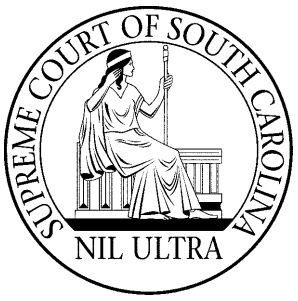

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 26, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

EXTENSIONS TO FILE PETITION FOR REHEARING

None

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5839 – In the Matter of Thomas Griffin	Pending
5882 – Donald Stanley v. Southern State Police	Pending
5903 – State v. Phillip W. Lowery	Pending
5906 – Isaac D. Brailey v. Michelin N.A.	Pending
5911 – Charles S. Blackmon v. SCDHEC	Pending
5912 – State v. Lance Antonio Brewton	Pending
5916 – Amanda Huskins v. Mungo Homes, LLC	Pending
5922 – State v. Olandio R. Workman	Pending
5925 – Patricia Pate v. College of Charleston	Pending
5930 – State v. Kyle M. Robinson	Pending
5933 – State v. Michael Cliff Eubanks	Pending
5934 – Nicole Lampo v. Amedisys Holding, LLC	Pending
5946 – The State v. Frankie L. Davis, III	Pending
5947 – Richard W. Meier v. Mary J. Burnsed	Pending
5948 – Frankie Padgett v. Cast and Crew Entertainment	Pending
5951 – State v. Xzariera O. Gray	Pending

5953 – State v. Nyquan T. Brown Pending

5954 – State v. Rashawn Carter Pending

5955 – State v. Philip Guderyon Pending

5963 – Solesbee v. Fundamental Clinical Pending

5965 – National Trust for Historic Preservation v. City of North Charleston Pending

5969 – Wendy Grungo-Smith v. Joseph Grungo Pending

5972 – McEntire Produce v. SCDOR Pending

5974 – The State v. Calvin D. Ford Pending

2021-UP-242 – G. Allen Rutter v. City of Columbia Pending

2022-UP-095 – Samuel Paulino v. Diversified Coatings, Inc. Pending

2022-UP-251 – Lady Beaufort, LLC v. Hird Island Investments Pending

2022-UP-252 – Lady Beaufort, LLC v. Hird Island Investments (2) Pending

2022-UP-253 – Mathes Auto Sales v. Dixon Automotive Pending

2022-UP-270 – Latarsha Docena-Guerrero v. Government Employees Insurance Pending

2022-UP-303 – Daisy Frederick v. Daniel McDowell Pending

2022-UP-307 – Frieda H. Dortch v. City of Columbia Pending

2022-UP-314 – Ronald L. Jones v. Rogers Townsend & Thomas, P.C. Pending

2022-UP-326 – Wells Fargo Bank v. Michelle Hodges Pending

2022-UP-380 – Adonis Williams v. State	Pending
2022-UP-382 – Mark Giles Pafford v. Robert Wayne Duncan, Jr.	Pending
2022-UP-402 – Todd Olds v. Berkeley County	Pending
2022-UP-413 – Lucas Marchant v. John Doe	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending
2022-UP-422 – Paula Russell v. Wal-Mart Stores, Inc.	Pending
2022-UP-425 – Michele Blank v. Patricia Timmons (2)	Pending
2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending
2022-UP-435 – Andrew Desilet v. S.C. Dep't of Motor Vehicles	Pending
2022-UP-437 – Nicholas Thompson v. Bluffton Township Fire District	Pending
2022-UP-444 – State v. James H. Baldwin	Pending
2022-UP-452 – In the Matter of Kevin Wright	Pending
2022-UP-462 – Karrie Gurwood & Howard Gurwood v. GCA Services Group, Inc.	Pending
2023-UP-005 – David Abdo v. City of Charleston	Pending
2023-UP-020 – Bridgett Fowler v. Fedex	Pending
2023-UP-037 – Diana Bright v. Craig Bright	Pending
2023-UP-041 –Joy Wymer v. Floyd Hiott	Pending
2023-UP-044 – Deutsche Bank National Trust Company v. Doris J. Dixon	Pending
2023-UP-051 – State v. Jason E. Stoots	Pending

2023-UP-055 – M. Baron Stanton v. Town of Pawleys Island	Pending
2023-UP-062 – Raglins Creek Farms, LLC v. Nancy D. Martin	Pending
2023-UP-064 – Karen K. Baber v. Summit Funding, Inc.	Pending
2023-UP-070 – James Kincannon v. Ashely Griffith	Pending
2023-UP-075 – Dana Dixon v. SCDMH (2)	Pending
2023-UP-087 – The State v. Seth H. Smith	Pending
2023-UP-096 – Viola M. Hackworth v. Bayview Manor LLC	Pending
2023-UP-118 – Joseph N. Grate v. Jameka Cohen	Pending
2023-UP-119 – The State v. Angelita Wright	Pending
2023-UP-121 – Mathew C. Dwyer v. State	Pending
2023-UP-132 – Monica Brown-Gantt v. Centex Real Estate	Pending
2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-158 – Herman Holcomb v. City of North Augusta	Pending
2023-UP-164 – Randall G. Dalton v. The Muffin Mam, Inc.	Pending
2023-UP-172 – The State v. Gary M. Wirtz	Pending
2023-UP-177 – John Mayers v. Konan Henthorn	Pending
2023-UP-178 – CRM of the Carolinas, LLC v. Trevor W. Steel	Pending
2023-UP-180 – The State v. Samuel L. Burnside	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vickie Rummage, Employee, Petitioner,

v.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, Respondents.

Appellate Case No. 2022-000003

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 28166
Heard June 6, 2023 – Filed July 26, 2023

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Andrew Nathan Safran, of Columbia, for Petitioner.

David Alan Wilson, of Wilson & Englebardt, LLC, of Greenville, for Respondents.

PER CURIAM: This Court granted Vickie Rummage's petition for a writ of certiorari to review the decision of the court of appeals in *Rummage v. BGF*

Industries, 434 S.C. 441, 865 S.E.2d 380 (Ct. App. 2021). We now dismiss the writ on the basis it was improvidently granted.

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

John Ernest Perry, Jr., Respondent.

Appellate Case No. 2021-000947

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Paul M. Burch, Circuit Court Judge

Opinion No. 28167
Heard April 20, 2023 – Filed July 26, 2023

REVERSED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Kevin Scott Brackett, of York, for Petitioner.

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

CHIEF JUSTICE BEATTY: A jury convicted the Respondent, John Ernest Perry, Jr., of the attempted murder of a police officer. During deliberations, the jury requested a recharge on intent. Over the defense's objection, the trial court instructed, "When the intent to do an act that violates the law exists motive becomes immaterial." The court of appeals reversed and remanded for a new trial, concluding the statement improperly instructed the jury on general intent for the crime of attempted murder. While we agree that the trial court erred in giving the jury this recharge, we believe the error was harmless. Accordingly, we reverse the decision of the court of appeals.

I. FACTS & PROCEDURAL HISTORY

Perry was involved in a shooting with police officers on June 22, 2016 in a residential area of Rock Hill. Patrolling officers observed Perry in a vehicle make an improper turn, without a turn signal, and initiated a traffic stop.[1] Perry fled from officers' blue lights because he had outstanding warrants. He jumped out of the car while still in drive and began to run. Officers pursued Perry over a fence, and he removed a handgun from his waistband. Perry fired in the officers' direction. Later, Perry told Agent Melissa Wallace that the gun fired accidentally when he tried to drop it while jumping over the fence.

Officer Dalton Taylor could clearly see Perry with the help of a street lamp overhead. When Perry pulled out the weapon, Officer Taylor testified that he heard the cocking noise of the pistol. Officer Taylor observed Perry "blade" towards him while firing two shots in his direction. Officer Taylor was not struck by the bullets and, continuing the chase, fired six shots at Perry. Officer Taylor believed that Perry tried to shoot him to escape on foot.[2] There is conflicting evidence whether the first shot was fired in the air or in the bladed position toward Officer Taylor.

---

[1] Officer Dalton Taylor testified that Perry turned left into the right-hand lane of the perpendicular road instead of the "utmost lane of travel," i.e., the lane closer to the median.

[2] Following a SLED investigation, Officer Taylor was found to have not committed any wrongdoing during the incident.

Perry escaped on foot and purportedly dropped the weapon in a nearby field.[3] At the time, his identity was unknown, and law enforcement failed to detain a suspect that night. Officers eventually identified Perry from papers found in the abandoned vehicle and from the surveillance video of a local convenience store.

Shortly after his escape, SLED agents apprehended Perry at his camper in Fairfield County. The agents had an ambulance ready because they believed Perry had been shot, and he was taken to a hospital in the Columbia area for the gunshot wound. In a statement given to law enforcement in the ambulance, Perry stated[4] the gun "accidentally went off" as he fled, prompting the officers to engage him in gunfire.

A grand jury indicted Perry for attempted murder. Perry rejected a guilty plea offer with the State for assault and battery of a high and aggravated nature, and the case proceeded to trial. Officer Taylor testified that he believed Perry fired at him with *the intent to kill*. Defense counsel asked Agent Melissa Wallace during cross, "If [Perry] had his back turned to the officer and the officer shot, I mean he wouldn't be a threat, though, based on that situation[?]" Agent Wallace responded, "Based on what you said at that point he would be considered *a fleeing felon*."

The State also admitted into evidence testimony from an eyewitness who observed the incident. The eyewitness studied at Winthrop University and lived in a nearby apartment in 2016. He testified that, on the night of the pursuit, he looked outside his apartment window and saw a car crash into a fence. He observed a man flee from officers and fire shots in their direction. He reiterated that the man fired directly at the officers and not in the air.

At the end of the State's case, the defense made a motion for a directed verdict, which the court denied. The defense did not put up a case, and Perry did not testify. The jury began deliberations and requested to have a recharge on attempted murder

---

[3] Perry initially told officers this is where he ditched the weapon; however, a gun was found during a search of the camper in Fairfield County. Perry later admitted this was the weapon used in the shooting.

[4] The State admitted into evidence, without objection, Perry's statement through the testimony of SLED Special Agent Melissa Wallace, who accompanied Perry to the hospital.

and assault and battery in the second and third degrees. The trial court recharged the jury, and deliberations resumed. Shortly thereafter, the jury sent the court additional questions: "Is malice only associated to attempted murder or is malice also associated to assault and battery?" and, "What is meant by intent? That was not charged." Trial counsel and the court discussed whether or not the court should recharge the jury with the definition of intent from Black's Law Dictionary. Over defense counsel's objection, the court accordingly recharged the jury:

> Intent. The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. *When the intent to do an act that violates the law exists motive becomes immaterial*.

Intent, *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

Defense counsel renewed his objection to the last sentence of the recharge, stating, "Also my concern is that attempted murder with case law out there[5] saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so that's my—I'm objecting to the charge."

Later, after deliberations began again, the court gave the jury an *Allen*[6] charge. It appears the defense and the State reached a plea deal; however, the jury simultaneously returned with a verdict. The trial court refused to accept the plea deal after the State made clear it was ready to accept the verdict of the jury.

The jury found Perry guilty of attempted murder. After the jury returned its verdict, the defense renewed all of its motions and exceptions and specifically objected again to the recharge. The trial court sentenced Perry to life imprisonment.[7]

---

[5] As will be mentioned *infra* note 11, Perry's case was tried after the court of appeals' opinion in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), but before this Court's opinion in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

[6] *Allen v. United States*, 164 U.S. 492 (1896).

[7] Perry's sentence was enhanced to life under the three strikes rule because he had two prior convictions, one on February 13, 1996, and one on February 29, 1996.

The court of appeals reversed Perry's conviction and remanded the matter for retrial. *State v. Perry*, 434 S.C. 92, 862 S.E.2d 451 (Ct. App. 2021). Ruling only on the one sentence of the intent recharge, the court of appeals concluded it gave "essentially a general intent instruction" whereas attempted murder is a specific intent crime. *Id.* at 95, 862 S.E.2d at 452. The court of appeals focused on the immaterial nature of a motive charge and the possibility of jury confusion. *Id.* at 103, 862 S.E.2d at 457 (citing *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000)). Further, because the trial court gave the statement in response to the jury's question, the court of appeals reasoned that it was unduly emphasized. *Id.* at 104, 862 S.E.2d at 457 (citing *State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 529–30 (1978)).

This Court granted the State's petition for a writ of certiorari to review the decision of the court of appeals.

II. STANDARD OF REVIEW

"In criminal cases, this Court only reviews errors of law." *State v. Gamble*, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "In reviewing jury charges for error, we must consider the court's jury charge as a whole *in light of the evidence and issues presented at trial*." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003) (emphasis added), *quoted in State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

III. DISCUSSION

Challenging the reversal of the court of appeals, the State argues that the trial court gave a correct statement of the law. The State maintains, "If someone has the mental resolution or determination to kill another, then they clearly have the specific intent to kill another person." With that in mind, the State asserts that the phrase "motive becomes immaterial" is correct because, after the jury finds that the requisite intent exists, motive no longer matters. Further, the State insists that motive and intent are distinct legal concepts, which needed to be distinguished. In the

---

S.C. Code Ann. § 17-25-45 (2014 & Supp. 2022). The trial court agreed with the State that these two offenses, though close in time, were separate and distinct.

alternative, the State contends the charge did not prejudice Perry because it clearly presented evidence that Perry had motive to shoot the officer when fleeing.

Conversely, Perry argues—as he has from the first objection to the proposed statement at trial—that the recharge improperly instructed the jury on a general intent crime when attempted murder requires specific intent. Perry focuses on the unique nature of a recharge and maintains that the jury's questions emphasize its confusion. As to prejudice, Perry makes two arguments. First, he contends that, because he testified his gun fired accidentally, intent was a key issue. Second, Perry argues the jury's question and recharge indicates the jury put substantial focus on intent and the instruction.

Turning to the law on jury instruction challenges, "An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Id*. (internal quotation omitted). For the reasons explained below, we hold the trial court erred in giving the recharge instruction under the specific circumstances and evidence of the case. However, the error was harmless based on the testimony presented at trial.

A. The trial court erroneously recharged the jury on intent.

First, the statement, "When the intent to do an act that violates the law exists motive becomes immaterial," is not an incorrect iteration of the law. Motive is "[s]omething, esp. willful desire, that leads one to act." *Motive*, *Black's Law Dictionary* (11th ed. 2019). Most frequently, motive operates as one of the justifications to introduce evidence of crimes or other bad acts as proof of character.[8] Rule 404(b), SCRE. Our courts have recognized that motive is tied to common scheme or plan evidence. *See State v. Cutro*, 365 S.C. 366, 375, 618 S.E.2d 890, 895 (2005) (concluding evidence established both motive and common scheme or plan under Rule 404(b), SCRE); *State v. Bell*, 302 S.C. 18, 29, 393 S.E.2d 364, 370 (1990) (reasoning evidence was admissible to show motive and state of mind under Rule 404(b), SCRE).

[8] Motive appears in several evidence rules dealing with witnesses and declarants. *See* Rules 608(c), 801(d)(1), 803(3), 804(b)(1), SCRE.

However, "motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)). Yet, "[s]tate of mind is an issue any time malice or willfulness is an element of the crime." *Id.*

On the other hand, intent, primarily, is "[t]he state of mind accompanying an act, esp. a forbidden act." *Intent*, *Black's Law Dictionary* (11th ed. 2019). We say "primarily" because Black's Law Dictionary states: "While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial. Cf. MOTIVE; SCIENTER." *Id.* As described above, the last sentence of intent's definition creates the issue here.

Despite having confusing definitions, motive and intent are distinct legal concepts. "There is no necessity for confounding the terms 'intent' and 'motive.'" *State v. Coleman*, 20 S.C. 441, 452 (1884). Further, motive and intent are different concepts because they are separately enumerated in Rule 404(b), SCRE.

Although perplexing, we do not interpret the statement as expressly erroneous. In other words, the Black's Law definition is not patent legal error. Motive is inherently different than intent. While intent encompasses one's resolve, commitment, or determination to act, motive represents the reason *why* a person intends an action. Further, the State never has to prove motive to a jury as the element of a crime. The only instance when the State must demonstrate motive is when trying to admit character evidence under Rule 404(b).[9] When the State proves a person intended to act, the law is not concerned with why the person acted. In fact, motive never matters. The statement charged purports to mean, *when the State proves intent, motive does not matter*. Therefore, it is not an incorrect declaration of the law. Yet, that does not end the inquiry.

[9] In that scenario, the State must argue motive before only the trial court judge to admit evidence that would otherwise be inadmissible.

