on appeal is a novel legal issue in South Carolina." Barnes argued that the applicable period of delay began upon the issuance of his arrest warrant in 2002 because despite failing to formally invoke his speedy trial rights, his IAD motion and *pro se* filings in his original trial constituted invocations of his speedy trial rights. Based on the fifteen-year time period between the issuance of the warrant and his retrial, Barnes argued that the State was responsible for an eight-year and seven-month delay.

The State argued that the period of delay should begin upon the date of remittitur in 2014 because Barnes waived his speedy trial rights in the first trial. The State noted that Barnes failed to preserve the issue for appeal in *Barnes I* by not raising it to the circuit court.[6] When asked whether the speedy trial claim from the first trial was preserved, Barnes's counsel responded, "I don't have any response to that because the record is what it is. It did not get argued to the trial court, it did not get raised again, and quite obviously it did not get raised on appeal []in the 2010 case."

The circuit court found that the proper period of delay to consider in Barnes's speedy trial analysis began on January 31, 2014, the date the case was remitted to the circuit court. The circuit court determined the remittitur represented the supreme court's final disposition of the issues in *Barnes I*, including the issue of Barnes's speedy trial rights which could have been ruled on by the supreme court had Barnes preserved the issue for appellate review and raised it before the supreme court.

Turning to Barnes's retrial, the court found that "[d]elay on its face from January 31, 2014, to October the 9th, 2017, is slightly more than three years and seven months," which was sufficient to trigger the speedy trial analysis. The circuit court then found two years and three months of the delay attributable to the State and sixteen months attributable to Barnes, but determined the delays weighed minimally against the State. Next, the court determined Barnes first raised his rights to a speedy trial on August 14, 2017. Finally, the circuit court found that Barnes did not suffer actual prejudice from the delay. Thus, the circuit court determined that based on the totality of the circumstances, Barnes's rights to a speedy trial were not

[6] The State further argued that Barnes's IAD motions were not equivalent to constitutional speedy trial motions and that Barnes's *pro se* filings were precluded by South Carolina's rule against hybrid representation.

violated. Furthermore, having acknowledged that the applicable period of delay for the speedy trial analysis was an unsettled question, the circuit court engaged in an alternative analysis in which it considered the delays between January 25, 2002, and January 31, 2014. The circuit court similarly determined that Barnes's rights to a speedy trial were not violated during this period of delay. Accordingly, the circuit court denied Barnes's motion to dismiss the indictment under the speedy trial clauses of the state and federal constitutions.

At the conclusion of the trial, Barnes was found guilty of murder and sentenced to life in prison without the possibility of parole. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in refusing to dismiss Barnes's indictment due to violations of his rights to a speedy trial?

2. Did the circuit court err in refusing to dismiss Barnes's indictment under the IAD?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). Therefore, "[appellate courts are] bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

Speedy trial

"The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard." *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371. "An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support." *Id*. at 342, 794 S.E.2d at 371–72.

Interstate Agreement on Detainers Act

"[An appellate court] will reverse a circuit court's decision to grant a continuance under the IAD only when it amounts to an abuse of discretion." *Hill*, 409 S.C. at 59, 760 S.E.2d at 807. Our courts have indicated that a circuit court's failure to comply with the mandatory language of the IAD is an error of law. *See*

Patterson, 273 S.C. at 363–64, 256 S.E.2d at 418 (finding that a court commits reversible error when failing to comply with the mandatory language of the IAD); *see also State v. Holbrook*, 274 S.C. 4, 6, 260 S.E.2d 181, 182 (1979) ("[T]he []time limitation imposed under [the IAD] is mandatory . . . .").

Novel issue of law

"When addressing [a] novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right." *State v. Sweat*, 379 S.C. 367, 373, 665 S.E.2d 645, 649 (Ct. App. 2008), *modified on other grounds*, 386 S.C. 339, 356, 688 S.E.2d 569, 578 (2010).

LAW/ANALYSIS

I. Speedy Trial

Barnes argues the circuit court erred in failing to dismiss his indictment because the State violated his rights to a speedy trial. The State argues the circuit court properly found that Barnes's speedy trial rights were not violated. We agree with the State.

Pursuant to the constitutions of the United States and South Carolina, an accused "shall enjoy the right to a speedy and public trial[] by an impartial jury." U.S. Const. amend. VI; S.C. Const. art. I, § 14. "A speedy trial means a trial without unreasonable and unnecessary delay." *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371. "Accordingly, '[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.'" *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481 (2012) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)). "Stated differently, '[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.'" *Id*. at 441, 735 S.E.2d at 481–82 (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). Therefore, "the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007).

In *Barker v. Wingo*, the U.S. Supreme Court laid out a four-factor test for determining whether a defendant's speedy trial rights have been violated. 407 U.S. 514, 530–31 (1972). "These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused." *Hunsberger*, 418 S.C. at 343, 794 S.E.2d at 372. In applying the *Barker* Test, the U.S. Supreme Court noted:

> [N]one of the four factors [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533. If a defendant demonstrates that his speedy trial rights have been violated, the proper remedy is dismissal of the charges. *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371.

A. Period of delay for analysis

Barnes argues the circuit court erred in failing to consider the period of delay associated with his first trial in its speedy trial analysis. Barnes asserts the appropriate period of delay for the court's speedy trial analysis began on January 25, 2002, the date his South Carolina arrest warrant was issued. The State argues the circuit court properly determined that the appropriate period of delay for its speedy trial analysis began on January 31, 2014, the date the case was remitted to the circuit court following *Barnes I*. We agree with the State.

Generally, "[a]n accused's speedy trial right begins when he is 'indicted, arrested, or otherwise officially accused.'" *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 372 (quoting *Langford*, 400 S.C. at 442, 735 S.E.2d at 482). However, after conducting our own research, we agree with the circuit court's conclusion that the date on which a defendant's speedy trial rights attach in a retrial following the reversal of a conviction on direct appeal is a novel question of law in South Carolina. Accordingly, this court is free to decide this issue with no particular deference to the conclusions of the circuit court. *See Sweat*, 379 S.C. at 373, 665 S.E.2d at 649 ("When addressing [a] novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport

with the law and public policies of this state and the court's sense of law, justice, and right.").

