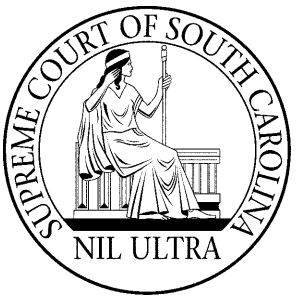

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 5, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael N. Frasier, Jr., Appellant.

Appellate Case No. 2017-000802

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5751
Heard October 15, 2019 – Filed July 29, 2020

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

LOCKEMY, C.J.: Michael N. Frasier, Jr. appeals his conviction for trafficking cocaine, arguing the trial court erred by refusing to suppress (1) evidence obtained from the search of a vehicle when police lacked reasonable suspicion of criminal activity to extend a traffic stop, (2) evidence found on his person as a result of an

illegal search, and (3) his statement to police taken in violation of *Missouri v. Seibert*.[1] We affirm.

FACTS

On the morning of August 14, 2013, Frasier arrived by bus at a transit station in North Charleston, where Cheryl Jones[2] was waiting to pick him up.[3] Soon after Jones and Frasier left the station, North Charleston police stopped Jones for an inoperative third brake light. During the stop, Jones consented to a search of her vehicle. Officers found a large quantity of a substance that appeared to be cocaine and a duffel bag containing men's clothing items and "Superior B"—a substance known as a "cutting agent" for cocaine—in the vehicle. Officers also searched Frasier and found a bus ticket, a straw, and a small Ziploc bag containing a white powdery substance in his pocket. Officers arrested Frasier and he was later indicted for trafficking cocaine.

At the outset of Frasier's jury trial, he moved to suppress the evidence from the vehicle and his pocket, arguing officers extended the traffic stop without reasonable suspicion and he did not consent to the search of his person. Frasier also moved to suppress his statement as involuntary. The trial court held an in camera hearing on the motions. Sergeant Daniel Pritchard of the North Charleston Police Department testified that in 2013, he worked on a task force in the narcotics division. He explained his duties included parcel interdiction, which involved "attempt[ing] to make contact with folks coming in on mass transit." Sergeant Pritchard stated that on August 14, 2013, he and another officer, Detective Ryan Johnson, were observing the bus station from an unmarked vehicle in the parking lot when they saw Frasier exit the bus station. Sergeant Pritchard testified that as he left the station, Frasier "looked left, cleared right, and then proceeded to a vehicle directly in front of the door, entered [the vehicle], and they left." He explained Frasier appeared to be "clearing the area for threats" such as "law

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[1] 542 U.S. 600, 604-12 (2004) (plurality opinion) (holding a postwarning statement was inadmissible when police used a "question first and warn later" tactic, reasoning that "th[e] midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with [the] constitutional requirement[s]" of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

[2] During trial, Jones testified Frasier was her common-law husband.

[3] A toddler was in the backseat of the car.

enforcement, enemies, something of the sort" and seemed "uncomfortable." Sergeant Pritchard stated Frasier's "scanning" of the parking lot seemed suspicious because the vehicle he entered was "directly in front of the door," yet he looked "at the whole parking lot, left and right." He stated he and Officer Johnson followed in an unmarked vehicle, "were able to get a violation on the vehicle" because the third brake light was out, and contacted patrol to request a traffic stop.

Officer Steve Hall testified he was employed with the North Charleston Police Department for eleven years, consisting of four years of patrol, four years of narcotics, and four years in backup patrol. He stated he conducted "at least 1,000" traffic stops and was familiar with how people reacted to traffic stops. Officer Hall testified he pulled Jones's vehicle over at approximately 8:00 a.m. on August 14, 2013. He recalled that either Sergeant Pritchard or Officer Johnson contacted him and asked him to initiate a traffic stop of the vehicle. Officer Hall testified that when he initiated the stop, he knew the other officers had observed Frasier at the bus stop and they believed there was "something suspicious" about him. He explained that when he first got behind Jones's vehicle, she "made several lane changes, almost in an attempt to evade [him]" and it took her "a few hundred yards" to pull over after he activated his blue lights.[4] Officer Hall explained that when he approached the vehicle, he noticed Jones's pants zipper was "pulled all the way down" and in his experience, people sometimes tried to hide narcotics in "their pants or crotch area." He acknowledged that after Jones got out of the vehicle, he asked her why her pants were unzipped and she said she had just gotten out of the shower and left quickly to go to the bus station.