In addition to correctly stating the law, the trial court has a distinct responsibility to tailor a jury instruction to the facts of the case and the evidence presented at trial.[10] "In reviewing jury charges for error, we must consider the court's jury charge as a whole *in light of the evidence and issues presented at trial*." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003) (emphasis added), *quoted in State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error." *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000).

It is well established in South Carolina that when the jury asks for an additional charge, it is enough for the court to recharge only what is necessary to answer the jury's requests. *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996) (citing *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993)); *see also State v. Nichols*, 325 S.C. 111, 118–19, 481 S.E.2d 118, 122 (1997) (finding no error in limiting recharge when the jury did not request clarification on that subject matter).

In the instant case, the State had the burden to prove beyond a reasonable doubt that Perry committed attempted murder while firing at the pursuing officers. *See State v. King*, 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017) ("[W]e hold that a specific intent to kill is an element of attempted murder.").[11] "[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000), *quoted in King*, 422 S.C. at 56, 810 S.E.2d at 22.

Whereas general intent is "the state of mind required for the commission of certain common law crimes not requiring specific intent and it usually takes the form of recklessness . . . or negligence." *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (2007) (internal quotations omitted), *overruled on other grounds by State*

---

[10] However, a judge must not *comment* on the facts of a case. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

[11] Perry's case was tried one month before this Court issued *State v. King* in 2017 but after the court of appeals issued its opinion coming to the same conclusion in 2015.

v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). "[P]rosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter." *King*, 422 S.C. at 56, 810 S.E.2d at 23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016)).

Thus, the trial judge had an obligation to instruct the jury on specific intent. Perry, from the time the instruction was proposed, has objected to the final statement of the recharge because it confuses general and specific intent, the requisite intent of attempted murder. In *King*, this Court noted, "[T]he phrase 'with intent to kill' in section 16-3-29 does not identify what level of intent is required." 422 S.C. at 55, 810 S.E.2d at 22. Because "with intent to kill" is not precise in what level of intent is required, we believe it could create confusion for the jury.

Moreover, the jury heard evidence sufficient to find general intent to commit a crime. Agent Wallace testified that, at the point of fleeing from pursuing officers, Perry's actions would make him a fleeing felon with a deadly weapon. Consequently, the jury could find the existence of general intent to violate the law based on this testimony alone.

Therefore, the trial court erred under the circumstances of the case in instructing the jury, "When the intent to do an act that violates the law exists motive becomes immaterial." Because the State charged Perry with attempted murder, the trial court should have been more precise in defining specific intent based on the evidence presented at trial.

B. The trial court's error was harmless.

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (internal quotations omitted). "[W]e are required to review the trial court's charge to the jury in its entirety." *Id.* at 498, 832 S.E.2d at 580.

In *Burdette*, we concluded an erroneous instruction on inferred malice was *not* harmless. *Id.* When instructing the jury on the lesser-included offense of voluntary

manslaughter in a murder trial, the court failed to explain to the jury that malice is not an element of voluntary manslaughter. *Id.* at 499–500, 832 S.E.2d at 580–81. There, we concluded the jury had an incorrect impression malice was an element of voluntary manslaughter. *Id.* at 501, 832 S.E.2d at 581. The jury asked for clarification of the charges, and the trial court repeated the same. *Id.* Importantly, the State's and Burdette's theories of the case conflicted—Burdette claimed to have fatally shot the victim accidentally. *Id.* at 493, 832 S.E.2d at 577.

Here, unlike in *Burdette*, we conclude that the trial court's error was harmless. Importantly, a disinterested eyewitness[12] corroborated Officer Taylor's testimony that Perry fired directly at him, as opposed to up in the air. Evidence of specific intent was clear. The eyewitness observed the events from the upstairs window of a nearby apartment building. In his testimony, the eyewitness observed Perry fire two—maybe three—gunshots in the officers' direction while fleeing. No less than six times did the eyewitness indicate he observed Perry fire *at* the officers. Therefore, we cannot say beyond a reasonable doubt that the jury found only general intent to commit a crime.

The jury needed an *Allen* charge during deliberations after the recharge. However, we cannot conclude the sole explanation for this was confusion on intent. Similarly, although we must infer the jury gave special attention to the recharge, see *Blassingame*, 271 S.C. at 46–47, 244 S.E.2d at 529–30, we still must review the entirety of the record to determine if the erroneous charge was harmful. For those reasons, we hold the error was harmless beyond a reasonable doubt.

IV. CONCLUSION

The trial court erred in recharging the jury, "[w]hen the intent to do an act that violates the law exists, motive becomes immaterial," because it, effectively, defines the required mental state of attempted murder as general intent. Trial courts must be more explicit in their charges that specific intent must be proven. However, because the State presented additional testimony of a disinterested eyewitness, we conclude the error was harmless.

REVERSED.

[12] The eyewitness was sequestered before his testimony.

KITTREDGE, FEW, JAMES, JJ., and Acting Justice James E. Lockemy, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cleo Sanders, Respondent,

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram; Santander Consumer USA Holdings, Inc.; Isiah S. White; Danny Anderson; and Patrick Bachrodt Jr., Defendants,

of which Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, and Isiah S. White are the Petitioners.

Appellate Case No. 2021-000137

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28168
Heard April 28, 2022 – Filed July 26, 2023

REVERSED AND VACATED

John Thomas Lay Jr. and Jessica Waller Laffitte, of Gallivan, White & Boyd, PA, of Columbia, for Petitioners.

C. Steven Moskos, of C. Steven Moskos, PA, of Charleston, and Brooks Robert Fudenberg, of Law Office of Brooks R. Fudenberg, LLC, of Charleston, for Respondent.

James Y. Becker and Robert Lawrence Reibold, of Haynsworth Sinkler Boyd, P.A., of Columbia, for Amicus Curiae the South Carolina Automobile Dealers Association.

JUSTICE JAMES: The Federal Arbitration Act[1] (FAA) sometimes requires the arbitrator to decide not only the merits of a dispute but also the gateway question of whether the dispute is arbitrable in the first instance. Petitioners Rick Hendrick Dodge Chrysler Jeep Ram (Rick Hendrick Dodge) and Isiah White contend this is such a case. Specifically, Petitioners argue the arbitrator—not the circuit court—must decide whether they can enforce an arbitration provision in a contract even after that contract has been assigned to a third party. The court of appeals rejected this argument and affirmed the circuit court's determinations that (1) the circuit court was the proper forum for deciding the gateway question of whether the dispute is arbitrable and (2) Petitioners could not compel arbitration because Rick Hendrick Dodge assigned the contract to a third party. *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 332-34, 852 S.E.2d 744, 746-47 (Ct. App. 2020).

We hold the *Prima Paint*[2] doctrine requires the arbitrator to decide whether the assignment extinguished Petitioners' right to compel arbitration. Therefore, we reverse the court of appeals' decision and vacate the circuit court's discovery order.

Background

In August 2012, Cleo Sanders purchased a vehicle from Rick Hendrick Dodge. Sanders and Rick Hendrick Dodge closed the deal by executing a retail installment sales contract (RISC) containing an arbitration provision. A portion of the arbitration provision provides:

---

[1] 9 U.S.C. § 1 *et seq.*

[2] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

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

Sanders alleges Rick Hendrick Dodge contacted Santander Consumer USA Holdings, Inc. (Santander) in an effort to assign the RISC to Santander. Among other allegations of wrongdoing, Sanders alleges Rick Hendrick Dodge misrepresented his income to Santander, thus causing Santander to accept an assignment of the RISC. Sanders contends that as a result of Rick Hendrick Dodge's wrongful acts, he had a monthly payment that was thirty-seven percent of his true pretax monthly income. Sanders did not make timely payments under the RISC, so Santander repossessed the vehicle. Sanders commenced this action against Rick Hendrick Dodge, Santander, Isiah White, Danny Anderson, and Patrick Bachrodt.[3]

Petitioners answered and moved to stay or dismiss the case and compel arbitration.[4] Sanders then moved to compel discovery. Sanders argued Petitioners could not compel arbitration because Rick Hendrick Dodge assigned in full its rights and interests under the RISC to Santander. Petitioners acknowledged Rick Hendrick Dodge "fully assigned" the RISC to Santander but claimed the arbitrator—not the circuit court—should decide the gateway question of whether the arbitration provision is enforceable. The circuit court determined it was the proper forum for deciding the gateway arbitrability question and ruled on the merits of Sanders' challenge to arbitration. On the gateway arbitrability question, the circuit court determined that although the FAA applied, South Carolina law governed "the enforceability of the arbitration clause." The circuit court ruled that because Rick Hendrick Dodge assigned "all of its interests in the [RISC] to Santander," Petitioners'

[3] White, Anderson, and Bachrodt were representatives of Rick Hendrick Dodge.

[4] The circuit court granted Sanders' motion to dismiss Santander from the case without prejudice.

right to compel arbitration was extinguished. The circuit court denied Petitioners' motion to compel arbitration, and Petitioners appealed.

A few weeks after Petitioners appealed, the circuit court granted Sanders' motion to compel discovery. The circuit court ordered Rick Hendrick Dodge to respond to Sanders' discovery requests in thirty days and ruled Rick Hendrick Dodge would waive its right to arbitration by responding to discovery. Petitioners appealed the discovery order.

The court of appeals consolidated the appeals and affirmed the circuit court. *Sanders*, 432 S.C. at 331, 852 S.E.2d at 745. Like the circuit court, the court of appeals held Petitioners could not compel arbitration after the assignment: "Because Rick Hendrick Dodge assigned the RISC to Santander, we find all alleged rights arising from the contract, including the right to have an arbitrator determine the arbitrability of the action and the right to arbitrate, were extinguished as to [Petitioners]." *Id.* at 334, 852 S.E.2d at 746-47. Apart from the passing mention of Rick Hendrick Dodge's "right to have an arbitrator determine the arbitrability of the action[,]" the court of appeals did not discuss Petitioners' argument that the arbitrator should decide that gateway question. The court of appeals also held the circuit court had authority to issue the discovery order.

The court of appeals denied Petitioners' petition for rehearing and suggestion for rehearing en banc. We granted Petitioners a writ of certiorari to review the court of appeals' decision.

Discussion

Petitioners contend the court of appeals erred in affirming the circuit court's arbitration ruling. We review this issue de novo. *See Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review."). However, we must honor the factual findings of the circuit court pertinent to its arbitration ruling if those findings are reasonably supported by evidence in the record. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

Our holding in this case is not controlled by what Petitioners refer to in their brief as the "heavily-favored arena of arbitration." We recently addressed the notion that the law "favors" arbitration in *Palmetto Construction Group, LLC v. Restoration*

Specialists, LLC, 432 S.C. 633, 856 S.E.2d 150 (2021). We noted: "[O]ur statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as [they] respect[] and enforce[] all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration." *Id.* at 639, 856 S.E.2d at 153.

I. Arbitration Appeal

Petitioners do not ask this Court to reverse the court of appeals' holding that the assignment extinguished their right to arbitration. While Petitioners assert—in their brief and during oral argument—their right to arbitration was not extinguished by the assignment,[5] Petitioners ask this Court to hold only that the FAA requires the arbitrator to decide the gateway question of whether the assignment extinguished their right to arbitration.

Petitioners raise two arguments in support of their position that the arbitrator must decide Sanders' challenge to arbitration. First, they claim that because Sanders did not specifically challenge the validity of the arbitration provision, the *Prima Paint* doctrine requires the arbitrator to resolve Sanders' challenge. Second, Petitioners contend the parties contracted for the arbitrator to resolve Sanders' challenge to arbitration by including a delegation clause in their agreement. We begin our analysis with a review of general FAA provisions concerning arbitrability.

A. The FAA and Gateway Arbitration Issues

The parties concede Sanders' transaction with Rick Hendrick Dodge involved interstate commerce and is, therefore, governed by the FAA. The FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and

[5] Petitioners claim the assignment of a contract containing an arbitration provision does not always extinguish the assignor's right to arbitration. Specifically, Petitioners contend they retained the right to arbitration after assignment because of a "survival clause" in the arbitration provision. These arguments are for the arbitrator to resolve.

> enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

9 U.S.C. § 2. The FAA recognizes arbitration agreements "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Here, Sanders' challenge—or defense—to arbitration is that Petitioners lost the right to arbitration after Rick Hendrick Dodge assigned the RISC to Santander.

When one party challenges another party's right to invoke an arbitration provision, the gateway question sometimes becomes: Does the court or the arbitrator decide whether the dispute is arbitrable? *See Peabody Holding Co. v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012) ("Arbitrability disputes often necessitate a two-step inquiry. First, we determine *who* decides whether a particular dispute is arbitrable: the court or the arbitrator. Second, if we conclude that the court is the proper forum in which to adjudicate arbitrability, we then decide *whether* the dispute is, in fact, arbitrable." (citation omitted)). Under the FAA, the presumptive answer is that the court—rather than the arbitrator—resolves gateway questions of arbitrability such as whether an arbitration provision is enforceable and whether the provision applies to a particular dispute. *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 250-51 (2d Cir. 2019); *see Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.").

This case represents one instance in which the *Prima Paint* doctrine renders muddy what should be clear. Petitioners cite two situations in which the arbitrator must decide certain gateway questions. First, in *Prima Paint* and subsequent decisions, the United States Supreme Court held challenges to the contract containing an arbitration provision (sometimes referred to as the "container contract") are for the arbitrator to decide, while challenges to the arbitration provision itself are for the court to decide. *See Prima Paint*, 388 U.S. at 406; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Second, the Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

B. *Prima Paint*

The *Prima Paint* doctrine has been roundly criticized, and some of the caselaw interpreting and applying the doctrine is unnecessarily muddled. *See, e.g.*, *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 121 (Colo. 2007) ("The 'separability doctrine' of *Prima Paint* has been criticized throughout its 40-year existence, beginning with Justice Black's heated dissent from the Court's opinion."); Zeb-Michael Curtin, *Rethinking Prima Paint Separability in Today's Changed Arbitration Regime: The Case for Inseparability and Judicial Decisionmaking in the Context of Mental Incapacity Defenses*, 90 Iowa L. Rev. 1905, 1917 (2005) (noting legal scholars have "condemn[ed] the [separability] doctrine's consequences"). Even so, we must apply the *Prima Paint* doctrine in cases governed by the FAA.

In *Prima Paint*, the petitioner alleged it was fraudulently induced by the respondent into entering a contract that contained an arbitration provision. 388 U.S. at 397-98. The petitioner did not challenge the arbitration provision directly but instead claimed that because the contract was void, so too was the arbitration provision. The respondent moved to compel arbitration. Applying the FAA, the United States Supreme Court held the arbitrator had to resolve the petitioner's claim. In reaching this decision, the Supreme Court adopted what has become known as the severability (or separability) doctrine: "[A]rbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded[.]" *Id.* at 402; *see also Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2d Cir. 2001). The Supreme Court explained the judiciary's role is constrained by the FAA, and a "court may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. The Supreme Court held that because the petitioner's claim of fraudulent inducement did not challenge the arbitration provision specifically, the claim was for the arbitrator to resolve:

> If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 403-04 (cleaned up). The takeaway from *Prima Paint* is that the scope of the challenge to a party's right to invoke arbitration is critical.

Since *Prima Paint*, courts have generally recognized two types of challenges to arbitration: (1) challenges to the validity of the container contract as a whole and (2) challenges to the validity of the arbitration provision contained in the contract. *See Rent-A-Ctr.*, 561 U.S. at 70; *Buckeye*, 546 U.S. at 444. Under the *Prima Paint* doctrine, the arbitrator decides the first type of challenge, and the court decides the second type. *See Rent-A-Ctr.*, 561 U.S. at 70; *Buckeye*, 546 U.S. at 445-46.

We have applied the *Prima Paint* doctrine on several occasions. We recently stated:

> Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint*, 388 U.S. at 395). The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator. *Buckeye*, 546 U.S. at 445-46 ("Unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 608-09, 879 S.E.2d 746, 753 (2022) (cleaned up). We have held the court may hear a claim that an arbitration provision is unconscionable, but the arbitrator must hear a claim that the contract as a whole is unconscionable. *Compare Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48-49, 790 S.E.2d 1, 4 (2016) (holding the question of whether an arbitration provision is unconscionable is for the court to decide), *with Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the arbitrator must hear an unconscionability challenge where the party seeking to avoid arbitration "failed to allege that it lacked a meaningful choice as to the arbitration clause specifically"). However, as is often the case, the application of *Prima Paint* to a given set of facts is not so simple. Here, the parties seeking to enforce arbitration had assigned the contract containing the arbitration provision.

1. The Parties' Arguments

Petitioners argue Sanders' challenge to arbitration was not directed to the arbitration provision specifically. Rather, Petitioners claim Sanders challenged only their ability to enforce the RISC as a whole, thus making Sanders' challenge one for the arbitrator to decide. We agree with Petitioners.