We find two rationales in support of the circuit court's conclusion that Barnes's speedy trial rights attached in his retrial on January 31, 2014, the date of remittitur. First, Barnes waived his speedy trial rights in the previous case by failing to raise the issue to the circuit court or the supreme court. *See Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive."). Barnes's argument that the circuit court erred in not considering the entire period between 2002 and 2017 ignores one crucial fact: Barnes received a trial in November 2010. *See Hunsberger*, 418 S.C. at 342–43, 794 S.E.2d at 372 (indicating the speedy trial analysis focuses on the *interval between an official accusation and the trial*). Further, Barnes conceded that he never filed a motion or otherwise challenged the eight-year period between the issuance of his arrest warrant and his trial while before the circuit court or the supreme court.[7] Thus, we conclude that Barnes's failure to challenge the period of delay in his previous trial while before the circuit court or the supreme court constitutes a waiver of his right to challenge the delay as unreasonable. *See Bonnette*, 277 S.C. at 18, 282 S.E.2d at 598 ("Acts inconsistent with the continued assertion of a right, *such as a failure to insist upon the right*, may constitute waiver." (emphasis added)). Accordingly, we find that a defendant should not be permitted to waive an alleged violation of his speedy trial rights while before the supreme court only to load the deck with the alleged violation in his subsequent retrial. *Cf. Wheeler*, 247 S.C. at 402–03, 147 S.E.2d at 631 (finding the circuit court's rejection of the defendant's contention that he had been denied his speedy

[7] The circuit court properly determined that Barnes's IAD motions in the first trial did not constitute assertions of his constitutional rights to a speedy trial. *See State v. Tucker*, 376 S.C. 412, 416, 656 S.E.2d 403, 405 (Ct. App. 2008) ("Numerous courts have held the rights created by the IAD are statutory in nature and do not rise to the level of constitutionally guaranteed rights."); *see also State v. Allen*, 269 S.C. 233, 236–39, 237 S.E.2d 64, 66–67 (1977) (analyzing an IAD claim separately and distinctly from a speedy trial claim). Similarly, the circuit court properly found that any assertion of the right in Barnes's *pro se* filings was invalid because Barnes was represented by counsel. *See State v. Stuckey*, 333 S.C. 56, 58, 508 S.E.2d 564, 564–65 (1998) ("Here, appellant, who is represented by counsel, attempted to file a substantive document relating to his case. Since this document was not submitted through counsel, it is not appropriate for consideration by this [c]ourt.").

trial rights could not be reviewed in post-conviction relief proceedings when the defendant failed to challenge the ruling on appeal); *State v. Cooper*, 386 S.C. 210, 212–18, 687 S.E.2d 62, 64–67 (Ct. App. 2009) (measuring the period of delay in the appellant's retrial from the date of remittitur after the supreme court affirmed the grant of post-conviction relief to the appellant).

Second, after conducting a survey of other jurisdictions that have addressed this issue, we find that courts generally measure the period of delay from the date the case was remitted from the appellate courts when conducting a speedy trial analysis in a retrial following the reversal of a defendant's conviction. *See Duplantis v. State*, 708 So. 2d 1327, 1334 (Miss. 1998) ("[T]he speedy trial clock begins to run for purposes of determining a violation of a defendant's right to speedy retrial on the date this Court reverses his first conviction."); *State v. Stewart*, 881 P.2d 629, 632 (Mont. 1994) ("In the case of retrials, it is the time of the filing of the remittitur which is controlling in determining a defendant's speedy trial rights."); *State v. Kula*, 579 N.W.2d 541, 547 (Neb. 1998) ("[T]he period between the petitioner's arrest and his first conviction should not be counted against the state in examining the delay incident to the petitioner's second trial, unless the trial error that necessitated the second trial occurred for the purpose of delay." (quoting *Pelletier v. Warden*, 627 A.2d 1363, 1371 (Conn. App. Ct. 1993)); *People v. Malone*, 237 Cal. Rptr. 794, 796 (Cal. Ct. App. 1987) (indicating the period of delay for speedy trial analysis under California's speedy trial statute starts with the date of remittitur); *Levin v. State*, 816 S.E.2d 170, 177 (Ga. Ct. App. 2018) ("Where, as here, there has been an appeal or a dismissal of the charges and a subsequent re-indictment, the court measures the delay from the filing of the remittitur in the trial court."); *Icgoren v. State*, 653 A.2d 972, 978 (Md. Ct. Spec. App. 1995) ("[I]n construing a party's right to a speedy trial under the Sixth Amendment of the Federal Constitution . . . , we are *generally*, absent extraordinary circumstances . . . , only concerned with the period between the receipt of an appellate mandate, if the next prior conviction is reversed, and the subsequent retrial, or the period between the declaration of a mistrial and the commencement of the retrial."); *see also Brewington v. State*, 705 S.E.2d 660, 662 (Ga. 2011) ("While typically the time for speedy trial attaches at the date of arrest (or date of indictment/accusation if earlier), in this case appellants Brewington and Gary Brown were actually tried. Although they moved for dismissal on speedy trial grounds prior to their November 2009 trial, they did not appeal the denial of that motion prior to being tried. Therefore, as to these two defendants, the relevant time frame for purposes of the instant motion to dismiss on constitutional speedy trial grounds is

from the date of the mistrial, November 25, 2009, through the date the motion was denied on March 16, 2010." (footnote omitted)).

Accordingly, we hold the circuit court correctly determined that Barnes's speedy trial rights attached in his retrial on January 31, 2014, the date of remittitur.

B. Speedy Trial analysis

Length of delay

Both parties agree that the three-year and seven-month period between the date of remittitur and the date of Barnes's retrial is "presumptively prejudicial," triggering the speedy trial analysis. *See Hunsberger*, 418 S.C. at 342–43, 794 S.E.2d at 372 ("To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness."); *see also State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (holding a delay of *two years and four months* was "sufficient to trigger our review of the other three factors").

Reason for the delay

Barnes argues the circuit court erred in attributing only two years and three months of the delay to the State. Barnes further asserts the circuit court erred in determining the State's interlocutory appeal[8] was a neutral reason for delay.

"Closely related to the length of the delay is the reason the State advances to justify the delay." *State v. Reaves*, 414 S.C. 118, 130, 777 S.E.2d 213, 219 (2015). "A deliberate effort by the State to delay the trial to injure the defense should be weighted heavily against it." *Id*. "Neutral reasons, such as overcrowded dockets or negligence, should be weighted less heavily; however, the State is still ultimately responsible for bringing a criminal defendant to trial." *Id*. "Delays caused by the defendant should weigh against him." *Id*. "[A] valid reason, such as a missing witness, justifies an appropriate delay." *Hunsberger*, 418 S.C. at 346, 794 S.E.2d at

[8] While before the circuit court and throughout their appellate briefs, both parties refer to the State's common law petition for writ of certiorari in *Barnes II* as an "interlocutory appeal." For ease of discussion and to avoid confusion, we use the parties' phraseology in our discussion. *But see* note 4.

374. In other words, "[t]he delay must be attributable to the State before [an] appellant[] can complain." *State v. Dukes*, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971).

In determining the period of delay attributable to the State, the court made findings regarding several periods of time within the three-year and seven-month period between the date of remittitur and the date of Barnes's retrial. Based on these findings, the circuit court determined that two years and three months of the delay were attributable to the State and sixteen months were attributable to Barnes. Barnes challenges only two of the circuit court's findings on appeal.

First, Barnes argues the circuit court erred in attributing sixteen months of the delay to Barnes. We disagree.