Officer Hall stated Frasier seemed "nervous" because he was sweating profusely and avoided eye contact with him. He noted the outside temperature was about seventy-five or eighty degrees at the time. Officer Hall averred that based on his experience, Frasier's nervousness appeared "a little more elevated" than a "normal traffic stop." He stated he asked Jones and Frasier where they were coming from several times but they never gave him a clear answer and he felt they "were being evasive." Officer Hall explained that "with the totality of everything," including what the detectives told him, as well as Jones's delay in pulling over, her unzipped pants, and Jones and Frasier failing to directly answer his questions, "[his] interest was piqued highly that something was amiss." He agreed, based on his experience

[4] Officer Hall's dashboard camera captured the stop and the remainder of the encounter with Jones and Frasier.

in narcotics, that it was "common for people who traffic and deal with narcotics to utilize the mass transit and bus system" to bring drugs into the community, and this was another "significant factor" that "piqu[ed]" his interest. Officer Hall also recalled Jones opening her car door when he was writing the ticket, which he thought "seemed a little odd" because he did not "know why someone would try to get out" and did not "see [that] very often."

After writing Jones a warning ticket for the brake light but before giving it to her, Officer Hall asked her to exit the vehicle. He then asked Jones for consent to search the vehicle, which she provided, and one of the officers asked Frasier to exit the vehicle as well. Officer Hall asked Frasier "if he minded if [he] checked him out or searched him," and Frasier stated, "I do, but," and then turned around and put his hands on top of the vehicle. Officer Hall interpreted this as meaning, "I do mind, but proceed [with the search]." He then searched Frasier and found a "small plastic Ziploc bag[] of white powder substance" in his pocket and placed him under arrest. Officer Hall stated he did not read Frasier his *Miranda*[5] rights immediately because when he began to place Frasier in handcuffs, Frasier "kind of tensed . . . or flexed up" and Officer Hall "threw [his] attention towards that." He explained reading a person his *Miranda* rights "can add to the tension" and he was "trying to de-escalate" the situation.

Thereafter, the officers searched the vehicle and found what appeared to be a large quantity of cocaine in a jacket pocket in the backseat. As shown in the video from the dashboard camera, Officer Hall, after reaching into the back seat of the vehicle, stood up and asked, "[W]hose jacket?" while holding the jacket over his head. Frasier then claimed ownership of the jacket. Remaining where he stood, Officer Hall then asked, "[T]hat's your jacket? Do you know what's in your jacket? What would be in your jacket?" Officer Hall continued questioning Frasier for a few more seconds, but he did not respond. Frasier and Jones were both in handcuffs at the time.

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[5] *Miranda*, 384 U.S. at 479 (holding that in order for a statement given by a defendant during custodial interrogation to be admissible, the record must show law enforcement advised him of his right to remain silent and his right to counsel and gave him the "[o]pportunity to exercise these rights . . . throughout the interrogation" and after being so advised, he "knowingly and intelligently waive[d] these rights and agree[d] to answer questions or make a statement").

Officers then placed Frasier in the back of a police cruiser. Officer Hall stated that he then read Frasier his *Miranda* rights and this took place about twenty-eight minutes after the arrest. He testified Frasier did not appear to be intoxicated, was able to communicate with him, and seemed to understand his rights. Officer Hall denied engaging in a tactic of delaying reading Frasier his *Miranda* warnings to elicit an incriminating response. He stated he again asked Frasier about the jacket and he gave the same answer. Officer Hall denied threatening Frasier, promising him leniency, or threatening to arrest Jones if he did not admit the drugs were his.

On cross-examination, Officer Hall explained he did not "stop to try to clarify what [Frasier] meant" when he stated "I do, but" because Officer Hall did not believe anyone ever "want[ed] to be searched," and he, too, "would mind if someone wanted to search [him]." Officer Hall explained that after Frasier stated, "I do, but," Frasier "turn[ed] around and, if you will, assume[d] the position like he was okay with it." He agreed Frasier asked, "My pockets too?" but never said "stop" or "stop doing that." Officer Hall acknowledged he was about six-feet tall and weighed about 200 pounds, the other responding officer had a similar build, and both were armed with pistols, stun guns, pepper spray, and batons during the stop.