Sanders acknowledges he has not challenged the validity of the arbitration provision specifically. Therefore, it would seem Sanders' challenge is to the contract as a whole and that the *Prima Paint* doctrine mandates this challenge be decided by the arbitrator. Not so fast, says Sanders. Sanders claims that after Rick Hendrick Dodge assigned the contract to Santander, the agreement between him and Rick Hendrick Dodge ceased to exist. Sanders claims the court must decide his challenge—even though it is directed to the contract as a whole. As we will now explain, Sanders' argument is without merit.

2. Courts Resolve Issues of Contract Formation

As we explained above, there are generally two types of challenges to arbitration—a challenge to the validity of the container contract as a whole (to be decided by the arbitrator) and a challenge to the validity of the arbitration provision therein (to be decided by the court). *See Rent-A-Ctr.*, 561 U.S. at 70; *Buckeye*, 546 U.S. at 444-46. Some courts have recently held the court must decide a party's contention that the container contract was never formed in the first place. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010); *Spahr v. Secco*, 330 F.3d 1266, 1272-73 (10th Cir. 2003).

The Supreme Court of Texas confronted a contract formation challenge in *In re Morgan Stanley & Co.*, 293 S.W.3d 182 (Tex. 2009). There, a Morgan Stanley client sought to avoid arbitration by claiming she lacked mental capacity to sign Morgan Stanley contracts containing arbitration provisions. Morgan Stanley argued the arbitrator had to decide the client's challenge because "the defense of mental incapacity is an attack on the validity of the contract as a whole[.]" *Id.* at 185. The court rejected Morgan Stanley's argument, noting the important distinction between issues of contract validity and issues of contract formation. The court held that because issues of contract formation necessarily raise the question of whether an arbitration agreement was ever created, such issues are for the court to decide. The court stated challenges to contract formation "add a third discrete category to the *Prima Paint* analysis, which includes: (1) a challenge to the validity of the contract as a whole, (2) a challenge to the validity of the arbitration provision itself, and (3) a challenge to whether any agreement was ever concluded." *Id.* at 187. The court explained that while the first challenge is for the arbitrator, the second and third challenges are for the court.

Other courts have also held the *Prima Paint* doctrine does not prevent a court from deciding various challenges contract formation. *Melaas v. Diamond Resorts U.S. Collection Dev., LLC*, 953 N.W.2d 623, 632-33 (N.D. 2021); *see, e.g.*, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) (holding a court had to decide whether a representative possessed authority to bind his principal to a contract containing an arbitration provision); *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) (stating courts are "required to rule upon . . . contract formation issue[s] before compelling arbitration"). The rationale of these decisions is obvious—arbitration is a matter of consent, and courts can only order arbitration when they are satisfied the parties agreed to arbitrate a dispute. *Granite Rock*, 561 U.S. at 299. Accordingly, the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance. *Id.* at 299-300; *Melaas*, 953 N.W.2d at 633 ("If the contract containing the arbitration agreement was never formed and therefore does not exist, then the parties never agreed to arbitrate."); *MZM Constr. Co. v. N.J. Bldg. Labs. Statewide Benefit Funds*, 974 F.3d 386, 400 (3d Cir. 2020) ("Lack of assent to the container contract necessarily implicates the status of the arbitration agreement, when the container contract and the arbitration provision depend on the same act for their legal effect.").

3. Sanders' "Continued Existence" Argument Is Misplaced

It is clear courts must determine issues of contract formation. If Sanders challenged arbitration by claiming the contract was never formed (e.g., because he never signed it or because there was no meeting of the minds), the court would decide the gateway question of arbitrability. But Sanders does not challenge contract formation. Instead, Sanders claims the court must determine whether the contract continued to exist after a certain point in time—even when, as here, the parties concede a valid contract was originally formed. We disagree with Sanders.

Some cases include language that, on the surface, appears helpful to Sanders' argument. For instance, courts often state that they—rather than arbitrators—must determine whether a contract exists. However, a closer review of these cases shows courts were addressing the question of whether a contract existed in the first place, not whether the contract continued to exist after a certain point. *See, e.g.*, *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003) (stating the court must resolve an attack to "the very existence of an agreement" where a party claims that not all parties signed the agreement containing the arbitration provision); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (stating the arbitrator cannot resolve an "argument that the contract does not exist" where a party

challenges an agent's authority to bind him to a contract containing arbitration provision); *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 400 (Mont. 2008) (stating "the court is the proper body to hear a challenge to the existence of a contract containing an arbitration provision" where a party challenges arbitration on the ground that a condition precedent to the creation of a container contract did not occur).

One case speaks more directly to the issue before us. In *Large v. Conseco Finance Servicing Corp.*, the United States Court of Appeals for the First Circuit rejected an argument similar to the one Sanders advances. 292 F.3d 49, 52 (1st Cir. 2002). The Larges borrowed money from Conseco and signed a loan agreement containing an arbitration provision. A year later, the Larges told Conseco they were rescinding the loan agreement on the ground that Conseco failed to accurately disclose the applicable interest rate. When Conseco responded that it made adequate disclosures and rescission was not appropriate, the Larges filed suit in district court. Conseco moved to compel arbitration, and the Larges opposed on the ground that the arbitration provision had been automatically rescinded—along with the remainder of the loan agreement—when they gave Conseco notice of rescission. The district court granted Conseco's motion to compel arbitration, ruling the matter was for the arbitrator "absent an attack on the specific arbitration clause included within a contract[.]" *Id.*

On appeal, the Larges advanced much the same argument Sanders makes here. They claimed that because the "loan agreement ceased to exist . . . so did the arbitration clause embedded in it." *Id.* The Larges further claimed the district court "overlooked the recent clarifications by the majority of circuits, which found that the [*Prima Paint* severability] doctrine does not apply to allegations of nonexistent contracts." *Id.* at 53 (alteration in original). The First Circuit rejected this argument:

> [T]he Larges cite cases involving allegations that the contract with the arbitration clause *never* existed. The "clarification" of *Prima Paint* in these cases does not bear on a dispute over a purported rescission of a contract that is acknowledged to have once existed[] but is alleged to have been rescinded subsequently.

Id. The First Circuit concluded the Larges' allegation of a non-existent contract was immaterial to the *Prima Paint* analysis. Because the challenge to arbitration was directed at the loan agreement as a whole, the First Circuit held the challenge was for the arbitrator to decide.

We agree with the First Circuit and reject Sanders' "contract existence" argument for two reasons. First, Sanders' argument rests on a misreading of contract formation cases; there is no support for the conclusion that a challenge to the continued existence of a container contract is for the court to decide under the *Prima Paint* doctrine. Second, there is good reason to treat a challenge to the original formation of a container contract differently from a challenge to the continued existence of the contract. As stated above, a challenge to the original formation of the container contract necessarily raises the question of whether the parties ever agreed to arbitrate. *See Granite Rock*, 561 U.S. at 299-300. Because arbitration is strictly a matter of consent, it would be illogical for the arbitrator to resolve such a challenge. *See id.*; *All Am. Ins.*, 256 F.3d at 591. On the other hand, continued contract existence cases—like the one before us—typically present no such risk of sending a party to arbitration when that party never agreed to arbitration.

Here, Sanders does not challenge the validity of the arbitration provision itself—for example, he does not argue the provision is unconscionable or that it expires on some express condition. Sanders concedes the arbitration provision would ordinarily require arbitration of the claims he makes against Petitioners. However, Sanders argues Petitioners' assignment of the contract to Santander divested Petitioners of all rights under the contract. This is a challenge to the continuing validity of the contract as a whole. Therefore, *Prima Paint* requires the arbitrator to decide whether Petitioners retained the right to compel arbitration after assignment.

As did the court of appeals, the dissent relies upon *In re Wholesale Grocery Products Antitrust Litigation*, 97 F. Supp. 3d 1101, 1106 (D. Minn. 2015), *aff'd*, 850 F.3d 344 (8th Cir. 2017), in support of the general conclusion that an assignment erases the assignor's right to compel arbitration. The *Wholesale Grocery* court noted that "where a party assigns agreements that include an arbitration clause, the assignor's 'right to compel arbitration under those agreements is extinguished.'" *Id.* (quoting *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc.*, 590 F. Supp. 2d 677, 684-85 (D.N.J. 2008)). However, the courts in *Wholesale Grocery* and *HT of Highlands Ranch* were not asked to address, nor did they address, the question of whether the arbitrator or the court decides the gateway question of arbitrability.[6]

[6] The court of appeals cited *Kennamer v. Ford Motor Credit Co.*, 153 So.3d 752, 762-63 (Ala. 2014), for the basic proposition that assignment of a contract containing an arbitration provision bars the assignor from enforcing the provision. However,

B. Delegation Clause

In light of our holding, we need not consider Petitioners' delegation clause argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when the resolution of a prior issue is dispositive).[7]

C. Discovery Appeal

Because we reverse the court of appeals on the gateway issue of arbitrability, we vacate the circuit court's discovery order.

Conclusion

The *Prima Paint* doctrine is not the model of clarity; however, as applied to this case, the doctrine requires us to hold that the arbitrator must decide the gateway question of whether Petitioners retained the right to compel arbitration after assignment of the RISC. We reverse the court of appeals' decision and vacate the circuit court's discovery order.

REVERSED AND VACATED.

FEW, J., and Acting Justice Aphrodite K. Konduros, concur. Acting Justice Kaye G. Hearn, dissenting in a separate opinion in which Acting Justice James E. Lockemy, concurs.

---

the *Kennamer* court was not asked to address, nor did it address, the gateway *Prima Paint* question of whether the court or the arbitrator decides whether a dispute is arbitrable.

[7] Petitioners argue the court of appeals improperly created a blanket rule that an assignment always extinguishes the assignor's right to compel arbitration. Because we have reversed the court of appeals, there is no reason to address this argument. The arbitrator will have to determine whether this particular assignment extinguished Petitioners' right to arbitration.

Acting Justice Kaye G. Hearn: I agree with the majority's discussion of the general principles governing arbitration, but I disagree that the answer to the threshold question of whether this dispute is subject to arbitration is for the arbitrator to decide. Because I believe well-established law establishes that the contractual assignment from Rick Hendrick Dodge to Santander Consumer USA Holdings, Inc. extinguished any enforceable rights by Rick Hendrick Dodge, there is nothing left to enforce, including the arbitration provision. I understand *Prima Paint* requires that the arbitration provision is severable, but once Rick Hendrick Dodge assigned its rights under the contract, I do not believe severability can save the day because Rick Hendrick Dodge is not the party that may enforce the contract.

I disagree with the majority's characterization of the cases the court of appeals relied on in concluding that the gateway question of arbitrability in this case was for the circuit court. The court of appeals relied in part on *In re Wholesale Grocery Product Antitrust Litigation,* a case involving allegations of antitrust violations by some of the largest wholesale grocers in the country. 97 F. Supp. 3d 1101, 1106 (D. Minn. 2015). In that multi-district litigation, the federal district court noted, "[W]here a party assigns agreements that include an arbitration clause, the assignor's 'right to compel arbitration under those agreements is extinguished.'" *Id.* (quoting *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc.*, 590 F.Supp.2d 677, 684-85 (D.N.J. 2008)). Pointedly, the court stated, "the issue is not whether the right to arbitrate survives, but rather who is entitled to assert that right." *Id.* The court concluded the defendants were no longer signatories of the arbitration agreement because "they voluntarily and unconditionally transferred" the rights under the arbitration agreement. *Id.* As a result, they were not entitled to enforce the arbitration agreement.

On appeal to the Eighth Circuit, the court affirmed. 850 F.3d 344, 350-51 (8th Cir. 2017). The Eighth Circuit rejected the defendants' position that an assignment should be treated the same as when a contract is terminated, the latter being that a party generally retains the right to arbitrate claims that are based on conduct that occurred during the life of the contract. *Id.* at 349. Instead, the court stated, "We see no reason to extend a presumption about what rights and obligations the parties to a contract might have intended to keep after the contract expired to a situation where a party has affirmatively given up—indeed, sold—everything it had under the contract." *Id.* at 349-50 (cleaned up). The court also concluded, "[I]t is the assignors, not their assignees, claiming a right to compel arbitration. The clear consequence . . . is that the assignors—in this case, the nonsignatory wholesalers—should have

nothing left to enforce, since 'all of [their] remaining rights' were 'assumed' by someone else." *Id.* at 350 (quoting *Koch v. Compucredit Corp.*, 543 F.3d 460, 466 (8th Cir. 2008)).

Like the decision from the federal court in Minnesota, the court of appeals in this case also relied on *HT of Highlands Ranch, Inc. v. Hollywood Tanning Systems, Inc.*, 590 F. Supp. 2d 677 (D.N.J. 2008). There, operators of four franchisees of a national tanning business entered into a contract with the franchisor, which subsequently assigned its rights to another entity. *Id.* at 679. After the operators filed a lawsuit against the franchisor and others raising numerous allegations, the defendants filed a motion to dismiss the claims and compel arbitration. *Id.* at 683. The court denied the motion to dismiss and refused to compel arbitration, noting, "In light of the fact that, prior to the commencement of this action, Defendant HTS assigned its rights and obligations under the franchising agreements to Defendant HT Franchising . . . the Court cannot, at this stage, conclude that 'a valid agreement to arbitrate [presently] exists' between HTS and Plaintiffs." *Id.* at 684 (internal citation omitted).[8] The court concluded, "[I]f, as Plaintiffs appear to allege in the Amended Complaint, HTS assigned the entirety of its rights under the franchise agreements to HT Franchising, its right to compel arbitration under those agreements 'is extinguished.'" *Id.* at 684-85 (quoting Restatement (Second) of Contracts § 317(1)). The court acknowledged that the successor in interest would retain the right to compel arbitration, just as Santander could compel arbitration in this case over claims subject to the arbitration clause.

I agree with the court of appeals that these cases are persuasive because they apply the same general principle of contract law—that an assignment extinguishes

---

[8] I disagree that this case does not concern the question of "who decides." First, the circuit court denied the motion to compel arbitration, noting "As the following discussion makes clear, the Court denies the HTS Defendants' motion on the narrow grounds that the validity of an existing arbitration agreement between HTS and Plaintiffs is a live question in this case." *Id.* at 684 n.6. Second, the court stated many of the plaintiffs' remaining arguments against compelling arbitration concerned the contract as a whole, and thus would be for the arbitrator to resolve. *Id.* This demonstrates the court treated the issue of the assignment's effect as a threshold question for the court to resolve while the remaining arguments would be for an arbitrator to decide, and thus, I disagree that it is not relevant to the question before the Court.

the rights and obligations under an agreement once transferred to a third party. Restatement (Second) of Contracts § 317 (1981) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance."). Accordingly, I believe the majority places too fine a point on the slight distinction between whether an agreement to arbitrate ever existed versus if one continues to exist. To be sure, there are instances when a nonsignatory may be compelled to arbitrate a dispute. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."). However, I would follow the general rule that an assignment extinguishes the rights under a contract, and without an agreement to enforce, it follows that the circuit court must generally resolve this threshold question. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.").[9] Accordingly, I respectfully dissent.

Acting Justice James E. Lockemy, concurs.

[9] I acknowledge parties may delegate gateway issues to an arbitrator that typically would be for a court to decide. *Henry Schein, Inc.*, 139 S. Ct. at 530 ("[A] court may not decide an arbitrability question that the parties have delegated to an arbitrator."). While this particular contract contained a delegation clause, Rick Hendrick Dodge failed to preserve the significance of this clause for appeal. Although it raised the delegation clause to the circuit court, the court did not rule on it and there was no Rule 59(e) motion filed. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shannon P. Green and Darrell Russell, Plaintiffs,

v.

Edward C. McGee and David Hudgins, Respondents,

Of whom Shannon P. Green is the Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

Appellate Case No. 2020-000203

Appeal From Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Opinion No. 6001
Heard March 1, 2023 – Filed July 26, 2023

AFFIRMED IN PART AND REVERSED IN PART

Douglas A. Churdar, of Churdar Law Firm, of Greenville, for Shannon P. Green.

Jessica Waller Laffitte and Curtis Lyman Ott, both of Gallivan, White & Boyd, PA, of Columbia, for David Hudgins.

Michael T. Coulter, of Clarkson, Walsh & Coulter, PA, of Greenville, for Edward C. McGee.

HEWITT, J.: This case arises out of an unusual car wreck. David Hudgins and Edward McGee were both driving on the interstate. Each claimed the other was driving dangerously. Hudgins called 9-1-1 and began following McGee. The pursuit eventually left the interstate and continued on surface streets. Not long after that, McGee crashed into Shannon Green.