The circuit court properly attributed this delay to Barnes. The State indicated that it was ready to proceed to trial prior to its interlocutory appeal regarding the appointment of counsel in *Barnes II*. During the State's interlocutory appeal, one of Barnes's attorneys was placed under an order of protection. After the case was remitted on August 10, 2015, the order of protection continued until December 16, 2016. Therefore, despite being prepared for trial, the State could not proceed with Barnes's trial because Barnes chose to continue retention of counsel who he knew was subject to an order of protection. While we acknowledge that Barnes was entitled to retain counsel of his choice, this decision and the resulting delay cannot be properly attributed to the State. Consequently, the delay cannot be characterized as neutral and must be attributed to Barnes. *See Reaves*, 414 S.C. at 130, 777 S.E.2d at 219 ("Neutral reasons, *such as overcrowded dockets or negligence*, should be weighted less heavily; *however, the State is still ultimately responsible for bringing a criminal defendant to trial*." (emphases added)); *id*. ("Delays caused by the defendant should weigh against him.").

Second, Barnes argues the circuit court erred in finding that the State's interlocutory appeal was neutral and did not weigh heavily against the State. Barnes contends that the interlocutory appeal was an unjustified attempt to preclude Barnes from asserting his constitutional right to counsel. The State argues the circuit court properly determined the interlocutory appeal was a legitimate reason for delay. We agree with the State.

> [A]n interlocutory appeal by the [State] ordinarily is a valid reason that justifies delay. In assessing the purpose

> and reasonableness of such an appeal, courts may consider several factors. These include the strength of the [State]'s position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime.

United States v. Loud Hawk, 474 U.S. 302, 315 (1986); *see also United States v. Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975) (finding that unless an interlocutory appeal was taken in bad faith or for the sole purpose of delay, "to put the onus of appellate delay on the [State] would severely infringe the [State]'s right to appeal").

The circuit court found that the State's interlocutory appeal was not taken in bad faith or for purpose of delay because (1) the supreme court granted the petition, (2) the supreme court heard the petition in its original jurisdiction, and (3) the supreme court held oral arguments on the case. Moreover, we note the supreme court affirmed the circuit court's ruling in favor of Barnes in a split decision. Consequently, we find the circuit court's determination that the interlocutory appeal was not taken in bad faith or for purpose of delay is not "clearly erroneous." *See Baccus*, 367 S.C. at 48, 625 S.E.2d at 220 ("[Appellate courts are] bound by the [circuit] court's factual findings unless they are clearly erroneous."). Thus, the circuit court properly determined the State's interlocutory appeal was a neutral reason for delay.

Accordingly, the circuit court properly found that two years and three months of the delay were attributable to the State. Furthermore, the circuit court properly determined that the neutral delays should not be weighed heavily against the State. *See State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) ("The delay was not caused by any willful neglect on the [S]tate's part. The constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay.").

Assertion of the right

Barnes argues that he first raised his speedy trial rights in the previous trial. The State argues Barnes first asserted his speedy trial rights on August 14, 2017, and this factor supports the conclusion that Barnes's speedy trial rights were not violated

because his retrial occurred approximately two months after he asserted his speedy trial rights.[9] We agree with the State.

"The third factor—assertion of the right—recognizes that while a criminal defendant has no responsibility to bring himself to trial, the extent to which he exercises his right to a speedy trial is significant." *Reaves*, 414 S.C. at 130, 777 S.E.2d at 219. While a defendant's assertion of the right is not dispositive of whether he is entitled to relief, it is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. *Hunsberger*, 418 S.C. at 349, 794 S.E.2d at 375. "Accordingly, 'the defendant's failure to assert the right, although not conclusive, makes it more difficult to show that the right was violated.'" *Reaves*, 414 S.C. at 130, 777 S.E.2d at 219 (quoting *Pittman*, 373 S.C. at 550, 647 S.E.2d at 155). "This consideration prevents a criminal defendant from strategically acquiescing in a delay [that] works to his advantage, then asking the case be dismissed at the last moment once it is called for trial." *Id*.

As indicated in Section I(a), the circuit court properly determined that Barnes's speedy trial rights attached on January 31, 2014. Accordingly, the only time Barnes asserted his speedy trial rights after they attached was August 14, 2017, when he filed his motion to dismiss. Moreover, we note that Barnes, who was represented by counsel, waited approximately forty-two months before invoking his speedy trial rights. *See Waites*, 270 S.C. at 109, 240 S.E.2d at 653 ("We think it significant that Waites, represented by counsel, waited approximately twenty-eight months before claiming he had been denied his constitutional right to a speedy trial."). Additionally, Barnes's retrial was held approximately two months after he filed his motion to dismiss. *See Robinson*, 335 S.C. at 626, 518 S.E.2d at 272 (indicating the fact that Robinson was tried within one year of his first formal motion to dismiss contributed to the finding that his speedy trial rights were not violated). Consequently, this factor weighs against Barnes. *See Hunsberger*, 418 S.C. at 349, 794 S.E.2d at 375 ("The accused's assertion of the right . . . is entitled [to] *strong evidentiary weight in determining whether the accused is being deprived of the right*." (emphasis added)).

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[9] The State alternatively argues that Barnes never asserted his speedy trial rights because his motion to dismiss was not a proper invocation of the rights. We find this argument meritless. *See State v. Robinson*, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (Ct. App. 1999) ("Robinson first asserted his right to a speedy trial in May 1995 *when he filed the formal motion to dismiss*." (emphasis added)).

Prejudice

Barnes argues the circuit court erred in finding his speedy trial rights were not violated because he was prejudiced by the delay. The State argues the circuit court's finding is proper because Barnes cannot demonstrate any actual prejudice resulting from the delay. We agree with the State.

"The final factor—prejudice to the defendant—requires a reviewing court to analyze the three different types of prejudice the speedy trial right seeks to prevent: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility the defense will be impaired." *Reaves*, 414 S.C. at 131, 777 S.E.2d at 219. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Langford*, 400 S.C. at 445, 735 S.E.2d at 484 (quoting *Barker*, 407 U.S. at 532); *but see Loud Hawk*, 474 U.S. at 312 ("[T]he Speedy Trial Clause's core concern is impairment of liberty . . . .").

"[A]n accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial." *Hunsberger*, 418 S.C. at 351, 794 S.E.2d at 376. "Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." *Id*. "The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Id*. "While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time." *Id.*

At the outset, we note that Barnes does not identify any actual prejudice resulting from the applicable delay in his brief but relies solely on presumptive prejudice stemming from the length of delay between the arrest warrant and the retrial. *See id*. ("[P]resumptive prejudice cannot alone support a speedy trial claim . . . ."). Therefore, Barnes cannot demonstrate that he was prejudiced by the delay between the remittitur and the retrial. However, we will also review the findings of the circuit court.