Officer Hall acknowledged that when he asked about the jacket, Jones had just been placed in handcuffs. He explained that after Frasier stated, "They don't have nothing to do with it," Officer Hall stated, "She's just be[ing] detained right now. I am not saying she's under arrest." Frasier asked if this implied that if he claimed the drugs, she would not be arrested; Officer Hall responded, "Right, pending further investigation." He agreed that after Frasier claimed the jacket, the officers released Jones and the child. Officer Hall conceded that after he read Frasier his *Miranda* rights he resumed questioning by asking, "[Y]ou are telling me the jacket is yours," which was a continuation of the questions he asked about eight minutes earlier. He acknowledged he told Frasier that if he "sp[oke] up," he "c[ould] get people there . . . who c[ould] help him." Officer Hall explained he was not trying to convince Frasier to "admit the drugs were his"; instead, he meant that Frasier "could potentially work off these charges and help himself."

The State argued the officers lawfully extended the traffic stop and contended the following facts created a reasonable suspicion under the totality of the circumstances: (1) officers observed Frasier "scanning" the bus station parking lot before entering a vehicle parked close to the door, (2) Jones's pants were unzipped, (3) Frasier behaved nervously, (4) Jones and Frasier failed to directly answer the

officer's questions, (5) Jones delayed in stopping her vehicle, and (6) Jones opened her car door during the traffic stop. The State conceded whether Frasier consented to the search of his person was a "close call" but argued the officer believed Frasier consented based upon the interaction.[6]

Frasier argued the officers unlawfully extended the traffic stop because the purpose of the stop had already concluded when the officer asked Jones to exit the vehicle. He asserted the officers had no reasonable suspicion to detain them after that point. Frasier argued that regardless of what his body language indicated, when officers searched him he thought he "d[id]n't have a choice" because "they [we]re going to search [him] anyway." The court responded,

> I don't know what was in his mind. I can only judge objectively what I see on the video. [Frasier] didn't testify. Nobody can speculate what [his] state of mind was. I can only judge the reasonable unambiguous meaning of his words and his body language. And he doesn't have to testify. He doesn't have any burden of proof. But I cannot base a decision on what I speculate to be his state of mind. I can only look at a video and tell me [sic] what it says.

Frasier argued the officers did not ask if they could search him but rather they asserted, "You don't mind if [we] check you real quick." He argued he submitted to the officers' authority but did not voluntarily consent, and even if he consented, he revoked his consent by protesting when officers began to search his pockets.

The State conceded Frasier's prewarning statements were inadmissible. Frasier argued that pursuant to *Seibert*, the court should exclude his postwarning statements as well. He also argued that under *State v. Corns*,[7] the statements were

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[6] The parties agreed the search of Frasier's person was not a "*Terry* frisk." *See Terry v. Ohio*, 392 U.S. 1 (1968) (holding that under certain circumstances, an officer may "conduct a carefully limited search of [a person's] outer clothing . . . in an attempt to discover weapons [that] might be used to assault him").

[7] 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (finding officers' testimony that they told the defendant his wife could be arrested and their children

involuntary because he made them in response to the officer's implication that he would arrest Jones if Frasier did not claim the drugs.

After briefly taking the matter under advisement, the trial court ruled all of Frasier's post-*Miranda* statements were admissible. The trial court distinguished the officer's first questioning from the postwarning questioning, stating that once Frasier was placed in the back of the cruiser, "any questioning of him was designed to inculpate him." The trial court noted Frasier had previous interactions with law enforcement and therefore had sufficient education and awareness to understand his *Miranda* rights and know he did not have to answer.[8] The trial court reasoned officers had not used *Miranda* "[to] clean up an inappropriate interrogation" but instead had directed their first question to both Frasier and Jones, and that question could have inculpated either of them. The court stated that although it would have been prudent to "*Mirandize*" Frasier immediately upon arrest, the officer testified Frasier "flexed" when he handcuffed him and he felt that if he administered *Miranda* warnings at that time it might have escalated tensions. The court found Officer Hall "credible, that in hindsight, he thought it would have been better" to read *Miranda* warnings immediately. The trial court stated that according to the video, Frasier appeared to be oriented as to time and place and nothing indicated he was under the influence of any substances or did not understand the warnings. In addition, the trial court rejected Frasier's argument that he claimed the jacket because he felt threatened officers would arrest Jones.