Green sued Hudgins and McGee, claiming both were at fault for the wreck even though the only collision was between McGee's vehicle and hers. She won a verdict of roughly $88,000 actual damages, punitive damages of $35,000 against McGee, and punitive damages of $35,000 against Hudgins. She appealed. Hudgins, the instigator of the vehicular pursuit, filed a cross-appeal.

The main issue in the case is how to properly account for Green's $100,000 pretrial settlement with McGee's insurance carrier. Both Green and Hudgins argue the trial court erred on this point, but they reach different conclusions. Green argues the trial court impermissibly converted the separate punitive awards to a joint award and that she is due more money, not less. Hudgins argues that his liability to Green is completely extinguished because even though the jury awarded Green more than $100,000 in damages, Hudgins' share of the judgment is less than the $100,000 Green has already received.

We agree that the trial court's setoff calculation was not correct, but we disagree with Hudgins' argument that this extinguishes all of his liability to Green. We respectfully disagree with the parties' remaining arguments for reversal.

FACTS

It is not necessary to describe much more of the background leading up to the crash. Both Hudgins and McGee said traffic on the interstate was heavy. McGee claimed he was stuck behind Hudgins and that Hudgins slammed on his brakes three times, almost causing the vehicles to collide. When the interstate expanded from two lanes to three, McGee changed lanes and hurriedly passed Hudgins. Hudgins called 9-1-1 to report McGee's driving and followed McGee.

McGee said he could see Hudgins following him and that this made him feel uncomfortable. Both McGee and Hudgins pled guilty to driving too fast for conditions.

Green testified she did not remember the collision. She woke up with broken glass in her mouth and had difficulty breathing. She said she thought she was going to

die. Green sustained two broken ribs and damage to the bicep in her left arm. She had her left arm in a sling for six weeks and testified that she had to temporarily rely on her husband for assistance with some normal daily functions. The extent to which her injuries limited her ongoing activities of daily living was disputed.

The jury found McGee sixty percent at fault and Hudgins forty percent at fault. The precise award for actual damages was $88,546.78. We mention this because one of the issues in this case relates to the fact that Green offered the same exact number to the jury as the direct financial costs to her from the wreck.

The jury also heard the claim brought by Green's husband for loss of consortium. There, the jury returned a defense verdict.

Green filed a post-trial motion seeking a new trial nisi additur. She also asked the trial court to allocate some of the $100,000 settlement with McGee to her husband's consortium claim.

Hudgins filed a post-trial motion seeking a ruling releasing him from all liability, releasing him from punitive damages, and (if nothing else) a setoff of the jury's verdict on account of Green's settlement with McGee.

The trial court denied all motions except the motion for setoff. The court calculated the setoff by adding the actual damages award (again, roughly $88,000) and both punitive damages awards ($35,000 each) for a total verdict of roughly $158,000. Then, the court subtracted the $100,000 settlement. This left about $58,000 in damages remaining. The trial court held this would be shared by the defendants and allocated 60/40 between them according to the fault assigned by the jury.

GREEN'S ISSUES

1. Whether the trial court abused its discretion by declining to grant a new trial nisi additur based on Green's argument that the award for actual damages is the precise amount of her economic loss with no award for pain and suffering.

2. Whether the trial court should have allocated some of Green's $100,000 settlement with McGee to Green's husband's loss of consortium claim.

3. Whether the trial court erred in dividing the punitive damage awards against McGee and Hudgins on a pro rata basis.

HUDGINS' ISSUES

4. Whether the trial court erred in declining to set aside the verdict against Hudgins in its entirety.

5. Whether the trial court erred in declining to set aside the punitive verdict against Hudgins.

6. Whether the trial court erred in rejecting the argument that the proper application of the setoff for Green's settlement with McGee precludes Green from recovering anything against Hudgins.

NEW TRIAL *NISI ADDITUR*

Green argues the trial court abused its discretion in declining to grant additur. She says it is evident the jury's award of actual damages does not include anything for her pain and suffering.

Our task does not involve deciding whether we agree with the jury's verdict or whether we agree with the circuit court's decision to let the jury's verdict stand. The standard of review is highly deferential. *See Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) ("A jury's determination of damages is entitled to 'substantial deference.'" (quoting *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009))); *id*. ("The decision to grant or deny a 'new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.'" (quoting *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009))); *id*. at 57, 710 S.E.2d at 89 ("'The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.'" (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006))); *see also Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*.").

We must defer to the jury and the trial court. Despite the fact the actual damages award corresponds exactly (to the cent) with the exhibit Green offered for her economic damages, we do not know, and the jury was not asked, whether the jury limited Green's damages in this way. The jury found Green had no fault in the wreck, and there is no doubt she received serious injuries in the wreck, but causation was

an issue for treatment and ongoing pain because Green had pre-existing medical ailments. The trial court believed the verdict was appropriate and declined to invade the jury's province. We do not see how we can question that determination given our standard of review.

Green argues this court's decision in *Waring v. Johnson* establishes that we need look at nothing more than the fact that the actual damages award corresponds exactly with Green's offered economic damages. *See* 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000). As we see it, the key to *Waring* is that this court was reviewing a grant of additur rather than the denial of it. *Id*. at 256-61, 533 S.E.2d at 910-13. The standard of review is weighted in favor of affirming the trial court's decision; no doubt because that court possesses a superior sense of the case having presided over the trial. Just as the standard of review led this court to affirm in *Waring*, so too it leads us to affirm here.

ALLOCATING FUNDS TO THE CONSORTIUM CLAIM

As already noted, Green argues the trial court erred by not attributing some of her $100,000 settlement with McGee's insurance carrier to her husband's consortium claim. This argument draws on the principle that funds previously paid to the plaintiff mandate a reduction in the amount of the plaintiff's claim against other tortfeasors causing the same injury. *See, e.g.*, S.C. Code Ann. § 15-38-50 (2005) (codifying the right to setoff). If it is true that some of the settlement was compensation for injuries to Green's husband, this would reduce the settlement funds attributed to Green and the offset to which Hudgins is entitled.

Precedent explains that when a settlement involves multiple claims, the trial court "must make the factual determination of how to allocate the settlement between the [] claims." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012); *see also Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (reallocating settlement funds the parties attributed to a survival claim when there was no evidence of pain and suffering). Here, however, it does not appear that Green's settlement with McGee's insurance company involved multiple claims. The facts are confusing. The same day Green received the full limits of $100,000 under McGee's liability policy, Green's husband signed his own covenant not to execute against McGee in exchange for $2,500. Green argues this $2,500 was not for her husband's consortium claim, but there is no limiting language in the settlement documents we have in the record.

Beyond that, the jury returned a defense verdict on the consortium claim. We were not able to locate a case authorizing a judge, sitting after the verdict, to allocate settlement funds to a claim after the jury determines the claim has no value. The situation would be different if there had been an allocation before the jury spoke. In *Riley v. Ford Motor Co.*, for example, our supreme court upheld a pretrial allocation of settlement funds to a survival claim even though the plaintiff later withdrew that claim during the trial. 414 S.C. 185, 197-98, 777 S.E.2d 824, 831 (2015). Green's argument that setoff is equitable in nature and should be based on all of the circumstances is a correct statement of precedent. Here, however, the trial court was asked to allocate settlement money to a claim after the jury rejected it. Again, we are not presented with any authority suggesting it was error for the trial court to decline this request.

MOTIONS TO SET VERDICTS AGAINST HUDGINS ASIDE

Hudgins offers several reasons the trial court erred in denying his motions to set the verdict against him aside in its entirety, or at least to set the punitive damages award aside. He argues a wholesale reversal is required because (1) the only reasonable inference is that McGee was the sole cause of the wreck; (2) a reasonable jury could not conclude he (Hudgins) breached a duty or proximately caused the wreck; (3) McGee was an independent intervening cause and Hudgins was a remote cause rather than a proximate cause; and (4) a jury could not determine that Green's injuries were proximately caused by the wreck because Green did not present medical evidence supporting causation. He argues the punitive award cannot stand because no reasonable jury could find that his behavior was willful, wanton, or reckless by clear and convincing evidence.

The record supports the trial court's decision denying these motions. *See Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law."); *id*. ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict."); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.").

McGee testified Hudgins followed him after he passed Hudgins on the interstate. McGee said he was concerned for his safety and feared Hudgins might harm him if he pulled over. Hudgins disputed that he was "following" McGee, but other evidence suggested this denial was not truthful. The encounter between Hudgins

and McGee lasted for an extended period of time over different roadways, and while Hudgins claimed he was driving this route on purpose, he told authorities during his phone call with them that he did not know where he was. After the wreck, Hudgins can be heard on the 9-1-1 recording driving past McGee and telling McGee that he had the police coming for him. It was reasonable for the jury to find Hudgins chased or followed McGee, which made McGee distracted and nervous, and therefore made Hudgins a proximate cause of the collision. As for punitive damages, we need go no further than Hudgins' guilty plea to driving too fast for conditions, which is some evidence that Hudgins acted recklessly, willfully, and wantonly. *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 315, 594 S.E.2d 867, 875-76 (Ct. App. 2004) ("Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence the defendant acted recklessly, willfully, and wantonly. . . . The jury determines whether a party has been reckless, willful, and wanton.").

SETOFF AND PUNITIVE DAMAGES

We come now to the remaining setoff arguments. Green argues the trial court erred in its setoff calculation by crediting the settlement against the entire verdict and dividing the unsatisfied punitive damage awards on a pro rata basis. Hudgins argues that he has no liability to Green because the $100,000 settlement exceeds his share of the actual damages and the punitive damage award against him.

Setoff comes from the principle that "there can be only one satisfaction for an injury or wrong." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (quoting *Truesdale v. S.C. Highway Dep't.*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975)). By statute, a settlement with a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). Precedent instructs that before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. *Hawkins*, 330 S.C. at 113, 498 S.E.2d at 406-07. When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law. *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App. 1999).

Hudgins argues that the setoff statute compels the court to find that his liability to Green is extinguished. The statute says that a settlement reduces the amount of a plaintiff's claim against "other tortfeasors." § 15-38-50(1). Green's underinsured

motorist (UIM) carrier took over litigating McGee's part of the case after McGee's liability carrier settled. Hudgins has $1 million in liability coverage and no funds have been paid on his behalf towards the verdict. Even so, he argues a UIM carrier is not a tortfeasor and that as the only tortfeasor, he is entitled to credit the $100,000 settlement towards his share of the liability.

We respectfully reject this argument. We note our supreme court's statement in *Riley* that the Uniform Contribution Among Tortfeasors Act codified the "equitable principles" of setoff. 414 S.C. at 195, 777 S.E.2d at 830. *Riley* also noted that setoff "should be exercised so as to do justice between parties." *Id*. (quoting *Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911)). We think it plain that neither justice nor equity support giving Hudgins—who did not settle and has paid no money—the benefit of settlement funds that were paid on McGee's behalf before those funds are credited to McGee's share of the verdict. After all, precedent explains that when a liability insurance carrier provides funds for a settlement, the funds are provided to benefit its insured. *Cobb v. Benjamin*, 325 S.C. 573, 579, 482 S.E.2d 589, 592 (Ct. App. 1997).

In many cases, if not most, a settling defendant will not be a party when the jury decides the case, and will thus not be listed on the verdict form and will not receive an allocation of comparative fault. *E.g., Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017) (joint tortfeasor who settled was not to be included in the jury's apportionment of fault). In deciding the case, the jury is tasked with determining the total amount of the plaintiff's damages (if any). S.C. Code Ann. § 15-38-15(C)(1) (Supp. 2022). The setoff for funds paid on the same injury are then applied to the verdict in proportion to each defendant's percentage of liability as found by the jury. § 15-38-15(E).

Here, we face a situation where a joint tortfeasor—McGee—remained a defendant and received an allocation of fault notwithstanding the settlement on his behalf. We are keenly mindful that the legislature's word with respect to public policy is final. *Tiffany*, 419 S.C. at 559, 799 S.E.2d at 485. Still, the result Hudgins seeks to achieve is so far from the equitable purpose of setoff—he seeks to pay nothing even though the verdict plainly exceeds his co-defendant's coverage—that his interpretation is an interpretation we cannot follow.

We still face the question of how the $100,000 should be allocated between the various parts of the verdict. Should it apply first to McGee's sixty percent of the actual damages award and then to McGee's punitive award before the excess is credited to Hudgins, or should it follow some other allocation?

We approach this question mindful of the fact that this case involves a settling tortfeasor who remained a defendant and was allocated a percentage of fault by the jury. We are also mindful of precedent's explanation that though the relevant statutes were not designed to achieve perfect equity, they were designed to promote and foster settlements. *See Tiffany*, 419 S.C. at 557, 799 S.E.2d at 484 (citing *Riley*, 414 S.C. at 196, 777 S.E.2d at 830).

The jury determined that the wreck caused Green to suffer $88,000 in actual damages and that sixty percent of the fault belonged to McGee. The jury also found McGee liable for $35,000 in punitive damages. The principles above dictate that the $100,000 should be allocated first to McGee's share of the actual damages, then to the punitive award against him. After that, the excess should be credited to the judgments against Hudgins.

We have already explained why we reject one of the alternative approaches. Suppose the jury entered the same allocation of fault but found actual damages of $200,000 rather than the $88,000 awarded here. Hudgins would say he still owes Green nothing because he believes Green's claim against him (forty percent of $200,000) should be reduced by the $100,000 Green received from McGee. There, as here, extinguishing Hudgins' liability is so at variance with the equitable purpose of setoff we do not think the legislature could have intended it.

The other alternative approach would be to first apply the settlement funds to the entire actual damages award (as the trial court did here), and then to the punitive awards against McGee, Hudgins, or both. We reject this alternative because, as with the other, it is contrary to the principles of setoff. Setoff is designed to prevent a plaintiff from recovering more than one share of her damages, not to prevent a plaintiff from recovering damages the jury determined she was entitled to recover. Hudgins has sufficient liability coverage to satisfy the awards against him. The equitable principles codified in the statute dictate that McGee receive first credit for funds paid on his behalf, and that the excess be applied to the judgment against Hudgins.

The jury determined Green's total actual damages were $88,546.78. The sixty percent allocated to McGee is $53,128.07. When added to the $35,000 in punitive damages, McGee's liability would be $88,128.07. Applying the $100,000 settlement to McGee's liability leaves $11,871.93 in remaining settlement funds that are allocated to Hudgins' liability. Hudgins' forty percent share of the actual damages award comes to $35,418.71. Subtracting the remaining settlement funds leaves

Hudgins responsible for $23,546.78 in actual damages and $35,000 in punitive damages. Hudgins' total remaining liability (exclusive of any applicable interest) is $58,546.78.

CONCLUSION

Based on the foregoing, the trial court's judgment is

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard W. Downing, Appellant,

v.

Rebecca B. Downing, Respondent.

Appellate Case No. 2019-001980

Appeal From Charleston County
Vicki J. Snelgrove, Family Court Judge

Opinion No. 6002
Heard September 15, 2022 – Filed July 26, 2023

AFFIRMED

William P. Tinkler and Paul E. Tinkler, both of Tinkler Law Firm, LLC, of Charleston, for Appellant.

Mark O. Andrews and Kelley D. Andrews-Edwards, both of Andrews Mediation and Law Firm, PA, of Mount Pleasant, for Respondent.

VINSON, J.: Richard W. Downing (Husband) appeals the family court's order denying his request for a reduction in his alimony obligation and awarding attorney's fees to Rebecca B. Downing (Wife). On appeal, Husband argues the family court (1) failed to analyze the factors enumerated in section 20-3-170(B) of

the South Carolina Code (2014),[1] (2) improperly characterized his deferred compensation benefit as income, (3) erred in finding there had not been a material change in circumstances, and (4) erred in awarding Wife $42,000 in attorney's fees. We affirm.

FACTS AND PROCEDURAL HISTORY

Husband and Wife (collectively, the parties) were married in 1982 and separated in January 2010. In March 2010, Wife filed a summons and complaint. The family court approved a final settlement agreement (the Agreement) in 2011,[2] which provided Husband would pay Wife $3,500 per month in permanent periodic alimony and $60,000 in lump sum alimony. Husband was further obligated to equally share his pension income with Wife. Husband's 2010 financial declaration reflected $13,050 in gross monthly income; $6,898 in monthly expenses; $311,000 in assets; and over $485,000 in debt. The circumstances upon which the Agreement was based are set forth below.