The circuit court made the following findings regarding prejudice: (1) Barnes benefitted from the availability of prior witness testimony given under oath in his first trial; (2) Barnes benefitted from the availability of witness testimony given

under oath in the trials of his co-defendants Alex[10] and Julio Hunsberger[11]; (3) Barnes did not identify any defense witnesses who could not be reached due to the State's delay; (4) Barnes did not testify in his prior trial so he was not prejudiced by the potential use of his own prior testimony; (5) Barnes suffered prejudice from being incarcerated and awaiting trial, and his incarceration for other offenses was immaterial to the fact that these prejudices attached; and (6) Barnes benefitted in part from the delay because the State revoked its notice of intent to seek the death penalty. Based on the foregoing, we find that any prejudice Barnes suffered as a result of the delay is minimal, especially in light of the fact that the State withdrew its notice of intent to seek the death penalty despite previously obtaining a capital conviction. *See Pittman*, 373 S.C. at 552–53, 647 S.E.2d at 157 (finding no violation of the appellant's right to a speedy trial in light of the quantity of evidence presented by the State and the fact that the appellant "received some benefits as a result of the delay"); *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (noting the State's withdrawal of its notice to seek the death penalty "could be construed as a benefit to Cooper resulting from the delay").

Weighing the factors

Here, the circuit court properly found that the State was responsible for a two-year and three-month delay and that the neutral reasons for delay weighed minimally against the State. Additionally, the circuit court properly determined that Barnes asserted his speedy trial rights approximately two months before the retrial. Furthermore, we find that Barnes can demonstrate only minimal prejudice resulting from the State's delay. Consequently, based on the totality of the circumstances, including the complexity of the case, we find that Barnes's speedy trial rights were not violated. *See Hunsberger*, 418 S.C. at 343, 794 S.E.2d at 372 (indicating that a speedy trial analysis must consider: "(1) [the] length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused"); *Langford*, 400 S.C. at 445, 735 S.E.2d at 484 ("While we are cognizant of not minimizing the deleterious effects of lengthy pre-trial incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case."); *State v. Kennedy*, 339 S.C. 243, 251, 528 S.E.2d 700, 704–05

[10] *See Hunsberger*, 418 S.C. at 335, 794 S.E.2d at 368.
[11] *See State v. Hunsberger*, Op. No. 2016-MO-029 (S.C. Sup. Ct. filed October 12, 2016).

(Ct. App. 2000) ("Given the complexity of the case, supplying the State with a legitimate reason for the delay, and the lack of prejudice to the defendant, we conclude the trial court properly denied Kennedy's motion to dismiss based on his assertion of a speedy trial violation."). Accordingly, the circuit court properly denied Barnes's motion to dismiss.

II. Interstate Agreement on Detainers Act

Barnes argues the circuit court erred in failing to dismiss his indictment under the IAD. We find that this issue is not preserved for appellate review. While before the circuit court, Barnes conceded that the supreme court disposed of this issue in *Barnes I*. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in [circuit] court may not be argued on appeal."). On appeal, Barnes concedes that the issue was disposed of in *Barnes I* but argues that the circuit court abused its discretion by refusing to reconsider his IAD claim because the record on appeal presented to the supreme court did not contain all of the documents relevant to the claim. However, Barnes does not cite any authority, and likely none exists, to support the proposition that the circuit court abuses its discretion by refusing to allow a defendant to relitigate an issue that has been finally determined by our supreme court.[12] *See State v. Jones*, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (finding an issue is abandoned when an appellant only raises conclusory arguments without citing authority). Accordingly, Barnes has abandoned this issue on appeal.

CONCLUSION

Based on the foregoing, Barnes's conviction is

AFFIRMED.

LOCKEMY, C.J., and HEWITT, J., concur.

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[12] Moreover, our supreme court's final determination of an issue is equally binding on this court. *See* S.C. Const. art V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Patrick*, 318 S.C. 352, 358, 457 S.E.2d 632, 636 (Ct. App. 1995) (finding when the Supreme Court rules on an appellant's IAD claim in a prior appeal, that ruling is binding on the Court of Appeals in subsequent appeals).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Progressive Direct Insurance Co., and USAA General Indemnity Company, Respondents,

v.

Shanna Groves, as the Personal Representative of the Estate of Lynn Harrison, Appellant.

Appellate Case No. 2017-001946

Appeal From Dorchester County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5750
Submitted April 15, 2020 – Filed July 22, 2020

REVERSED AND REMANDED

John Phillips Linton, Jr., of Walker Gressette Freeman & Linton, LLC, of Charleston, and Ryan Harris Sigal, of Miller, Dawson, Sigal & Ward, LLC, of North Charleston, for Appellant.

Wesley Brian Sawyer, of Murphy & Grantland, PA, of Columbia, for Respondents.

GEATHERS, J.: In this declaratory judgment action, Shanna Groves, as personal representative of the Estate of Lynn Harrison ("the Estate"), appeals the circuit court's order granting summary judgment to Progressive Direct Insurance Co. and

USAA General Indemnity Company (collectively "Respondents"). The underlying action arises out of a vehicle-to-vehicle shooting perpetrated by Jimi Carl Redman, Jr. against Lynn Harrison. Respondents brought suit against the Estate seeking a declaratory judgment that the killing was not covered by Harrison's uninsured or underinsured motorist policies obtained through Respondents. On appeal, the Estate argues the circuit court erred in concluding that 1) Redman's vehicle was not causally connected to the killing, and 2) Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the killing. We reverse and remand.

FACTS

On April 2, 2015, Lynn Harrison was driving a 2010 GMC eastbound on East Carolina Road, which became Old Trolley Road just before it intersected Bacon's Bridge Road in Summerville. At the same time, Jimi Carl Redman, Jr. was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Harrison's right. Harrison and Redman had not previously met and did not know each other.[1] As both vehicles approached the intersection, a witness saw Redman blowing kisses and making hand gestures toward Harrison. When Harrison and Redman reached the intersection, the light turned red and both vehicles stopped. Moments later, Redman pointed a rifle at Harrison and shot in her direction. The bullet went through the passenger window of Harrison's vehicle, striking her in the neck and killing her. Redman then drove through the red light and fled before being apprehended a few blocks away. Harrison's car rolled slowly through the intersection before coming to a stop on the median.

Redman's Ford Escape was either uninsured or underinsured at the time of the attack. Conversely, Harrison's husband had a South Carolina motorcycle insurance policy through Progressive[2] and a South Carolina auto insurance policy through USAA. At the time of the shooting, Harrison lived with her husband, both policies were in full force, and both policies contained uninsured and underinsured motorist coverage. The Progressive policy provided in relevant part:

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[1] The record reveals that Redman traveled to Dorchester County from Texas, and it appears that his killing of Harrison was a random act of violence.

[2] *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007) ("[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is 'personal and portable.'").

> If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:
>
> 1) an uninsured[3] motor vehicle because of bodily injury:
>
> a) sustained by an insured person;
>
> b) caused by an accident; and
>
> c) arising out of the ownership, maintenance or use of an uninsured motor vehicle[.]