The trial court next found Frasier consented to the search of his person. The court determined that according to the video, notwithstanding Frasier's verbal comments, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[] his hands on the car and consent[ed] to his person being searched." The trial court noted the officer did not put his hands on Frasier in any way and his tone was not threatening but was "very moderate." In addition, the court reasoned that regardless of what Frasier's inner thoughts might have been, it could not "speculate about what was in someone's consciousness when they did what they did." The trial court noted that when he said, "[E]ven my pockets too?" he could have said, "I don't want you in my pockets" but did not.

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could be taken from them amounted to improper influence rendering his statement involuntary).

[8] The State noted Frasier had several prior drug-related charges on his record and was convicted of a drug offense in 1999 that was reversed on appeal.

Next, although the trial court acknowledged it was "at best a 50/50 call," it concluded officers had an objectively reasonable and articulable suspicion to extend the stop beyond its initial purpose based upon the totality of the circumstances. The trial court noted it had to consider the officers' subjective opinions about what they perceived in determining whether, from an objective standpoint under the totality of the circumstances, there was reasonable suspicion. The court found the officers "articulated many factors" and "what they believed to be the basis of a reasonable and articulable suspicion to extend the stop," and it concluded such "testimony [wa]s reasonable and supported by the facts." The trial court found Sergeant Pritchard's observations of Frasier at the bus station were part of the totality of the circumstances. However, the court declined to include Jones's purported delay in pulling over as part of its analysis, finding this delay was reasonable under the circumstances.[9] In addition, the trial court concluded the officer's testimony about what he "perceived objectively based on his experience and training" was credible and amounted to a reasonable articulable suspicion. The trial court reached these conclusions after reviewing the complete video of the traffic stop, hearing the testimony of the officers, and engaging in an extensive exchange with counsel. Finally, the court concluded that because there was reasonable suspicion to extend the stop, Jones's consent to search the vehicle was valid, and all evidence obtained from that search was admissible.

During trial, Sergeant Pritchard and Officer Hall testified consistently with their pretrial testimony. The State also called Jones as a witness. Jones denied giving consent to search her vehicle; however, the State impeached her by playing the video, which showed her consenting to the search. Frasier timely renewed all objections contemporaneously with the admission of the evidence, and the trial court admitted the evidence over his objections. The jury found Frasier guilty of trafficking cocaine, and the trial court sentenced him to twenty-five years' imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by refusing to suppress evidence obtained from the search of Jones's vehicle?

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[9] Because the trial court declined to consider Jones's delay as a factor, we likewise exclude this in determining whether the evidence supports the court's ruling.

2. Did the trial court err by refusing to suppress evidence obtained from the search of Frasier's person?

3. Did the trial court err by refusing to suppress Frasier's postwarning statements in violation of the rule established in *Missouri v. Seibert*?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling." *Id.* (quoting *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013)). "However, this deference does not bar this [c]ourt from conducting its own review of the record to determine whether the trial [court]'s decision is supported by the evidence." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205.

"On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

LAW/ANALYSIS

I. Extension of Traffic Stop

Frasier argues the trial court's ruling constituted clear error because the record did not support its finding that law enforcement had a reasonable articulable suspicion to justify the extended traffic stop and detention.[10] He asserts the "purported vague suspicious" behavior the officers observed at the bus station, Jones's delay in stopping and her unzipped pants, the opening of the driver's side door, and Frasier's nervousness did not give rise to an objectively reasonable and articulable suspicion that illegal activity was occurring. Frasier contends any purported consent he or Jones provided was "obtained through Officer Hall's exploitation of the unlawful detention" and therefore ineffective. We disagree.

The question before this court is whether there is "any evidence to support the trial court's finding of reasonable suspicion—not [our own] . . . independent view of the facts." *Moore*, 415 S.C. at 253, 781 S.E.2d at 901; *see also Provet*, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling." (citation omitted)).