In May 2018, Husband filed an action for divorce and a reduction in alimony. Husband alleged a material change in circumstances owing to his retirement in March 2018 and resulting reduction in his monthly income from $13,000 to $4,000. Husband's June 2018 financial declaration reflected $4,000 in gross monthly income; $4,495 in monthly expenses; more than $800,000 in assets; and $130,000 in debt. After a hearing, the family court issued a temporary order finding Husband failed to make a *prima facia* case warranting a temporary modification in his alimony obligation and ordered Husband contribute $5,000 to Wife's temporary attorney's fees.

Wife filed a motion to compel discovery in September 2018 seeking certain financial documentation from Husband, some dating as far back as seven years. At the motion hearing, Wife alleged Husband had not been forthright regarding his "financial landscape" and failed to provide Wife with documentation in response to her requests to produce and interrogatories. Among the information Wife sought

---

[1] Section 20-3-170(B) enumerates the factors the family court must consider when evaluating whether there has been a material change of circumstances for the purpose of modifying alimony upon the supporting spouse's retirement.

[2] The copy of the Agreement included in the record on appeal is missing the next-to-last page.

were financial records pertaining to Husband's monthly expenses and his Regions Bank account, which Wife discovered after issuing subpoenas to financial institutions to determine where Husband held accounts. The family court found several requests for production of documents were outstanding but limited the disclosure of some financial information, including credit card statements, to the three-year period immediately preceding Husband's action.

The family court held a final hearing on June 17 and 18, 2019. Husband testified that during the marriage, Wife was a traditional homemaker, earning income only from modeling early in their marriage and later, teaching piano lessons. He recalled Wife was diagnosed with multiple sclerosis in 2003 or 2004—before their separation—and confirmed he had witnessed a progression in her symptoms. Husband entered his 2017 and 2018 federal and state tax returns into evidence without objection and identified his June 2019 financial declaration. He explained that at the time of the parties' separation in 2010, they were "essential[ly] bankrupt." Husband testified that under the Agreement, he agreed to assume certain debts, both to individuals and to various financial institutions. He confirmed the Agreement obligated him to pay Wife $3,500 in monthly alimony and half his monthly pension, which totaled an additional $500 a month.

Husband testified his position with his employer was eliminated in April 2017 but he secured another position within the company at that time; however, this position was eliminated in March 2018 and he retired. Husband was sixty-seven at the time of his retirement, and he received a severance package as a result of his termination. Based on a statement from the Social Security Administration, Husband confirmed his taxed Medicare earnings for 2010 totaled $216,000 and by 2016, his earnings had reached a high point of $279,598. He indicated his earnings dropped to $83,000 in 2018 as a result of his retirement. Husband testified he did not search for another job outside of his company when his position was eliminated in March 2018 but indicated he was prepared to work until about the time of the hearing. He believed his age, health, and eyesight problems would have prevented him from finding employment. Husband elaborated that he suffered "eye issues" for a number of years, which made tasks such as reading and driving in adverse conditions difficult. To support this testimony, Husband entered into evidence medical information dating from 2014 regarding his eyesight issues, including a retinal detachment in one eye.

Husband explained his financial strategy from 2010 forward was to pay down his debts and defer as much income into his retirement accounts as possible. Husband testified he lived with a roommate in Atlanta, Georgia, with whom he split rent and expenses, until two years before the hearing. At the time of the final hearing, he lived in a one-bedroom apartment. He stated he had cut his expenses by cancelling his cable subscription and country club membership, and he indicated he intended to move out of Atlanta to reduce his expenses further. However, Husband acknowledged he had spent more money than usual in the year preceding the hearing due to his retirement. Husband testified he took "a series of small trips" in 2018 to Los Angeles, California to attend the Rose Bowl; Aruba; Iceland; Copenhagen, Denmark; and Spain. Husband maintained this reflected the majority of his travel in that year and his other travels included driving to destinations such as Florida, where he could stay with friends free of charge.

In reviewing his June 2019 financial declaration, Husband confirmed he included the following as monthly income: $645 in pension benefits; $2,700 in social security benefits; $77 from Prudential insurance; and $1,704 in interest.[3] He explained the interest figure reflected the total principal balance of his retirement accounts charged at an interest rate of 3.5%. Husband testified his retirement accounts were comprised of deferred stock units in his former employer that he categorized as deferred income, an IRA account,[4] and a Wells Fargo Executive Retirement Account. He determined the value of the deferred stock units by multiplying the number of units he held by the stock price of the day. The total pretax value of these retirement accounts was $676,219.

As to the deferred stock units, Husband explained that after receiving a distribution, the stock units went into an account from which he could then sell the

---

[3] A notation on Husband's June 2019 financial declaration stated the $1,704 interest figure represented "imputed income derived from 3.5% of net worth ($584,077)."

[4] Husband's June 2018 financial declaration does not list the Janney Montgomery Scott IRA account, which was valued at $160,324 on his June 2019 financial declaration. His June 2018 financial declaration lists two 401(k) accounts, with a total value of $152,755, that are not listed on his June 2019 financial declaration. In his March 2019 deposition, Husband testified he transferred one of these 401(k) accounts into the IRA account; however, his deposition testimony was unclear as to whether the second 401(k) account was also transferred into the IRA account.

stock after paying a commission. Husband testified he received annual distributions from his deferred stock and executive retirement account in February. He explained he would receive two more annual deferred stock distributions and eight additional annual distributions from his executive retirement account. Husband indicated he purchased a $10,000 United States Treasury Bill with proceeds from the sale of his deferred stock units and he intended to use the return from that investment later in the year to pay his debts. He stated his financial strategy since 2011 was "first and foremost" to ensure he could meet all of his monthly obligations to Wife, and he then prioritized significantly reducing his debt obligations and ensuring he could meet his own financial needs. He believed that a reduction in his monthly alimony obligation to $2,050 a month was "fair and sustainable."

On cross-examination, Husband confirmed he received distributions valued at approximately $40,000 in both 2018 and 2019 from his executive retirement account. Husband could not recall the amount of the February 2019 distribution from his deferred stock units. He acknowledged he deposited $56,000 into one of his bank accounts in February 2018. Husband testified those funds were related to a stock distribution that he sold from his deferred stock account. He explained the $34,816 stock value listed under the company name "Wells Fargo Share Owner's Stock" in the nonretirement securities section on his June 2018 financial declaration reflected the value of the distributed stock he had not sold at the time he completed his financial declaration. When asked where he indicated on his financial declarations that he had received distributions from his deferred stock and executive retirement accounts, Husband responded it was reflected in the value of his retirement assets. He testified the income he received in regular salary before his retirement in March 2018 and $26,000 severance payment were reflected in his bank account balances on his June 2018 financial declaration.

Husband confirmed that both his June 2018 and June 2019 financial declarations reflected monthly expenses totaling approximately $4,500 and he intended that to be a truthful representation. Husband later testified this amount reflected what he anticipated spending in the future and his expenses since his retirement were not typical. Wife then questioned Husband about his direct testimony related to his travel the previous year. She specifically questioned Husband about charges made to three of his credit card accounts that appeared in his monthly statements from March 2018 to April 2019. Husband confirmed charges related to the trips he testified to during his direct testimony as well as charges related to additional trips

within the United States to attend social and sporting events and other international travel. The charges reflected substantial amounts spent on airfare and dining. In addition to air travel, Husband testified he drove long distances on several occasions, including to the Florida Keys and New York, in an attempt to reduce his travel expenses. He testified he also planned to travel to Ireland in July 2019 to attend the Open Championship. Husband maintained his monthly expenditures would match those reflected in his financial declarations after this trip.

Husband acknowledged he had less than $100,000 in assets at the time the parties entered into the Agreement in 2011 and the total value of his assets had increased by almost $850,000 since that time. He also acknowledged he had paid down a significant portion of his debt, almost $400,000. Husband agreed this showed a $1.2 million increase to his net worth.

Husband confirmed his 2018 federal tax return showed he had $279,491 in gross income that year, which he agreed that divided monthly throughout the year, totaled $23,000 per month. When asked why he indicated on his financial declaration his monthly income was only $4,400, Husband responded, "So those have already been distributed, so I didn't count them as monthly income." He explained the distributions had been captured as assets on his financial declaration. Husband confirmed that based on his 2018 and 2019 financial declarations, his monthly expenses were $2,400 less than his stated monthly expenses in 2011. Husband confirmed he deposited $48,442 into his bank accounts in January 2019 and an additional $81,977 in February 2019. He testified he put some of those funds into high-interest savings accounts and purchased a United States Treasury Bill for $9,875. Husband admitted to withdrawing funds from the savings accounts to fund his debts. He further admitted to using around $60,000 of the approximate $100,000 he deposited into his bank accounts in January and February 2019 to pay debts. Later, Husband could not recall what he did with significant amounts of cash totaling over $15,000 he received from checks issued by his employer as part of a stock distribution.

Wife then questioned Husband about check deposits made into his Regions Bank account from a company named "Potter Concrete" in Texas. Husband did not disagree with Wife's assertion that the funds deposited since 2011 totaled almost $450,000. Husband stated the funds were connected with his facilitation of the sale of badges to the Masters Tournament to friends. On redirect, Husband testified his arrangement with Potter Concrete to procure badges for the Masters

Tournament predated the Agreement by almost thirty years. He maintained he did not earn any income from these transactions. Husband explained he would cash part of the checks to pay the badge sellers and would retain some funds across multiple accounts for later payment; he also stated he did not like to carry large amounts of cash as explanation for why he only partially cashed these checks. Husband admitted to facilitating ticket sales to another sporting event but maintained he did not make a profit off of the transaction.

Husband confirmed he felt a strong obligation to support Wife. He stated he was unaware Wife would have a monthly deficiency of over $3,000 if his alimony obligation was reduced to $2,050. Husband maintained he did not have any hidden sources of income. He stated the record of how much money he was able to save was evidence of his frugal lifestyle. Husband expressed his desire for Wife to move to Washington state to live with her brothers in an attempt to cut expenses and to have someone nearby to support her. He believed it would be less expensive for her to live in Washington than in Mount Pleasant, South Carolina. Husband acknowledged Wife did not have the financial means to pay his attorney's fees or her own attorney's fees.

Kelly Simon, a forensic accountant, testified she used Husband's 2018 federal tax return to create a mock financial declaration document. She explained she differentiated Husband's regular wages and deferred compensation income but that both were included as income. Simon also included Husband's pension and annuity income, as well as his social security income and dividend interest for a total gross monthly income of $23,666. Simon explained that she created a comparison of Husband's 2010 financial declaration and her mock financial declaration and it reflected an almost $10,000 increase in Husband's gross monthly income from 2010 to 2018. She explained the difference in Husband's net income for that time period showed an increase of almost $9,000. As to the check deposits from Potter Concrete, Simon testified the total amount deposited since 2011 was more than $457,000. She testified that over the fourteen-month period from February 1, 2018 to March 31, 2019, Husband deposited $374,885 into his bank accounts. Simon further testified Husband had credit card charges totaling $62,259 from January 2018 to March 2019, and he regularly paid his credit card balances in full. On cross-examination, Simon confirmed she did not review any of Husband's older credit card statements. She acknowledged she could not determine whether Husband provided cash payments to the individuals selling their Masters Tournament badges.

On the second day of trial, Wife published a letter from her physician regarding her multiple sclerosis diagnosis. The letter stated Wife suffered from primary progressive multiple sclerosis and her condition would continue to worsen over time. Her physician noted Wife suffered from muscle weakness and fatigue and she had to make many adjustments to accommodate her condition, including having her groceries delivered to her home and using a wagon to get the groceries inside her home, which still caused great difficulty. The letter also described Wife's difficulty in preparing meals and washing dishes and completing everyday tasks such as picking items up with both hands. Her physician expected Wife to be wheelchair-bound in the future and would require assistance with routine activities such as bathing, dressing, and meal preparation. The letter stated Wife had been unable to work for many years due to her diagnosis and cautioned Wife to limit her piano teaching to avoid exhausting herself. Finally, Wife's physician stated Wife would require regular medical care and in the future, specialized medical equipment.

Wife testified she was fifty-nine years old. She stated she had lived at her current residence since 2012. Wife explained the house met her medical needs and the landlord had made further improvements to accommodate her changing needs. She stated her neighbors helped her with everyday tasks and checked in on her. Wife noted she had many friends that lived near her. She testified she made $325 per month teaching piano lessons. In describing her daily routine, Wife testified it took her two-and-a-half to three hours to get ready in the morning if leaving the house. She described herself as a "homebody" but noted she occasionally had friends and family visit her or she would go to dinner or drinks with friends. Wife explained she splurged approximately three times a year on dinner when her daughters visited but noted she did not pay for their meals. She testified she typically only traveled to visit her daughters once a year due to cost.

Wife testified that in two months' time, her medical insurance premium would increase significantly to over $1,000 per month. She stated her monthly rent totaled $1,600 and food and household supplies cost her approximately $400 per month. Wife noted she tried to eat inexpensively by purchasing basic food items such as beans and rice. She indicated her largest expenses were related to her medical needs, including a recent increase in her prescription drug prices. Wife testified she was unable to afford all of the medication prescribed to treat her multiple sclerosis. She confirmed she had a current deficiency of $500 a month

that would increase to $1,600 a month when her insurance premium increased. Wife acknowledged she had significant personal debts owed to a friend as well as outstanding fees and costs of $41,938 owed to her attorneys. She stated she did not have the ability to pay these debts or the $4,500 in fees associated with Simon's financial services. She confirmed that pursuant to the fee agreement with her attorneys, one of her attorneys, Kelly Andrews-Edwards, reduced her hourly rate from $400 to $175 for representation in this matter. Wife testified a friend gifted her $3,000 annually to cover a prior increase in her rent. She indicated there was no assurance she would continue to receive these funds and her friend had recently informed her that her financial circumstances had changed. Wife confirmed she had a Roth IRA account valued at $17,000 but if Husband's alimony obligation was reduced to $2,050, her monthly deficiency would increase to $3,600 and those funds would be quickly depleted.

On cross-examination, Husband entered a financial analysis he had prepared for the temporary hearing into evidence. The analysis included imputed income at 4% of the value of his nonmarital assets and showed figures reflecting his net income when his alimony obligation was set at 50%, 40%, and 33% of his net income. During redirect, the family court told the parties it understood Husband's position that his assets would be depleted at the current level of alimony and Wife's position that Husband misrepresented his income in his financial declarations as it pertained to the distributions from his deferred compensation and executive retirement accounts.

In its August 2019 order denying Husband's request for a reduction in his alimony obligation, the family court stated it "considered Husband's recent retirement, examined the circumstances which existed at the time Husband's alimony obligation was established in 2011, examined Husband's current financial circumstances, and examined Wife's needs and Husband's present ability to meet those needs." The family court also stated it considered and gave appropriate weight to the factors enumerated in section 20-3-130(C) of the South Carolina Code (2014). It stated Husband was sixty-eight years old and in reasonably good health at the time of his retirement. The family court also stated Husband's employer "closed down" the division Husband worked in, which led to his retirement. The court then noted,

> Retirement by a supporting spouse is grounds to warrant a hearing to evaluate whether there has been a change of

> financial circumstances sufficient to modify an existing alimony obligation. To justify modification or termination of alimony, the moving party must establish that there has been a substantial or material change of financial circumstances. It is well established that even where a supporting spouse['s] salary or income has been reduced by retirement, the [family c]ourt must examine the totality of the supporting spouse's financial circumstances such as the availability of assets which could be utilized to pay support. The [family c]ourt must assess the overall ability of the supporting spouse to pay the [c]ourt ordered alimony.

In its analysis, the family court made specific factual findings pertaining to Husband's 2018 taxable income, deposits of funds into Husband's checking accounts, distributions from Husband's retirement assets, Husband's assets and liabilities at the time alimony was established, Husband's financial needs at the time alimony was established and his current financial needs, Husband's actual spending at the time of filing the alimony reduction action, Wife's medical needs and ability to earn income, and Wife's current expenses and assets. Specifically, the family court found Husband's income in 2018 totaled $283,987, or $23,666 per month. It determined Husband "grossly understated" his income by approximately $19,000 per month in his sworn June 2018 financial declaration. The family court concluded Husband's income was substantially greater than his income when his alimony obligation was established by the Agreement. It further found Husband's bank account records showed deposits totaling over $450,000 related to his selling Masters Tournament badges. The family court concluded "a great deal of cash [was] unaccounted for in these transactions" and Husband's testimony that he merely facilitated the sale of badges was not credible. Without determining a specific monetary amount, the family court concluded "Husband had income from sources other than those disclosed by [him]."