Similarly, the USAA policy provided:

> We will pay for the following damages which a covered person is legally entitled to recover from the owner or operator of an uninsured[4] motor vehicle because of an auto accident:
>
> 1) BI sustained by a covered person; and
>
> 2) injury to or destruction of the property of a covered person.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

On August 7, 2015, Progressive filed a complaint against the Estate seeking a declaratory judgment finding that the policy it issued did not provide uninsured motorist coverage[5] for Harrison's death. On September 17, 2015, Progressive and USAA filed an amended complaint, adding USAA as a plaintiff and seeking a

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[3] Except for the words uninsured and underinsured, the Progressive underinsured motorist policy is virtually identical to the uninsured motorist policy.

[4] The USAA underinsured motorist policy is virtually identical to the uninsured motorist policy except for the use of the word underinsured instead of uninsured and the following limitation found in the underinsured policy: "However, this does not include damage to property owned by the covered person while contained in your covered auto."

[5] Respondents assert there is no meaningful difference between the uninsured motorist coverage and the underinsured motorist coverage for the purposes of this appeal.

declaratory judgment that neither of their policies provided coverage for Harrison's death. On November 3, 2015, the Estate filed its answer to the amended complaint. On May 9, 2016, Respondents moved for summary judgment and, on January 27, 2017, the Estate filed a cross-motion for summary judgment.

On February 17, 2017, the circuit court held a hearing and heard arguments on both summary judgment motions. On August 7, 2017, the circuit court entered an order granting summary judgment in favor of Respondents and denying the Estate's summary judgment motion. In its order, the circuit court determined that Harrison's death did not arise out of Redman's ownership, maintenance, or use of a vehicle because there was no causal connection between Redman's use of the vehicle and Harrison's death. Additionally, the circuit court concluded that even if there was a causal connection between Redman's use of the vehicle and Harrison's death, Redman's act of shooting a rifle out of the vehicle was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding that Redman's vehicle was not causally connected to the killing?

2. Did the circuit court err in concluding that Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the killing?

STANDARD OF REVIEW

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the [circuit] court under Rule 56(c), SCRCP." *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). "Pursuant to Rule 56(c), SCRCP, summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." *Id*. (quoting *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990)). In other words, appellate courts must "liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might

reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

LAW/ANALYSIS

The Estate argues the circuit court erred in concluding that Harrison's death did not arise out of Redman's ownership, maintenance, or use of his vehicle. Respondents argue the circuit court's conclusion is proper because 1) there was no causal connection between Redman's vehicle and the assault; and 2) Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the assault. We agree with the Estate.

Pursuant to South Carolina law, no automobile insurance policy may be issued in this state unless it includes uninsured motorist coverage. *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 91, 644 S.E.2d 62, 63 (2007); *see also* S.C. Code Ann. § 38-77-150(A) (2015) (requiring that any insurance policy issued in South Carolina include uninsured motorist coverage). Accordingly, "[a]n insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998) (quoting S.C. Code Ann. § 38-77-140 (1989)). In *Aytes*, our supreme court laid out a three-part test for determining whether an injury arises out of the ownership, maintenance, or use of an uninsured vehicle. *Id*. To satisfy the test, a party must establish the following elements:

> 1) There exists a causal connection between the vehicle and the injury; and
> 2) No act of independent significance breaks the causal link; and
> 3) The vehicle is being used for transportation at the time of the assault.

State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (citing *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745).

Here, it is undisputed that both Harrison and Redman's vehicles were being used for transportation at the time of the shooting. Therefore, whether Harrison's killing falls within the uninsured motorist coverage of Respondents' policies hinges on the remaining two elements. We will address each element in turn.

I. Causal connection

The Estate argues the circuit court erred in concluding that there was no causal connection between Redman's vehicle and the killing because 1) the vehicle was an active accessory to the shooting; 2) the vehicle was more than the mere situs of the fatal injury; and 3) Harrison's death was foreseeably identifiable with the normal use of a vehicle. Respondents argue the circuit court properly determined that no causal connection existed because 1) Redman's vehicle was not an active accessory to the shooting; 2) Redman's vehicle was merely the site from which he fired the gun; and 3) gunshot injuries are not foreseeably identifiable with the normal use of a vehicle. We agree with the Estate.

Our courts have indicated that a causal connection means:

> a) the vehicle was an "active accessory" to the assault; and
> b) something less than proximate cause but more than mere site of the injury; and
> c) that the "injury must be foreseeably identifiable with the normal use of the automobile."

Bookert, 337 S.C. at 293, 523 S.E.2d at 182.

A) Active accessory to the assault

The Estate argues the circuit court erred in concluding that Redman's vehicle was not an active accessory to the assault because, but for the vehicle, Redman would not have been in a position to shoot Harrison. The Estate further contends that Redman would not have been able to follow Harrison to the stoplight without the use of the vehicle. Respondents argue the circuit court's conclusion was proper because Redman's position was not dependent on his use of the vehicle. Respondents further contend that Redman's use of the vehicle did not contribute to the shooting because Redman could have walked up to Harrison's vehicle off the street or after exiting his own vehicle before shooting her.

The Estate argues the facts in the record are similar to the facts of *Wausau Underwriters Ins. Co. v. Howser*[6] and *Home Ins. Co. v. Towe*,[7] further asserting that

[6] 309 S.C. 269, 422 S.E.2d 106 (1992).
[7] 314 S.C. 105, 441 S.E.2d 825 (1994).

the circuit court erred in distinguishing those cases from the case at bar. In *Howser*, our supreme court found that a vehicle was an active accessory to a vehicle-to-vehicle shooting. 309 S.C. at 273, 422 S.E.2d at 108. On a summer night in 1987, Howser and a friend were driving home after leaving a bowling alley. *Id*. at 270–71, 422 S.E.2d at 107. The two stopped at an intersection and drove about one-tenth of a mile when they were bumped by another vehicle. *Id*. at 271, 422 S.E.2d at 107. The unknown vehicle bumped Howser's vehicle two more times, and Howser accelerated her vehicle. *Id*. The unknown driver then pulled alongside Howser, shouted at her to slow down and stop, and pointed a pistol at the passenger window. *Id*. Howser made a quick left turn onto a side street but as she completed her turn, the unknown driver shot at her vehicle. *Id*. The bullet entered the vehicle, fragmented, and hit Howser's back in three places. *Id*. Notably, the supreme court observed that, "[t]he injuries that Howser sustained were the result of the gunshot[,]" further pointing out that "[n]either Howser nor Shealy w[ere] hurt when the other vehicle bumped [Howser's vehicle]." *Id*. Following the shooting, the unknown driver fled and was never captured. *Id*.

The supreme court held that it was "apparent that the unknown vehicle was an active accessory to th[e] assault." *Id*. at 273, 422 S.E.2d at 108. The court noted that the case was not one in which the assailant merely used his vehicle to provide transportation to the shooting, nor was it a case in which the assailant "happened, incidentally, to be sitting in a stationary vehicle at the time of the attack." *Id*. Rather, the court found that "*[o]nly through [the] use of his vehicle was the assailant able to closely pursue Howser*, thereby enabling him to carry out the pistol assault." *Id*. (emphasis added). Accordingly, the court determined that "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part." *Id*. The court further noted that "only a motor vehicle could have provided the assailant a quick and successful escape." *Id*.