"A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205. "Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." *Id.*

"The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." *Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851. "[C]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *Moore*, 415 S.C. at 252-53, 781 S.E.2d at 901 (alteration in original) (quoting *State v. Taylor*, 401 S.C.

[10] Frasier does not challenge the initial stop on appeal.

104, 113, 736 S.E.2d 663, 667 (2013)). "In determining whether reasonable suspicion exists, the whole picture must be considered." *Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851; *see also United States v. Sokolow*, 490 U.S. 1, 8 (1989) ("In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances—the whole picture.'" (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981))). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *Moore*, 415 S.C. at 252, 781 S.E.2d at 901 (quoting *Provet*, 405 S.C. at 108, 747 S.E.2d at 457).

Because we must evaluate the trial court's findings for clear error, we reluctantly conclude evidence supported the trial court's finding the officer had reasonable suspicion to extend the stop. *See Moore*, 415 S.C. at 251, 781 S.E.2d at 900 ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (quoting *Pichardo*, 367 S.C. at 96, 623 S.E.2d at 846)); *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court]'s ruling is supported by any evidence."). Here, Officer Hall testified that he had four years of experience in narcotics, had four years of patrol experience, and had conducted at least 1,000 traffic stops. He stated that at the time he initiated the stop, he knew Frasier had come from the bus station and narcotics officers had noticed something suspicious about him. Officer Hall testified that in his experience, people commonly used the bus system to bring narcotics into the community. He explained that when he first approached Jones's vehicle, her pants were fully unzipped and in his experience, people sometimes hid narcotics in their crotch area. Additionally, Officer Hall averred Frasier's level of nervousness was "a little more elevated" than what he normally saw during a traffic stop. Further, he stated Jones and Frasier evaded his questions about where they were coming from. Finally, he stated Jones's opening the driver's side door struck him as "a little odd" because it was an uncommon occurrence during traffic stops. Officer Hall stated that based on these observations, his "interest was piqued highly that something was amiss."

Although we acknowledge that several of these factors would likely be insufficient standing alone to support a finding of reasonable suspicion, they must be viewed under the totality of the circumstances. *See Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (acknowledging "many of the factors offered by the State seem innocent when

viewed in isolation," but finding there was "evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the surrounding circumstances"); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (recognizing that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Officer Hall's testimony linked the foregoing observations to the knowledge he gained from his experience in law enforcement to explain why Jones's and Frasier's behaviors caused him concern. Therefore, in view of the totality of the circumstances, we find Officer Hall's testimony supports the trial court's finding that the decision to further detain Jones and Frasier was based on reasonable articulable suspicion. *See Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851 (noting that reasonable suspicion "requires a particularized and objective basis that would lead one to suspect another of criminal activity"); *Moore*, 415 S.C. at 252-53, 781 S.E.2d at 901 ("[C]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." (alteration in original) (quoting *Taylor*, 401 S.C. at 113, 736 S.E.2d at 667)). We find the trial court applied the correct legal analysis and evidence in the record supports its findings. We therefore affirm the trial court's refusal to suppress the evidence obtained from the search of the vehicle.

II. Search of Frasier's Person

Frasier argues the trial court erred by finding he gave officers consent to search his person because his "begrudging submission" to their request was not consent. He asserts he demonstrated non-consent by stating, "I do, but" when the officer asked him if he minded if the officer searched him and he merely submitted to the search when he placed his hands on the vehicle. Frasier contends he was surrounded by two armed and uniformed officers, was not informed of his right to decline the search, and did not feel free to leave. We disagree.

"Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). "The existence of consent is determined from the totality of the circumstances." *Id.* "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances.'" *State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). "The burden is on the State to show voluntariness." *Id.* Although "the subject's knowledge of a right to refuse is a factor to be taken into account, the [State] is not required to demonstrate

such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

"Conduct falling short of 'an unequivocal act or statement of withdrawal' is not sufficiently indicative of an intent to withdraw consent." *State v. Mattison*, 352 S.C. 577, 587, 575 S.E.2d 852, 857 (Ct. App. 2003) (quoting *United States v. Alfaro*, 935 F.2d 64, 67 (5th Cir. 1991)). "Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement or [a] combination of the two, that is inconsistent with consent previously given." *Id.*