The family court further found Husband's 2019 year-to-date income substantially exceeded the amount he represented on his sworn June 2019 financial declaration. It concluded Husband received $83,000 in net deferred compensation income, representing more than $100,000 in gross income. The family court stated Husband failed to disclose this income or future streams of compensation from his former employer on his financial declarations. It concluded Husband presented no

credible evidence showing his retirement materially reduced his income, as compared to his income when alimony was established, or that his retirement impacted his ability to meet his $3,500 per month alimony obligation. The family court rejected Husband's assertion that the majority of the funds disbursed to him in 2018 and 2019 were retirement pay and not income. It found Husband was required to disclose all retirement income on the first page of his financial declarations, which he failed to do. The family court noted Husband would receive deferred compensation income "in substantial but yet to be determined amounts" through 2027. The family court found Husband's financial declarations did not show or explain that Husband had received, and would continue to receive, income from his deferred compensation plans. It stated, "Husband portrayed a very misleading financial picture to . . . Wife and to the [family c]ourt."

The family court compared Husband's financial situation in 2011 to his current financial situation, finding it had substantially improved. The family court found Husband's monthly expenses had decreased since 2011; however, it determined Husband had "grossly misrepresented his spending related to travel, incidentals, and entertainment on his sworn financial declarations." It noted, "Husband was enjoying a lavish, if not extravagant, lifestyle." The family court determined the testimony and evidence presented at trial did not support Husband's sworn testimony that he had modified his lifestyle and was living frugally. It specifically noted Husband's extensive travel and dining expenditures. The court determined Husband's spending evidenced his ability to pay alimony at the established amount. The family court concluded clear and overwhelming evidence showed Husband's overall financial circumstances had improved and he failed to demonstrate an inability to continue to pay Wife $3,500 in monthly alimony. It further noted Wife's "clear and profound need for continued alimony from Husband" due to her worsening medical condition and inability to earn significant income—Wife had no earned income at the time alimony was established in 2011. The family court determined Wife had a "very modest lifestyle" and was $400 a month short of meeting her monthly expenses, which would increase by $1,000 per month beginning September 2019 as a result of an increase in her health insurance premium. It noted Wife had virtually no assets from which she could draw to meet any financial shortfall and concluded that "[w]ithout the alimony payment from Husband, Wife would find herself unable to pay for her essential expenses and she would be in a truly destitute situation."

The family court also awarded Wife $42,000 in attorney's fees and costs. It found Husband made "gross misrepresentations . . . of virtually every material aspect of his financial circumstances." Specifically, the family court found Husband failed to provide Wife with sufficient responses to her requests for documentation, which necessitated Wife filing a motion to compel discovery. It determined that through the efforts of Wife's counsel, "Wife established that Husband had grossly understated his income and his spending." The family court acknowledged that "[a]t first blush," Wife's attorney's fees seemed more than what would be expected; however, it found that "in light of the gross misrepresentations by Husband, of virtually every material aspect of his financial circumstances . . . the efforts put forth by Wife's [counsel] were both reasonable and necessary." The family court concluded that without the efforts of Wife's counsel in uncovering evidence of Husband's financial circumstances, it "would have had only . . . Husband's misleading financial information upon which to base its decision." The family court further found the hourly rates charged by Wife's counsel were reasonable in light of their experience and standing in the legal community and that the time spent working on the case was necessary. It determined "Husband ha[d] demonstrated little if any financial restraint as evidenced by his lavish spending during the pendency of this action and his planned trip to Ireland in July 2019. Husband ha[d] the financial ability to contribute to the attorney's fees incurred by Wife." The family court ordered Husband to pay the outstanding balance of Wife's attorney's fees totaling $42,000.[5]

Husband filed a motion for a new trial, or in the alternative, to alter or amend and for stay of the final order pursuant to Rules 59 and 62(b) of the South Carolina Rules of Civil Procedure. Husband requested that the family court receive additional evidence, including Husband's 2011 and 2019 deposition transcripts. He argued his 2011 deposition showed the Masters Tournament badge scheme was discussed with Wife's counsel before the Agreement was finalized and therefore Wife was "collaterally estopped from claiming [he] made money from this source." Husband further argued the family court misapprehended facts relating to the calculation of his income. Finally, Husband argued Wife's attorney's fees were unreasonable and much of the work Wife's counsel billed for was unnecessary.

---

[5] Wife's attorney's fees totaled $75,444, which was reduced by $33,500 to account for Husband's $5,000 payment under the temporary order and a $28,500 payment made by Wife's friend.

At the outset of the motion hearing, the family court stated it had read the depositions submitted by Husband. Wife argued the depositions were not properly before the court. During the hearing, the parties addressed Husband's arguments relating to his 2011 and 2019 depositions, how his deferred income should be treated, the representations Husband made on his financial declaration, and the family court's alleged failure to address the elements under section 20-3-170(B) in its final order. Husband also noted Wife would be eligible to receive social security income in two years' time, and the family court responded it could not predict future events and Husband would need to file a motion at that time to reevaluate his alimony obligation. The family court denied Husband's motions and lifted the stay on the final order. It stated it had considered all of Husband's written submissions in reaching its decision. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err by failing to analyze Husband's request for a reduction of alimony under the factors enumerated in section 20-3-170(B)?

2. Did the family court improperly characterize Husband's required annual payouts from his deferred compensation benefit assets as income when these assets made up the bulk of his post retirement net worth and were insufficient to last his lifetime if he continued to make alimony payments at the existing level?

3. Did the family court err in finding that there had not been a material change of circumstances when Husband was mandatorily retired at the age of sixty-seven, had developed problems with his vision, was no longer earning a salary, and his assets were insufficient to last his lifetime if he continued to make alimony payments at the existing level?

4. Did the family court err by awarding Wife $42,000 in attorney's fees?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). "[O]ur review of a family court's order on whether to modify support awards is de novo." *Miles v. Miles*, 393 S.C.

111, 117, 711 S.E.2d 880, 883 (2011). "[T]his court may find facts in accordance with its own view of the preponderance of the evidence." *Weller v. Weller*, 434 S.C. 530, 537, 863 S.E.2d 835, 838 (Ct. App. 2021). Although this court reviews the family court's findings de novo, we are not required to ignore 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. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 652-53. "The appellant maintains the burden of convincing the appellate court that the family court's findings were made in error or were unsubstantiated by the evidence." *Weller*, 434 S.C. at 538, 863 S.E.2d at 838.

LAW AND ANALYSIS

I. Consideration of Factors Under Section 20-3-170(B)

Husband argues the family court "ignored" section 20-3-170(B) in its order denying alimony modification by failing to mention the statute or analyzing the enumerated factors. We disagree.

> Retirement by the supporting spouse is sufficient grounds to warrant a hearing, if so moved by a party, to evaluate whether there has been a change of circumstances for alimony. The court shall consider the following factors:
>
> > (1) whether retirement was contemplated when alimony was awarded;
> >
> > (2) the age of the supporting spouse;
> >
> > (3) the health of the supporting spouse;
> >
> > (4) whether the retirement is mandatory or voluntary;
> >
> > (5) whether retirement would result in a decrease in the supporting spouse's income; and
> >
> > (6) any other factors the court sees fit.

§ 20-3-170(B).

We find the family court considered all the factors enumerated in section 20-3-170(B) in its order denying Husband's request for a reduction in his alimony obligation. Although the family court did not specifically cite to section 20-3-170(B) in its order, it addressed all of the factors in its analysis. The family court specifically acknowledged the circumstances that led to Husband's retirement and his age and health. The court examined Husband's income in great detail, noted Husband participated in a "systematic plan to defer a portion of his earnings" subsequent to 2011, and referenced Husband's testimony "that he deferred income in order to continue to pay his obligations, with the exception of alimony, into his retirement."[6] Accordingly, we find the family court considered the mandated factors under section 20-3-170(B) and affirm as to this issue.

II. Deferred Compensation Distributions

Husband contends the only "new" income he earned after his retirement came from his pension and social security payments and "yields from funds and securities he managed to save (or defer) over the years he was employed." He asserts his "previously earned assets"—the deferred compensation accounts—were not monthly income for purposes of evaluating his alimony obligation, but rather, were "annual conversions of pre-tax savings to post-tax savings." Husband avers this deferred income vested before his retirement and was "tantamount to retirement savings." He argues that if this court accepts Wife's reasoning, he would be unable to modify his alimony until 2027, when his scheduled payments from his deferred compensation end and when his assets would be nearly depleted. We disagree.

We hold the family court did not err in characterizing the distributions Husband received from his deferred stock units and executive retirement accounts as income.[7] At the final hearing, Husband testified his financial strategy from 2010

---

[6] Husband contests the veracity of this factual finding; however, this demonstrates the family court considered the first enumerated factor under section 20-3-170(B).

[7] We note Husband failed to cite to any South Carolina case law in support of his argument that these distributions represented previously earned assets and should not be considered monthly income for purposes of reviewing his alimony obligation. *See Weller*, 434 S.C. at 538, 863 S.E.2d at 838 ("The appellant maintains the burden of convincing the appellate court that the family court's findings were made in error or were unsubstantiated by the evidence.").

onward was to defer as much income into retirement accounts as possible. His retirement assets included deferred stock units in his former employer, an IRA account, and an executive retirement account, which held both stock and cash assets. Husband acknowledged he received substantial annual distributions from the deferred stock units and executive retirement account and admitted he did not include these distributions in the calculation of his gross monthly income on his financial statements. He did not challenge that the distributions from these accounts were included as income on his 2017 and 2018 federal tax returns. Of the more than $100,000 in distributions Husband deposited in January and February 2019, Husband admitted to spending almost $60,000 of that amount as of June 2019.

Husband's June 2018 and June 2019 financial declarations listed his deferred stock units and executive account as both nonmarital assets and voluntary retirement accounts. In the nonmarital property section, the accounts were noted as a source of income to Husband. The value of these two accounts decreased by over $137,000 from 2018 to 2019; however, these distributions were not captured as income, Husband merely decreased the value of the assets without explaining how the entire value of the distributions from these accounts were spent or reinvested. Furthermore, Husband testified the asset values for these accounts included on his financial declaration were based on the stock's pretax value on a given day. This valuation failed to reflect the known actual value of the stock assets distributed to Husband in 2018 and 2019. Moreover, although Husband included imputed income derived from 3.5% of his net worth on his June 2019 financial declaration in his calculation of gross monthly income, this figure was inadequate to capture the actual value of the funds Husband was receiving, and admittedly spending, from his deferred compensation accounts. In addition, Simon's testimony supported the family court's characterization of the distributions as income. Simon testified Husband's 2018 gross monthly income was $23,666, which included Husband's deferred compensation distributions. Based on the foregoing, we hold the family court did not err in characterizing Husband's required annual payouts from deferred compensation benefit assets as income. *See Weller*, 434 S.C. at 537, 863 S.E.2d at 838 ("[T]his court may find facts in accordance with its own view of the preponderance of the evidence.").

Furthermore, in determining whether to make an award of alimony, the family court must consider the nonmarital properties of the parties. S.C. Code Ann. § 20-3-130(C)(8) (2014). Husband categorized his deferred compensation

accounts as nonmarital property on his June 2018 and June 2019 financial declarations. Accordingly, we find the family court's consideration of the listed value of these accounts and distributions under these accounts was proper.

As to Husband's argument the family court implicitly found the exhaustion of assets was a necessary statutory element for a reduction in alimony upon retirement, we find this argument is without merit. Section 20-3-170(B) merely provides that retirement by the supporting spouse is sufficient grounds to warrant a hearing under section 20-3-170(A) and sets forth specific factors the family court must consider in determining whether there has been a change in circumstances. As discussed in more detail below, here, the family court determined there had not been a material change in circumstances warranting a reduction in Husband's alimony obligation. In reaching this conclusion, the court not only considered the mandatory factors set forth under section 20-3-170(B) but it also considered Husband's financial ability to pay his alimony obligation. Husband argues the annual distributions he received and will continue to receive should not be considered as income in determining whether he is able to meet his alimony obligation. However, testimony and evidence showed Husband spent significant amounts of money after his retirement on travel and dining expenses in excess of the monthly expense figure represented to the family court in his June 2019 financial declaration. At the time of the final hearing, this evidence showed Husband was financially able to meet his alimony obligation. Accordingly, we find the family court's findings do not support Husband's assertion that the family court concluded only an exhaustion of his assets would support a reduction in his alimony obligation. Further, under section 20-3-170(A), Husband may petition the court at any time to reduce his alimony obligation if the circumstances of the parties or the financial ability of the supporting spouse changes. Although the family court determined that at the time of the final hearing there had not been a material change in circumstance that supported reducing Husband's alimony obligation, this does not foreclose Husband's ability to petition the court at a later date to consider whether his or Wife's financial situation has changed to warrant a future reduction in his obligation. Accordingly, we reject this argument.

III. Material Change of Circumstance

Husband argues the family court erred in failing to determine an appropriate alimony obligation. Specifically, Husband contends his assets would be depleted in twelve years if his alimony obligation remains unchanged. We disagree.

"The change in circumstances must be substantial or material in order to justify a modification of the previous alimony obligation." *Thornton v. Thornton*, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997). "Further, the change in circumstances must be unanticipated." *Penny v. Green*, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004). "The party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change has occurred." *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009) (quoting *Kelley v. Kelley*, 324 S.C. 481, 486, 477 S.E.2d 727, 729 (Ct. App. 1996)). "In addition to the changed circumstances of the parties, the financial ability of the supporting spouse to pay is a specific factor to be considered." *Riggs v. Riggs*, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (2003).

> Whenever any husband or wife, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments and the court, after giving both parties an opportunity to be heard and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the supporting spouse, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments.

S.C. Code Ann. § 20-3-170(A) (2014).

We hold the family court did not err in finding there had not been a material change of circumstances to support reducing Husband's alimony obligation. Husband's argument on appeal relies substantially on Husband's "back-of-the-envelope" calculations included in his June 2019 trial brief and a

comparison of the average amount of alimony as a percentage of the supporting spouse's gross income and the spouses' combined gross income awarded by South Carolina appellate courts in the five years preceding June 2019. Husband's argument ignores the family court's statutory and credibility findings concerning Husband's financial situation at the time of the final hearing. First, as discussed above, the family court did not err in characterizing Husband's required annual payouts from deferred compensation benefit assets as income. As to Husband's back-of-the-envelope calculations, we find they fail to reflect the known actual value of the stock assets distributed to Husband in 2018 and 2019 and how much of the distributions Husband spent as opposed to reinvesting. Moreover, the calculations were based on the value of Husband's retirement holdings at a certain point in time and without supporting testimony or evidence, the calculations were merely speculative. *See Butler*, 385 S.C. at 336, 684 S.E.2d at 195 ("The party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change *has* occurred." (emphasis added) (quoting *Kelley*, 324 S.C. at 486, 477 S.E.2d at 729)).

Second, Husband's reliance on comparisons of alimony as a percentage of gross income in support of his argument is misguided. In evaluating the statutory factors, the family court found "Husband portrayed a very misleading financial picture to . . . Wife and to the [c]ourt," and we defer to this finding. *See Lewis*, 392 S.C. at 385, 709 S.E.2d at 652-53 (holding that although this court reviews the family court's findings de novo, we are not required to ignore 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). At the final hearing, Husband testified his financial declaration reflected what he anticipated spending after his July 2019 trip to Ireland, not his actual spending in the year prior to the final hearing. The testimony and evidence presented by the parties at the final hearing show Husband made significant credit card charges related to travel and dining from March 2018 to April 2019, after Husband's retirement. This included international travel, extensive domestic travel, and social expenditures demonstrating a non-frugal lifestyle. Simon testified Husband's credit card charges totaled $62,259 over the fourteen-month period from January 2018 to March 2019 and Husband regularly paid his credit card balances in full. We find this testimony and evidence demonstrated that contrary to Husband's assertions, his lifestyle had not been negatively impacted by his retirement; further, Husband failed to present any evidence regarding his expenditures prior to his retirement.

In addition, a comparison of Husband's 2010 financial declaration with his 2018 and 2019 financial declaration shows an improvement in Husband's financial situation. In 2010, Husband had debts totaling $275,500 and assets with a negative value of $304,000. On his June 2019 financial declaration, Husband listed debts totaling $119,000 and assets valued at over $703,000. As discussed above, Husband's actual income in 2018 was significantly higher than the amount reflected on his financial declaration. In addition, Simon testified that over the fourteen-month period from February 1, 2018, to March 31, 2019, Husband deposited $374,885 into his bank accounts. Furthermore, the family court found "Husband had income from sources other than those [he] disclosed" in connection with its consideration of deposits totaling over $450,000 into one of Husband's bank accounts from Potter Concrete from November 2011 to March 2019. Although Husband asserts his March 2011 deposition testimony demonstrates he had not previously received any income from these transactions, we conclude Husband's testimony at the final hearing was inadequate to show he was not receiving income from these transactions. Husband failed to provide any evidence to support his contention that the cash received from these deposits was paid in full to the Masters Tournament badge holders. This evidence failed to demonstrate that Husband was unable to meet his alimony obligation at the time of the final hearing. *See Riggs*, 353 S.C. at 236, 578 S.E.2d at 6 ("In addition to the changed circumstances of the parties, the financial ability of the supporting spouse to pay is a specific factor to be considered."). Based on the foregoing, we find Husband failed to show a material change in circumstances to justify a reduction in his alimony obligation. *See Thornton*, 328 S.C. at 111, 492 S.E.2d at 94 ("The change in circumstances must be substantial or material in order to justify a modification of the previous alimony obligation."). Accordingly, we hold the family court did not err in finding there had not been a material change of circumstances to support reducing Husband's alimony obligation.