Similarly, in *Towe*, our supreme court concluded that a vehicle was an active accessory to an assault. 314 S.C. at 107, 441 S.E.2d at 827. Towe was driving when his passenger threw a bottle from the vehicle at a road sign. *Id*. at 106, 441 S.E.2d at 826. Instead of hitting the sign, the bottle shattered on the steering wheel of a tractor being driven by the victim in the opposite direction. *Id*. The supreme court held the vehicle was an active accessory to the attack because "*[t]he use of the automobile placed [the passenger] in the position to throw the bottle at the sign* and the vehicle's speed contributed to the velocity of the bottle[,] increasing the

seriousness of [the victim]'s injuries." *Id*. at 107, 441 S.E.2d at 827 (emphasis added).

Here, in determining that Redman's vehicle was not an active accessory to the shooting, the circuit court made the following distinctions between the facts at bar and the facts of *Howser* and *Towe*: 1) Redman did not use his vehicle to keep up with Harrison's vehicle; 2) Redman's vehicle did not make contact with Harrison's vehicle; 3) there was no evidence that Harrison saw Redman driving beside her or that she was aware of him making hand gestures toward her;[8] 4) Redman's use of the vehicle did not contribute to the severity of Harrison's injury; and 5) Harrison made no attempt to evade Redman. We find that the circuit court erred in relying on these distinctions.

First, like the two vehicles in the present case, the vehicles in *Towe* never made contact. Moreover, similar to the present case, there was no evidence that the driver of the tractor was aware of the passenger before he threw the bottle, and the tractor's driver made no attempt to evade the vehicle. Second, in *Howser*, the use of the vehicle did not contribute to the severity of Howser's injuries because Howser's injuries, like Harrison's, were the result of the shooting. Additionally, while the assailant bumped Howser's vehicle, the supreme court noted that this act did not cause Howser's injuries. Therefore, the circuit court's distinction of *Howser* from the present case on the ground of vehicle-to-vehicle contact was not meaningful. Finally, the facts of the case at bar are on all fours with the facts in *Howser*. We note that the stoplight, where Redman was able to quickly catch up with Harrison and shoot her, may have been the only thing that prevented Redman's pursuit of Harrison from turning into an extended chase as in *Howser*. Accordingly, we do not find that the brevity of Redman's pursuit, resulting from Harrison's compliance with the stoplight, distinguishes *Howser* from the case at bar. In fact, Howser only

[8] We find the circuit court improperly determined this lack of evidence distinguished the facts at bar from *Howser* and *Towe*. Notably, there is no evidence in the record indicating that Harrison was unaware of Redman. The sole witness to the attack indicated she was driving in the left lane *behind* Harrison at the time Redman was blowing kisses and gesturing towards Harrison. Consequently, the fact that the witness did not see Harrison react to Redman through Harrison's back window and driver seat does not lead to the conclusion that Harrison was unaware of Redman or his actions.

traveled one-tenth of a mile before being bumped a few times and then making an evasive maneuver onto a side street before being fired upon.

The circuit court erred in finding Redman's vehicle was not an active accessory to the shooting by overlooking one significant factor consistent between *Howser*, *Towe*, and the case at bar; but for the use of the vehicles, the assailants would not have been in a position to injure the victims. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("*Only through [the] use of his vehicle was the assailant able to closely pursue Howser, thereby enabling him to carry out the pistol assault*." (emphasis added)); *Towe*, 314 S.C. at 107, 441 S.E.2d at 827 ("The use of the automobile *placed [the passenger] in the position* to throw the bottle at the sign . . . ." (emphasis added)). Here, the record indicates that Redman drove beside Harrison, making hand gestures at her until the two stopped at a red light. Therefore, whether or not Harrison saw Redman, it is apparent that *Redman saw Harrison* at some point before the two drove down the street and stopped at the light. After spotting Harrison, Redman used his vehicle, like the assailant in *Howser,* to closely pursue her to the point where he shot her. Had Redman not been in his vehicle, he would not have been able to keep pace with and follow Harrison. In other words, but for Redman's use of his vehicle, he would not have been in a position to shoot Harrison.

Two additional factors support the conclusion that Redman's vehicle was an active accessory to the shooting. First, like the assailant in *Howser*, Redman used his vehicle to immediately flee the scene. While the assailant in *Howser* was able to successfully flee and avoid apprehension, the mere fact that Redman was eventually arrested does not diminish the fact that his vehicle was used to flee the scene. Second, unlike the assailants in *Howser* and *Towe*, Redman's vehicle contributed to the concealment of his weapon. The weapons used in *Howser* and *Towe*, a pistol and a bottle, respectively, do not require the use of a vehicle to be transported inconspicuously, and could easily be hidden in an assailant's waistband. Here, Redman used a rifle to shoot Harrison. Had Redman not been in a vehicle, he likely could not have transported his rifle down a public street to the stoplight where he shot Harrison without drawing her attention, the attention of law enforcement, or the attention of the public at large to the weapon. However, through the use of his vehicle, Redman was able to transport his rifle down the street without notice until he was in position to shoot Harrison. For the foregoing reasons, we find the circuit court erred in concluding Redman's vehicle was not an active accessory to the shooting.

Respondents argue the circuit court properly determined Redman's vehicle was not an active accessory to the shooting because the facts of the case at bar are more similar to the facts of *Holmes v. Allstate Ins. Co.*, 786 F. Supp.2d 1022 (D.S.C. 2009). In *Holmes*, the U.S. District Court for the District of South Carolina found that a vehicle was not an active accessory to an assault. 786 F. Supp.2d at 1027. Holmes and her ex-boyfriend broke up, and he began stalking Holmes, which included following her around town in his vehicle. *Id*. at 1023–24. One day, Holmes went to a friend's house and noticed her ex-boyfriend driving back and forth in front of the house. *Id*. at 1024. Later, Holmes left to pick up her neighbor's child at a local school bus stop. *Id*. Holmes's ex-boyfriend happened to be driving around and saw Holmes drive past him before turning to follow her. *Id*. Holmes's ex-boyfriend eventually found Holmes parked on the side of the road awaiting the arrival of the school bus. *Id*. Holmes's ex-boyfriend then shot Holmes several times before fleeing. *Id*.

In determining that the ex-boyfriend's vehicle was not an active accessory to the assault, the district court noted nothing in the record indicated that Holmes was aware that her ex-boyfriend was approaching or that the ex-boyfriend's vehicle made contact with Holmes's vehicle. *Id*. at 1026. The court further considered the fact that the ex-boyfriend's use of his vehicle did not increase the severity of the harm caused by the gunshots. *Id*. at 1027. Rather, the ex-boyfriend "merely used his car to approach [Holmes], stopped his car next to her parked car, fired several gunshots at [Holmes], and drove off." *Id*. Thus, the court explained that the case was one in which the ex-boyfriend merely "used his vehicle . . . to locate [Holmes], to position himself next to [Holmes]'s vehicle, and to leave the scene of the crime," not a case in which Holmes was "traveling in her vehicle at the time [her ex] fired the gun, thus making [her ex-boyfriend's] position in relation to [Holmes] depend[e]nt on the use of his vehicle." *Id*. at 1026–27.

At the outset, there is a key distinction between *Holmes* and the facts at bar.[9] Here, Harrison's car was in drive and operational during the shooting, whereas in

[9] Furthermore, we note that a federal district court's interpretation of South Carolina insurance law is not binding on this court. *See Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 552, 436 S.E.2d 182, 184 (Ct. App. 1993) ("A contract of insurance is governed by the law of the state in which [the] application for insurance was made, the policy delivered, and the contract formed."); *see also Santee River Cypress Lumber Co. v. Query*, 168 S.C. 112, 117, 167 S.E. 22, 24 (1932) ("We are not bound

Holmes, the victim's vehicle was parked and on the side of the road. Therefore, in *Holmes*, the assailant did not need the use of his vehicle to put himself in a position to shoot the victim. The assailant could have spotted the vehicle while on foot, walked up to the window, and shot the victim. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* . . . . Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack*." (emphases added)). Conversely, Redman could not have kept pace with Harrison's car and positioned himself to shoot her but for his use of the automobile.

Moreover, in explaining its conclusion, the district court focused on the victim's lack of mobility in distinguishing *Holmes* from scenarios like the one at bar. The court noted that the ex-boyfriend merely used his vehicle to position himself next to Holmes's stationary vehicle before shooting her. *See Holmes*, 786 F. Supp.2d at 1026–27. Thus, the vehicle was not an active accessory to the shooting because once the ex-boyfriend was in position to shoot Holmes, regardless of how he reached that position, he did not need the use of his vehicle to maintain his ability to shoot Holmes. Conversely, the district court explained that had Holmes's car been in motion, the ex-boyfriend's position in relation to Holmes would have been *dependent* on the use of his vehicle. *Id*. at 1026–27. In other words, a would-be assailant would be incapable of maintaining a close position from which to attack a mobile driver but for the use of the assailant's vehicle.

Respondents argue the facts at bar mirror those in *Holmes* because Harrison's vehicle was stationary when Redman shot her. Thus, Respondents argue, Redman could have walked up and shot Harrison without the use of his vehicle. However, Respondents' argument rests on the notion that Redman could have waited at the corner of the intersection with a rifle and approached Harrison on foot. This argument ignores the fact that Redman used his vehicle to drive from the point where he first spotted Harrison, while keeping pace with her vehicle, to the point where he shot her at the stoplight. Accordingly, Harrison's momentary stop at the stoplight is

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by the construction placed upon [a state s]tatute by any [f]ederal [c]ourt, and the [f]ederal [c]ourts should adopt and follow our construction."); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 237, 659 S.E.2d 213, 223 (Ct. App. 2008), *rev'd on other grounds*, 386 S.C. 108, 687 S.E.2d 29 (2009) (providing that an appellate court is not bound to follow a federal court's interpretation of South Carolina law).

distinguishable from the operation of the car in *Holmes*, which was in park and whose engine was turned off at the time of the assault. This difference is highlighted by the fact that Harrison's vehicle, with engine running and in drive, rolled through the intersection after she was shot.

Respondents also argue that Redman could have put his car in park at the stoplight, exited, shot Harrison, and fled the scene on foot. Thus, Respondents argue that Redman's use of the vehicle did not contribute to the assault. However, while the assailant in *Holmes* could have parked before attacking his victim, he did not need his vehicle to put himself in a position to shoot the victim because the victim was sitting in a vehicle that was turned off and stationary. Conversely, Redman would not have been able to keep pace with Harrison from the moment he spotted her until the moment he shot her but for the use of his vehicle. Therefore, the fact that Harrison's vehicle was operational and in drive distinguishes the facts at bar from *Holmes*.

B) Mere situs of the injury

The Estate argues the circuit court erred in finding Redman's vehicle was "merely the site from which he fired the gun." Respondents argue the circuit court finding was proper. Respondents further assert Harrison's vehicle is the mere situs of her injury.

Respondents assert the facts of this case are similar to the facts of *Holmes* because Redman merely used his vehicle to approach Harrison's vehicle, stop, and fire at Harrison. This argument mirrors Respondents' previous argument that Redman's vehicle was not an active accessory to the assault because he could have approached Harrison on foot. Thus, Respondents argue that because the car was not necessary to the assault, it is the mere situs from which Redman fired the weapon. *See Holmes*, 786 F.Supp.2d at 1027 ("[The ex] *merely used his car to approach Plaintiff*, stopped his car next to her parked car, fired several gunshots at Plaintiff, and drove off." (emphasis added)). However, this argument ignores the fact that Redman used his vehicle to drive from the point where he first spotted Harrison to the point where he shot her at the stoplight while also keeping pace with her vehicle. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* . . . . Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack*." (emphases added)).

Respondents also argue Harrison's vehicle is the mere situs of her injury, arguing the facts of the case at bar are comparable to the facts in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999). In *Wright*, this court determined a taxi cab was merely the situs of the driver's injury. *Id*. at 425, 523 S.E.2d at 475. One night while the driver was working, she picked up two men who, in a planned and joint effort, attempted to rob the driver while they were occupying her taxi. *Id*. at 422, 523 S.E.2d at 473. The driver was shot during the robbery and crashed into a parked vehicle. *Id*. The driver eventually died from her injuries. *Id*. This court found that the driver's taxi "served merely as the situs of the shooting." *Id*. at 425, 523 S.E.2d at 475. The court further explained that, "[t]he required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." *Id*.

We find the case at bar easily distinguishable from *Wright*. First, in *Wright*, the plaintiffs were not seeking coverage under an uninsured motorist provision of their own policy. Rather, the plaintiffs sought coverage from the driver's taxi company as a self-insurer. *Id*. 422, 523 S.E.2d at 473. Second, the assault was not facilitated by the use of an uninsured vehicle. Rather, the assailants entered the victim's self–insured taxi before the assault occurred. Third, the assailants and the victim were all located in the same vehicle when the assault occurred. Thus, the taxi was merely the scene of the assault. As such, this court found that the mere fact that the injury occurred in the taxi cab rather than on the street was not enough to invoke coverage. Here, Redman shot Harrison from his own vehicle rather than from within her own vehicle. Accordingly, we do not agree that the findings in *Wright* apply to the facts at bar.

C) Foreseeably identifiable injuries

The Estate argues the circuit court erred in finding Harrison's death was not foreseeably identifiable with the use of Redman's vehicle. Respondents argue the circuit court's finding is proper because a gunshot injury is not foreseeably identifiable with the normal use of an automobile.