IV. Attorney's Fees

Husband argues Wife's attorney's fees were unreasonable and he should not be required to contribute to any of Wife's attorney's fees beyond the $5,000 paid under the temporary order. We disagree.

> 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;
>
> (4) effect of the attorney's fee on each party's standard of living.

E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorney's fees to award, the court should consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

We hold the family court did not err in awarding Wife $42,000 in attorney's fees. The family court did not err in determining to award Wife attorney's fees because the factors under *E.D.M. v. T.A.M.* were met. First, the testimony and evidence presented at the final hearing showed Wife did not have the financial means to pay her own attorney's fees. Wife testified she had a current deficiency of $500 a month that would increase to $1,600 a month when her insurance premium increased within two months of the final hearing. Second, Wife's counsel successfully defended Husband's alimony reduction action and was able to maintain Wife's current alimony amount. Third, as addressed in more detail above, Husband's financial condition supported substantial travel and social expenditures despite his retirement. Conversely, Wife testified she owed comparatively significant personal debts and had a modest retirement asset valued at $17,000. Wife further testified to an extremely frugal lifestyle. Lastly, Wife's standard of living would decrease significantly if she was required to pay her attorney's fees. Wife's health condition would continue to worsen over time as a result of her primary progressive multiple sclerosis diagnosis. Her physician expected Wife to be wheelchair-bound in the future and require assistance with routine activities such as bathing, dressing, and meal preparation. Wife was already unable to pay for all of her medications at the time of the final hearing and she anticipated an increase in her prescription drug costs in the future, in addition to a significant increase in her health insurance premium. In contrast, based on the evidence

previously discussed, Husband's standard of living would be impacted far less if ordered to pay attorney's fees. For these reasons, we find the family court did not err in awarding Wife attorney's fees. *See Weller*, 434 S.C. at 537, 863 S.E.2d at 838 ("[T]his court may find facts in accordance with its own view of the preponderance of the evidence.").

As to the amount of attorney's fees awarded, we find the family court did not err in determining Wife was entitled to $42,000 in attorney's fees. *See Glasscock*, 304 S.C. at 161, 403 S.E.2d at 315 (holding in determining the amount of attorney's fees to award, the court should consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services."). Wife's attorney's fees were substantially related to services rendered in preparing a motion to compel discovery, issuing subpoenas to financial institutions in an attempt to discern Husband's financial position, and preparing for the two-day final hearing. We conclude the time spent in association with these services was justified in light of Husband's misrepresentations regarding his financial position as demonstrated by the discrepancies between the information he provided in his financial declarations and the testimony and evidence presented at the final hearing refuting his initial representations to both Wife and the family court. Both of Wife's attorneys are of good professional standing. As noted previously, Wife's counsel successfully defended Husband's alimony reduction action and were able to maintain Wife's current alimony amount. One of Wife's attorneys reduced her customary hourly fee from $250 to $175, and neither attorney billed for all of their time. We acknowledge that $75,444[8] in attorney's fees would typically be considered high in an alimony reduction action; however, in light of Husband's unwillingness to be forthcoming about his financial situation, the fee was reasonable under the circumstances. *See Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010) ("[W]hen parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees."). Accordingly, we find the family court did not err in determining Wife was entitled to $42,000 in attorney's fees. *See Weller*, 434 S.C. at 537, 863 S.E.2d at 838 ("[T]his court may find facts in accordance with its own view of the preponderance of the evidence.").

---

[8] The award amount was reduced by Husband's $5,000 payment under the temporary order and a $28,500 payment made by Wife's friend.

CONCLUSION

Based on the foregoing, we affirm the family court's final order denying Husband's request for a reduction in his alimony obligation and awarding Wife $42,000 in attorney's fees.

AFFIRMED.

KONDUROS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sara Gleaton, as Personal Representative of the Estate of Wilton Gleaton, Appellant,

v.

Orangeburg County, a Political Subdivision of the State of South Carolina, Respondent.

Appellate Case No. 2020-001006

Appeal From Orangeburg County
James B. Jackson, Jr., Master-in-Equity

Opinion No. 6003
Heard May 9, 2023 – Filed July 26, 2023

REVERSED AND REMANDED

William Franklin Barnes, III, of Barnes Law Firm, LLC, of Hampton; and John E. Parker and John Elliott Parker, Jr., both of Parker Law Group, LLP, of Hampton, all for Appellant.

Jerrod Austin Anderson, of Anderson Law Office, P.A., of Orangeburg; and Andrew F. Lindemann, of Lindemann Law Firm, P.A., of Columbia, both for Respondent.

HEWITT, J.: This is an appeal in an action for slander of title. The story began with a flawed tax sale, but there were several mistakes for years after. The

master-in-equity found in favor of Orangeburg County (the County) based on findings that the County did not publish a false statement impugning the owner's title and did not act with malice. We agree with the owner's arguments that the record does not support the master's findings and that the master did not apply the proper legal standard. Therefore, we reverse and remand.

FACTS

Bank of America (the Bank) began foreclosure proceedings in 1998 on property owned by Debra Foxworth. The foreclosure was finalized in 1999. The Bank bought the property at the foreclosure sale and recorded its deed that July.

The next month, in August 1999, the Bank sold the property to Wilton Gleaton. Wilton recorded his deed later that month and filed it with the County assessor two days later.

Wilton believed he bought the property free and clear of any delinquent taxes. However, at the time Wilton bought the property, the 1998 taxes had not been paid.

The County began delinquency proceedings in March 1999. It sent Foxworth notices for failing to pay the 1998 taxes in March and May. As those dates indicate, this was shortly before the foreclosure sale to the Bank, but long after the Bank started its foreclosure case against Foxworth.

The unpaid 1998 taxes did not get discovered and resolved during the two sales of the property that happened in 1999: the foreclosure sale to the Bank and the Bank's sale to Wilton. In February 2000—roughly six months after Wilton bought the property from the Bank—the County sold the property at a delinquent tax sale to James Fields.

Over the next several months, the County's delinquent tax collector sent three "Dear Property Owner" letters to give the required notice of the period to pay the unpaid taxes and redeem the property. Even though Wilton was the record owner, two of the three letters were addressed to Foxworth. The last of the three letters was addressed to Wilton. Still, this letter, like the two previous letters, was sent to Foxworth's last known address. Wilton's name and Foxworth's address were handwritten across from where Foxworth's name and address had been printed and crossed out.

This issue somehow remained unresolved even though Wilton's wife, Sara, visited the County in January 2001—before the redemption period expired—and went there precisely because she had not received a tax notice in the mail. She paid the 2000 property taxes after the County provided her a copy of the 2000 tax bill. That tax bill listed a Charleston address at which neither Sara nor Wilton had ever lived. Sara gave the County her correct address during this encounter and asked if there were any other taxes owed on the property. The County initially told her that no other taxes were due at that time but subsequently informed her the 1999 taxes had not been paid. She paid those taxes the next month, in February 2001. The County did not inform her of the 2000 tax sale to Fields or of the right to redeem the property from that sale.

The redemption period expired in February 2001, not long after Sara paid the 2000 property taxes, but before she paid the 1999 taxes. In May 2001, the delinquent tax collector issued a tax deed to Fields, which Fields promptly recorded. The tax deed listed Foxworth as the defaulting taxpayer and the "record owner against whom warrant was issued." The tax deed made no reference to the Gleatons.

Years passed. The Gleatons received annual tax bills for the property from 2001 forward and paid them.

In August 2006, the delinquent tax collector discovered that Wilton—the record owner at the time of the 2000 tax sale—had not been properly noticed. The tax collector then worked to reverse the sale but instructed Fields to convey the property back to Foxworth, not the Gleatons, via a quitclaim deed. An employee with the County's delinquent tax office testified that the office "reversed" the tax sale and instructed that the property should be quitclaimed back to Foxworth despite knowing that Wilton was the record owner. Employees of the delinquent tax office served as witnesses for the quitclaim deed. The Gleatons were not notified about any of this.

In 2007, the Gleatons listed the property for sale. In October 2009, Donnie and Connie Hall agreed to purchase the property for $33,000. The Halls discovered Fields' quitclaim deed to Foxworth during the title search. The Gleatons met with the County. The County's attorney offered to bring a declaratory judgment on the Halls' behalf seeking rulings that the tax sale and quitclaim deed were void. Wilton filed this suit against the County after the Halls chose not to purchase the property. The case was referred to the master.

In December 2014 and after a hearing, the master issued an order finding the delinquent tax sale to Fields was flawed and invalid due to lack of proper notice to Wilton. The master found the tax deed issued to Fields was improper and that the tax sale was derogatory to the title Wilton received from the Bank. The master ruled the tax deed to Fields and Fields' subsequent quitclaim deed to Foxworth were null and void, but took the issues of liability and damages under advisement and ordered the Gleatons to attempt to sell the property within four months. The master left open the issue of "additional relief sought by either party to help with the sale of the property." Wilton died shortly after the master issued this order and Sara was substituted as a party.

The property did not sell. The master held a second hearing in April 2017 and issued its final order in December 2019.

The final order appears to be controlled by the master's findings that the County's actions were not malicious. The master found the County did not know the Gleatons owned the property and wrote that the County had the right to conduct the tax sale to Fields because the 1998 taxes had not been paid. The master found the County "made no publication" that was intended to harm the Gleatons and made no statement that was knowingly false or in reckless disregard of its truth or falsity. The master also wrote that the County's efforts were "focused on collecting taxes for which [it] *may* be immune from liability" under section 15-78-60(11) of the South Carolina Code (2005) (emphasis added) of the South Carolina Tort Claims Act.

The master found the only statement slandering Wilton's title was the quitclaim deed from Fields to Foxworth, and that this was done for the purpose of returning the property to the defaulting taxpayer, not for the purpose of damaging Wilton's title. The master found that a proper title search when Wilton bought the property from the Bank would have revealed the 1998 taxes were due and owing.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Est. of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

SLANDER OF TITLE

There are several points to Sara's argument that the master erred in ruling for the County. One, she asserts the master erred in finding the only slanderous statement was in the quitclaim deed from Fields to Foxworth. As she sees it, the deed from the tax sale and the subsequent quitclaim deed to Foxworth purported to transfer title to third parties and publicly represented that someone else owned the property—things that obviously disparaged Wilton's title. Two, she argues the County plainly knew Wilton owned the property because the deed and mortgage on the property were properly recorded with the County's register of deeds well before the County's tax deed to Fields. Three, Sara argues the master erred in failing to find malice because malice, in a slander of title action, includes publications made without legal justification. Four, Sara argues the Halls plainly refused to purchase the property due to this cloud on the title.

"Slander of title is grounded in the tort of injurious falsehood." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 19, 567 S.E.2d 881, 890 (Ct. App. 2002). Our history with this claim is relatively brief. Precedent has relied heavily on the Restatement (Second) of Torts, which provides the guidelines that "modern courts generally follow in identifying the elements of slander of title." *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). This court set out the elements of a slander of title claim in *Huff*, stating that "to maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Id*.

Here, the master ruled the County's actions did not result in any publication and did not contain any statement that was knowingly false or made in reckless disregard of its truth. The master determined that Fields' quitclaim deed to Foxworth was the only statement derogatory of Wilton's title. No evidence supports these findings.

The three redemption period letters sent by the delinquent tax collector, the tax deed to Fields, and the quitclaim deed that the County facilitated from Fields to Foxworth are all published statements that demean Wilton's status as the property's true owner. *See* Restatement (Second) of Torts § 630 cmt. b (Am. L. Inst. 1977) ("The manner in which the injurious falsehood is communicated is immaterial. It is generally communicated by words written or spoken that assert the statement. Disparaging

matter is often published by filing a mortgage or other lien for record. As in the case of libel or slander, there may be a sufficient publication by any form of conduct that is intended to assert or is reasonably understood as an assertion of a disparaging statement."); Restatement (Second) of Torts § 629 cmt. c (Am. L. Inst. 1977) ("A common form of disparagement of another's property in land or other things is by the express denial of the other's title. Another common form is the indirect denial of another's title by the assertion of an inconsistent title in one's self or a third person."). As for knowing falsity and reckless disregard, beyond the obvious fact that Wilton was the record owner throughout the time period, there is the fact that Sara paid the 2000 property taxes in person, specifically requested information on any unpaid taxes for the subject property, and updated her address with the County, yet the County later engineered a quitclaim deed to someone else.

Sara also challenges the master's ruling regarding malice. The master found that malice requires an intent to injure; however, in a slander of title case, malice includes a defendant making a slanderous statement, without a legal basis for doing so, that the defendant should recognize would result in harm to the plaintiff's interest. *See Pond Place Partners, Inc.*, 351 S.C. at 21, 567 S.E.2d at 891 ("One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (quoting Restatement (Second) of Torts § 623A (Am. L. Inst. 1977))).

It seems evident that the County was at least reckless in failing to notify Wilton—the record owner—of the right to redeem the property during the redemption period. Again, we note that Sara paid the 2000 property taxes in person and specifically requested information on any unpaid taxes after the tax sale to Fields and before the end of the one-year statutory redemption period. The County only informed her of the unpaid 1999 taxes, which she promptly paid within a few weeks. When the County realized the owner of record at the time of the tax sale (Wilton) had not been properly noticed of the tax sale, the County had Fields deed the property back to the defaulting taxpayer—Foxworth—instead of informing Wilton and resolving the situation in a logical and reasonable manner.

These errors require reversal and a remand for the master to consider each element in a slander of title action and the proper standard for malice.

SOVEREIGN IMMUNITY

The County argues that we should affirm the master's decision under the two-issue rule because Sara has not challenged the master's ruling that the County was immune from suit. The County argues that even if this court determines the master did not definitively rule on immunity, this court could use immunity as an additional sustaining ground.

The master did not rule on immunity. The final order contained the observation that "[t]he [County's] efforts were focused on collecting taxes for which [it] *may* be immune from liability." (emphasis added). *See* § 15-78-60(11) ("The governmental entity is not liable for a loss resulting from . . . assessment or collection of taxes or special assessments or enforcement of tax laws . . . ."). The word "may" suggests the master believed the County might be immune from liability, but this was not a ruling by the master on this issue. A bedrock part of error preservation is that an issue must have been ruled upon in the trial court in order for it to be preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Without a ruling, there is nothing for us to review. More importantly, without a ruling, there was nothing for Sara to appeal. Thus, there is no two-issue rule question.

THE MASTER'S 2014 ORDER

There is much discussion in the briefs about whether the order that the master issued in 2014 is a "final order" and whether the master's last order in the case was faithful to the findings in that order. The 2014 order was the order finding the tax sale, deed to Fields, and quitclaim deed to Foxworth were void. It also instructed Wilton to try and sell the property.

This order was plainly interlocutory. Although designated as "final" on the cover page, it did not decide the entire case and explicitly stated that "liability and damages" remained under review. *See Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final."). Having said that, we do not see any factual inconsistencies between this order and the master's last order. We read the master's last order as being driven by the master's finding that the County did not act with malice. As noted above, the

master did not apply the proper standard for malice, necessitating our reversal and a remand.

CONCLUSION

Based on the foregoing, the master's order is

REVERSED AND REMANDED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

Appellate Case No. 2020-001095

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Opinion No. 6004
Heard June 5, 2023 – Filed July 26, 2023

REVERSED AND REMANDED

James David Smith, Jr., Helen F. Hiser, and Danielle F. Payne, all of McAngus Goudelock & Courie, LLC, of Mt. Pleasant, for Appellants.

Aaron Eric Edwards, of George Sink, PA Injury Lawyers, of North Charleston, for Respondent.

KONDUROS, J.: Bravo Media Productions, LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy (Appellants) appeal the circuit court's Form 4 Order denying

their motion to dismiss Joseph Abruzzo's amended complaint and compel arbitration. Appellants assert the arbitrator should decide whether Abruzzo's claims are subject to arbitration. We reverse the circuit court's order and remand for an order compelling arbitration.