Respondents cite *Bookert* for the proposition that gunshot injuries are not "'foreseeably identifiable with the normal use of an automobile.'" 337 S.C. at 293, 523 S.E.2d at 182. Bookert's son Michael was with some friends and stopped at a Hardee's restaurant, where two soldiers and fifteen other young men became involved in an altercation. *Id*. at 292, 523 S.E.2d at 181. Michael and his friends

left and went to a McDonald's restaurant, as did the fifteen men from the Hardee's. *Id*. The two soldiers were armed and picked up a third soldier before driving to the McDonald's in search of the men from Hardee's. *Id*. As Michael was about to walk into the McDonald's, he heard the soldiers yelling and turned in their direction. *Id*. The soldiers' vehicle was stopped in the traffic lane with the motor running, and one soldier stood in the back holding a shotgun while the front passenger brandished a handgun. *Id*. The vehicle jerked forward, and the soldier wielding the shotgun fell and fired his gun. *Id*. The shotgun pellets did not hit Michael, but while the vehicle was still moving forward, the front passenger shot Michael, striking him with a bullet in each leg. *Id*. at 292–93, 523 S.E.2d at 181–82. Our supreme court ultimately found that Michael's injuries were not "'foreseeably identifiable with the normal use of an automobile.'" *Id*. at 293, 523 S.E.2d at 182. Notably, however, our supreme court did not overrule *Howser*, in which the court found a causal connection between the use of the vehicle and the injuries suffered by the victim of a vehicle-to-vehicle shooting.

At the outset, the facts at bar are distinguishable from *Bookert*. Notably, Michael was on foot when he was assaulted. Thus, the facts in *Bookert* are consistent with *Holmes* and *Wright*, in which the assailant's ability to carry out the attack was not dependent on the use of the vehicle. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* . . . . Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack*." (emphases added)). As such, the assailant's use of the vehicle did not contribute to the assault because the assailants could have carried out the same attack after approaching on foot. Conversely, but for the use of his vehicle, Redman would not have been able to keep pace with Harrison from the point he spotted her to the stoplight where he shot her.

Additionally, we disagree with the proposition that *Bookert* created a bright line rule that gunshot injuries are not foreseeably identifiable with the normal use of an automobile. As previously mentioned, the *Bookert* court did not overrule *Howser*. Therefore, we must assume the fact that an assailant fired a gun from an automobile does not automatically defeat coverage by the automobile's insurer. Accordingly, we conclude that the holding in *Bookert* is limited to the facts of that case. Turning to the case at bar, the facts are more consistent with the vehicle-to-vehicle shooting in *Howser* than the vehicle-to-pedestrian shooting in

Bookert. Consequently, we conclude that Redman's assault was foreseeably identifiable with the normal use of an automobile.

Based on the foregoing, we find that Redman's vehicle was an active accessory to the shooting and more than the mere situs of the attack or injury. Additionally, pursuant to *Howser*, we conclude that Harrison's death was foreseeably identifiable with the normal use of a vehicle. *See Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (indicating that a "causal connection means: a.) the vehicle was an 'active accessory' to the assault; and b.) something less than proximate cause but more than [the] mere site of the injury; and c.) that the 'injury must be foreseeably identifiable with the normal use of the automobile'"). Accordingly, the circuit court erred in finding that there was no causal connection between Redman's use of his vehicle and Harrison's death.

II. Intervening act of independent significance

The Estate argues the circuit court erred in concluding that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. Respondents argue the circuit court's conclusion was proper. We agree with the Estate.

"Once causation is established, the court must determine if an act of independent significance occurred breaking the causal link." *Howser*, 309 S.C. at 273, 422 S.E.2d at 108. "If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its 'use.'" *Hite v. Hartford Acc. & Indem. Co.*, 288 S.C. 616, 621, 344 S.E.2d 173, 176 (Ct. App. 1986).

> Even if there is some remote connection between the use of the automobile and the injury complained of, if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile, the injury is not the result of the 'use' of an automobile.

Id. at 621, 344 S.E.2d at 176–77.

In *Howser*, our supreme court found the unknown driver's gunshot was not an intervening act of independent significance. 309 S.C. at 274, 422 S.E.2d at 109. The court explained that "the unknown driver's use of his vehicle and the shooting were

inextricably linked as one continuing assault." *Id*. Similarly, in *Towe*, the supreme court found the use of the vehicle and the passenger's throwing of the bottle were "'inextricably linked' as one continuing act." *Towe*, 314 S.C. at 108, 441 S.E.2d at 827.

Conversely, in *Wright*, this court found the gunmen's shooting was an intervening act of independent significance that broke any causal connection between the vehicle and the driver's injuries. 337 S.C. at 427, 523 S.E.2d at 476. This court found that "[t]he fatal injuries that [the driver] sustained were unrelated to any use of the vehicle." *Id*. The court further explained that "[t]he same injuries could have occurred when the vehicle was parked, or otherwise not moving, or when [the victim] or the gunmen were standing outside of the vehicle." *Id*.

We find the facts at bar more closely resemble those of *Howser* and *Towe* because, unlike the assault in *Wright*, Redman's attack on Harrison was not "unrelated to any use of [his] vehicle." *Id*. Rather, as discussed in section I(A), Redman's position from which he shot Harrison, his ability to inconspicuously transport his rifle, and his ability to flee the scene were dependent on the use of his vehicle. Thus, Redman's "use of his vehicle and the shooting were inextricably linked as one continuing assault." *Howser*, 309 S.C. at 274, 422 S.E.2d at 109. Accordingly, the circuit court erred in concluding that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault.

Based on the foregoing, we conclude: 1) there was a causal connection between Redman's vehicle and the shooting; 2) there was no act of independent significance breaking the causal link; and 3) the vehicle was being used for transportation at the time of the assault. *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (indicating that an injury arises out of the ownership, maintenance, or use of an uninsured vehicle if 1) there exists a causal connection between the vehicle and the injury; 2) no act of independent significance breaks the causal link; and 3) the vehicle is being used for transportation at the time of the assault). Therefore, the circuit court erred in concluding that Harrison's death did not arise out of Redman's ownership, maintenance, or use of his vehicle. Thus, we hold the circuit court erred in granting summary judgment in favor of Respondents.

CONCLUSION

Based on the foregoing, we hold the circuit court erred in concluding 1) that there was no causal connection between Redman's vehicle and the assault, and 2) that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. Accordingly, the circuit court's grant of summary judgment in favor of Respondents is **REVERSED** and the case is **REMANDED** to the circuit court for further proceedings.

LOCKEMY, CJ., and HEWITT, J., concur.[10]

[10] We decide this case without oral argument pursuant to the Supreme Court's order regarding the operation of the appellate courts during the Coronavirus Emergency, dated March 20, 2020, and Rule 215, SCACR. *See RE: Operation of the Appellate Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order dated March 20, 2020, amended May 29, 2020).