FACTS

In the fall of 2018, Abruzzo met Kathryn Dennis. At that time, Abruzzo was a Florida politician and Dennis was a cast member on the reality television show *Southern Charm.*[1] Shortly after meeting, Abruzzo and Dennis began a romantic relationship. According to Abruzzo, Dennis asked him to appear on season six of *Southern Charm*. Abruzzo claims that the show runners wanted him to go on a "guy's trip" with other cast members or have a dinner date with Dennis in a "public crowded restaurant." Instead, Abruzzo agreed to be a voluntary participant on the show for a private dinner at Dennis's house in downtown Charleston.

Abruzzo admits that he signed a three-page Release and Arbitration Agreement[2] before filming began. In paragraph 6 of the agreement, Abruzzo agreed that he would not be paid for any of the rights listed in the agreement. Abruzzo also acknowledged and agreed that "a significant element of the consideration" he received under the agreement was the opportunity for publicity.

In paragraph 8 of the agreement, Abruzzo agreed that he understood that "other parties may communicate private, factual, or fictional information" about himself that he could find "humiliating or embarrassing or that is defamatory, disparaging or unfavorable and that the depiction of such information may portray [him] in a false light." Abruzzo consented to the inclusion of this information in the show "even to the extent such inclusion might otherwise constitute an actionable tort."

---

[1] *Southern Charm* features the personal and professional lives of various Charleston residents.

[2] All of the appellants in this case are parties to the agreement. Pursuant to its terms, NBC Universal Media, LLC, is designated as the Network; Comcast Corporation and Bravo Media Productions LLC, are designated as affiliated entities; Haymaker Media, Inc is designated as the Producer; and the individual defendants are express intended third party beneficiaries of the Release and Arbitration Agreement.

Paragraph 19 of the agreement, entitled "**MEDIATION & ARBITRATION**," contains the arbitration clause.

> **WHERE ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT ARISES, THE PARTIES AGREE TO FIRST TRY TO RESOLVE SUCH DISPUTE THROUGH CONFIDENTIAL MEDIATION. IF MEDIATION IS UNSUCCESSFUL, THEN ALL DISPUTES, INCLUDING THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION ADMINISTERED BY JAMS[3] OR ITS SUCCESSOR ("JAMS") IN ACCORDANCE WITH ITS STREAMLINED ARBITRATION RULES AND PROCEDURES . . . . ALL SUCH PROCEEDINGS WILL BE CONDUCTED IN THE CITY OF NEW YORK. MY AGREEMENT TO MEDIATE ANY AND ALL DISPUTES SHALL EXTEND TO THE RELEASED PARTIES.**

Additionally, the following is printed immediately above the signature line:

> **I HAVE HAD AMPLE OPPORTUNITY TO READ THIS ENTIRE AGREEMENT, HAD AN OPPORTUNITY TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OF MY CHOICE, AND HAVE IN FACT READ THIS AGREEMENT. I UNDERSTAND THAT I AM GIVING UP LEGAL RIGHTS IN THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, MY RIGHT TO FILE A LAWSUIT IN COURT OR TO BRING A CLAIM IN CONNECTION WITH THIS AGREEMENT.**

Abruzzo claims that prior to and following filming, Appellants assured him that the show would portray him in a good light. Abruzzo also asserts that he was under

[3] JAMS stands for Judicial Arbitration and Mediation Services, Inc.

pressure to sign the agreement because he and Dennis had gone through hair and makeup and were sitting down for dinner, the film crew was ready to begin, and "bright lights" were shining on him.

Additionally, Abruzzo initially alleged that he was presented with a document for his signature "turned to the third page." Abruzzo then alleged that he was presented with a "partial piece of paper with only the signature portion of the page visible," and Appellants assured him that the document simply authorized them to film the dinner. However, the executive producer asserted that Abruzzo asked a question about paragraph 5 of the agreement, which is located on the first page. Additionally, the record contains a photograph that shows Abruzzo displaying the third page of the agreement and clearly depicts more than just a signature block.

Abruzzo claims that he ended his relationship with Dennis in early 2019, and Appellants "later falsely claim[ed] that Dennis ended the relationship . . . as a result of the concern expressed by other cast members . . . ." Abruzzo asserts these concerns were false and "designed and intended to defame, disparage, and/or portray [him] as an unsafe, corrupt, abusive and/or otherwise unsavory individual in order to preserve and further Dennis's storyline on the show."

Specifically, Abruzzo alleges that Conover made false statements during an episode of *Southern Charm* by saying that Abruzzo is "a disgraced politician in Florida" and "not running for re-election because of his divorce. His wife is accusing him of being physically abusive." Additionally, Abruzzo alleges that LeCroy, Meissner, and other individuals falsely stated there were nude photographs of him on the internet. Abruzzo asserts that such photographs do not exist, and Appellants intentionally showed a photograph with "the image blurred at the bottom of his torso" to imply the cast members were looking at his penis.

On January 28, 2020, Abruzzo filed a complaint in the Charleston County Court of Common Pleas, alleging ten causes of action against Appellants.[4] On May 12, 2020, Appellants filed a motion to dismiss. On June 19, 2020, Appellants filed a corresponding memorandum in support, and Abruzzo filed an amended complaint

[4] Abruzzo's claims were for Outrage/Intentional Infliction of Emotional Distress; Fraud; Constructive Fraud; Negligent Misrepresentation; Fraudulent Inducement; Civil Conspiracy; Defamation; Violation of the South Carolina Unfair Trade Practices Act; Negligence; and Unjust Enrichment.

that added seven additional causes of action.[5] Abruzzo also filed a one-paragraph response to Appellants motion to dismiss, arguing that it was moot in light of his amended complaint. On June 22, 2020, Appellants filed a motion to dismiss the amended complaint and to compel arbitration as well as a supporting memorandum. On June 29, 2020, Abruzzo filed a memorandum in opposition. The circuit court presided over a hearing between the parties on June 30, 2020.

On July 6, 2020, the circuit court issued a Form 4 Order denying Appellants' motion to dismiss and compel arbitration. Appellants requested that the circuit court issue a detailed written order setting forth the reasons for denying the motion. Abruzzo opposed that request. In response, the circuit court's law clerk responded: "[W]e did a [F]orm 4 [Order], and I believe it indicated that if the parties desired formal orders they could submit them to us. If it did not include that part I apologize." On July 16, 2020, Appellants filed a motion for reconsideration pursuant to Rule 59(e). The circuit court denied Appellants' motion on July 22, 2020, stating a hearing was not necessary. This appeal followed.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3.

LAW/ANALYSIS

Appellants argue that the circuit court erred in failing to enforce the parties' arbitration agreement. Appellants assert that the arbitrator should decide whether

---

[5] Abruzzo's additional claims were for Wrongful Appropriation of Personality/Infringement on the Right of Publicity; Wrongful Publicizing of Private Affairs; Public Nuisance; Private Nuisance; Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement; and Fraudulent Inducement of Release/Unconscionability of Release; and Rescission of "Release and Arbitration Agreement."

Abruzzo's claims are subject to arbitration because Abruzzo's allegations focus on the agreement as a whole rather than the arbitration clause specifically. We agree.

"Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). The parties' contract is governed by the Federal Arbitration Act (FAA), which states the following:

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

9 U.S.C. § 2.

"Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract. This . . . is the law[] known as the *Prima Paint* doctrine." *Doe*, 430 S.C. at 607, 846 S.E.2d at 876 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)). Accordingly, "[c]hallenges to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract' can be divided into two types." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). "One type challenges specifically the validity of the agreement to arbitrate." *Id.* "The other challenges the contract as a whole, . . . *e.g.*, the agreement was fraudulently induced . . . ." *Id.*

Under the *Prima Paint* doctrine, "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the . . . court may proceed to adjudicate it." *Id.* at 445 (quoting *Prima Paint*, 388 U.S. at 403-404). However, "the statutory language [of section 4 of the

FAA[6]] does not permit the . . . court to consider claims of fraud in the inducement of the contract generally." *Id.* (quoting *Prima Paint*, 388 U.S. at 403-404).

In *Buckeye Check Cashing, Inc.*, the United States Supreme Court provided the following:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.

Id. at 445-46. The Court concluded that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Here, the arbitration clause is severable from the entire agreement. The clause is contained only in paragraph 19 of the agreement and is highlighted by the title appearing in bold, underlined, and capital letters. The rest of the arbitration clause is also highlighted by appearing in bold and capital letters, unlike the paragraphs around it. Additionally, the broad language of "any dispute in connection with this agreement" includes the enforceability and validity of the parties' agreement.

> [6] A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court [with jurisdiction] . . . for an order directing that such arbitration proceed in a manner provided for in such agreement. . . . [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

Like the parties opposed to arbitration in *Prima Paint* and *Buckeye*, Abruzzo challenges the validity and enforceability of the entire contract rather than the arbitration clause specifically. Abruzzo alleges that producers assured him that he would be portrayed in a good light and that he felt pressure to sign the agreement due to the film crew and bright lights. These allegations do not specifically pertain to the arbitration clause; rather, they address how he felt about signing the entire agreement to both appear on the show and arbitrate any disputes. Therefore, Abruzzo has failed to specifically challenge the arbitration agreement independently from the rest of the agreement as required under *Prima Paint* and *Buckeye*. Accordingly, we reverse the circuit court's order and remand for an order compelling arbitration.[7]

CONCLUSION

Abruzzo challenges the validity and enforceability of the parties' agreement as a whole rather than the arbitration agreement specifically. Therefore, the circuit court's order is

REVERSED AND REMANDED.

VINSON, J., and LOCKEMY, A.J., concur.

[7] Because we remand on this issue, we do not address Appellants' other contentions. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate courts need not address remaining issues when disposition of an issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina CVS Pharmacy, LLC, Appellant,

v.

KPP Hilton Head, LLC, Respondent.

Appellate Case No. 2020-001446

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 6005
Heard June 6, 2023 – Filed July 26, 2023

REVERSED

Walter Hammond Cartin, Katon Edwards Dawson, Jr., and Jeffrey Evan Phillips, all of Parker Poe Adams & Bernstein, LLP, of Columbia, for Appellant.

Thomas A. Pendarvis, of Pendarvis Law Offices, PC, of Beaufort, and Philip Benjamin Zuckerman, of Berger Singerman LLP, of Fort Lauderdale, FL, both for Respondent.

HEWITT, J.: This case is about an option to renew a commercial lease. The master-in-equity found that the tenant—South Carolina CVS Pharmacy, LLC—did not comply with the lease's deadline for giving the landlord notice of intent to exercise the option. CVS argues this decision was error.

The key facts are not in dispute. The deadline fell on a Sunday. Written notice of CVS's intent to renew the lease was delivered to the local post office and available for the landlord to pick up on Saturday; the day before the deadline. The landlord did not retrieve the notice until the following week.

The case turns on the lease's language. For the reasons that follow, we agree with CVS and reverse.

FACTS

The lease is a twenty-year lease that ran from April 1999 to January 2020. It included four options to renew the lease for five years. The first parties to the lease have all moved on. The original landlord assigned its interest to KPP Hilton Head, LLC (KPP). The original tenant assigned its interest to CVS.

The lease required CVS to give notice that it would exercise the option no later than ninety days prior to the current term expiring. Here, it meant CVS had to provide notice by Sunday, November 3, 2019. The dispute in this case centers on the lease's "notice" clause. The text of the clause is block quoted below with a line break added between sentences for the reader's ease.

> [Notice] shall be given or served as follows: by mailing the same to the other party by registered or certified mail, return receipt requested, or by overnight courier service provided a receipt is required, at its Notice Address set forth in Part I hereof, or at such other address as either party may from time to time designate by notice given to the other.
>
> The date of receipt of the notice or demand shall be deemed the date of the service thereof (unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof).

The parties refer to the parenthetical section at the end as the "service upon mailing exception."

The parties do not dispute the basic facts. On October 30—the Wednesday before the deadline—CVS mailed written notice to the landlord via certified mail, return receipt requested. The landlord (KPP) has no office building and only receives mail at a P.O. Box. The notice arrived at the post office on Saturday, November 2—the day before the deadline—and was available for pickup by 9:45 a.m. that morning. KPP did not check its mail until Wednesday, November 6; three days after the deadline. KPP took the position that CVS's notice was untimely and refused to honor the option. CVS then filed this action.

Both parties moved for summary judgment. The master granted KPP's motion. The master relied on *33 Flavors Stores of Virginia, Inc. v. Hoffman's Candies, Inc.*, 296 S.C. 37, 40, 370 S.E.2d 293, 295 (Ct. App. 1988), for the proposition that an option to renew a lease must be strictly construed against the party claiming the option. The master further found the notice clause was unambiguous, that it specifically required a signed receipt, that the date the receipt was signed was the date of service, and that KPP did not receive the notice until it signed for the notice at the post office. The master found the notice would still have been untimely even if KPP checked its mail the first business day after the notice arrived because Monday, November 4 was still after the November 3 deadline. The master interpreted the "service upon mailing exception" as only covering situations when the intended recipient refused to accept notice or failed to abide by the normal method of receiving deliveries, which did not apply to these facts.

CVS filed a motion for reconsideration, which the master denied. This appeal followed.

ISSUE

Did the master err in finding CVS did not timely exercise its option to renew the lease?

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Here, there were cross-motions for

summary judgment, so there is no dispute the case qualifies for resolution as a matter of law. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

ANALYSIS

We begin with the lease's language, for those terms define the scope of the agreement. First, we note the lease's instruction that it should be construed according to its plain meaning and not for or against either party. Second, we note that the notice clause is not tied to the renewal option, but applies "[w]henever, pursuant to this Lease, notice or demand shall or may be given to either of the parties by the other."

There is no doubt that the notice clause requires a return receipt, but it is equally evident that the clause does not equate the date of service with the date that any return receipt is signed. The clause contains multiple disjunctives: it says notice shall be "given or served" and explains that the notice upon mailing exception applies when notice is not "received or accepted" in the ordinary course of business. Disjunctives suggest alternatives—the clause implies differences between notice being "given," notice being "served," notice being "received," and notice being "accepted." *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." (quoting *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993))). The clause does not define what constitutes receipt.

The Restatement explains:

> A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, *or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.*

Restatement (Second) of Contracts § 68 (Am. Law Inst. 1981) (emphasis added). A particular agreement might have language contrary to the general rule, but one way to approach this dispute would be to ask whether the lease's language suggests that constructive receipt (depositing notice in a mailbox or post office box, for example)

would count as receiving notice. Given the disjunctives we outlined above, we believe it does. A rule limiting notice to actual receipt and hinging the time of receipt on the recipient's signature seems like it would be easy to write and would not be written the way this clause is written.

Though they are not binding, a few federal decisions are useful. These cases involve the requirement that a plaintiff in certain types of cases act within ninety days of receiving a right to sue letter from the Equal Employment Opportunity Commission. Some circuits have adopted the view that rather than wrestle with whether receipt includes constructive receipt, the dispute should instead be resolved by applying common understandings of receipt to the facts of individual cases. *See Bell v. Eagle Motor Lines*, 693 F.2d 1086, 1087 (11th Cir. 1982) (explaining the court will approach the matter of determining when receipt occurred on a case by case basis). This approach has led courts to hold, for example, that a wife's receipt of a letter to her husband triggered the start of the period for her husband to sue, *id*., and that receipt occurred when the postal service delivered a slip of paper notifying the plaintiff there was a letter at the post office for her to pick up, *Watts-Means v. Prince George's Fam. Crisis Ctr.*, 7 F.3d 40, 42 (4th Cir. 1993). We think this case is cut from the same cloth as those. *See also Harvey v. City of New Bern Police Dep't*, 813 F.2d 652 (4th Cir. 1987) (similar to *Bell*).

One argument KPP has made throughout this litigation is that CVS had years to exercise its option and that CVS is simply paying the price for waiting to the last minute. KPP also argues that CVS knew or should have known to act earlier because the renewal notice for a different CVS store took eleven days for a return receipt to be executed, making it obviously unlikely that notice sent four days before the deadline would arrive in time.

We accept these points, but we do not see how they factor into deciding what it means to receive notice under the lease. CVS had a long time to consider renewing the lease, but that does not justify the master shortening the lease's deadline for giving notice to eighty-eight days from ninety (this was the practical effect of the master's ruling). Notice of CVS's intent to renew the lease arrived at its final destination and was available for pick up the day before the deadline. We reverse the decision that this did not constitute timely receipt of the notice.

CONCLUSION

For these reasons, the master's decision is

REVERSED.

THOMAS and MCDONALD, JJ., concur.