We find evidence supports the trial court's finding that Frasier consented to the search of his person. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court']s ruling is supported by any evidence."). Here, Frasier can be seen and heard in the video stating, "I do, but" when the officer asked if he minded if he "checked" him and then he turned around and placed his hands on top of the vehicle. When the officer began to search his pockets, Frasier stated, "my pockets too?" but did not tell the officers to stop or otherwise revoke his consent. Additionally, Officer Hall testified that even though Frasier said he "mind[ed]," he then turned around and placed his hands on the vehicle, which Officer Hall perceived as permission. Further, he stated Frasier never said "stop" or "stop doing that." Finally, the record contains no evidence officers used or threatened the use of force to coerce Frasier to consent. The trial court found that according to the video, notwithstanding Frasier's statements, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[] his hands on the vehicle and consent[ed]" to the search. The trial court stated it could not speculate as to Frasier's inner thoughts but found he did not revoke his consent by stating "even my pockets too?" because this was not an unequivocal act or statement revoking consent. We find Frasier's conduct depicted in the video as well as Officer Hall's testimony support a conclusion that, by Frasier's words and conduct, he voluntarily consented to the search and did not effectively withdraw that consent at any point during the search. Accordingly, we find the trial court did not err by concluding Frasier consented to the search, and we affirm its denial of his motion to suppress.

III. Voluntariness of Frasier's Statement

Frasier argues the trial court erred by refusing to suppress his statement claiming ownership of the jacket found in the vehicle as involuntary and in violation of *Seibert*. He asserts that although the officer's initial questioning about the ownership of the jacket was not lengthy, the same officer conducted the second, post-*Miranda* questioning, which occurred only eight minutes later. Additionally, Frasier contends his statement was involuntary because he made it after law enforcement's veiled threat to arrest Jones. We disagree.

"On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). "The State bears the burden of proving by a preponderance of the evidence that a defendant's rights were voluntarily waived after being advised of his *Miranda* rights." *State v. Osborne*, 301 S.C. 363, 365, 392 S.E.2d 178, 179 (1990). "Interrogation is the express questioning, or its functional equivalent[,] which includes 'words or actions on the part of the police . . . that the police should know *are reasonably likely to elicit an incriminating response.*" *Kennedy*, 333 S.C. at 431, 510 S.E.2d at 716 (second alteration in original) (quoting *State v. Sims*, 304 S.C. 409, 417, 405 S.E.2d 377, 381 (1991)).

"The purpose of *Miranda* warnings is to apprise a defendant of the constitutional privilege not to incriminate oneself while in the custody of law enforcement." *State v. Medley*, 417 S.C. 18, 24, 787 S.E.2d 847, 850 (Ct. App. 2016). In *Seibert*, the Unites States Supreme Court considered the admissibility of a repeated statement elicited pursuant to a police practice of "question first, warn later." 542 U.S. at 604-06 (plurality opinion). The Court identified "relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Id.* at 615. These facts consist of the following:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. Discussing the case of *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court noted that when unwarned questioning took place during a short conversation at the suspect's home followed by delivery of *Miranda* warnings to the suspect at the police station, "a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience." *Seibert*, 542 U.S. at 615. The Court opined that under such circumstances, "the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615-16.

We find Officer Hall's testimony and the contents of the video support the trial court's finding that, based on the totality of the circumstances, Frasier's postwarning statement, in which he admitted to owning the jacket, was voluntary notwithstanding Officer Hall's pre-warning questioning. *See Rochester*, 301 S.C. at 200, 391 S.E.2d at 247 ("On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.").

First, as to the completeness and detail of the questions and answers during the first round of interrogation, the question asked was, "Whose jacket?", and Frasier admitted it was his. Although Officer Hall continued to question Frasier for a few more seconds about what was in the jacket, Frasier did not respond. We find the foregoing supports the trial court's finding that Officer Hall directed his initial question to both Jones and Frasier and it could have incriminated either. Second, as to the timing and setting of the first and second round of questioning, the trial court concluded the first and second round of questioning was distinct and found that once the officers had placed Frasier in the vehicle, "any questioning of him was designed to . . . incriminate him." Additionally, the trial court noted Frasier had previous "contact with the system" and had sufficient knowledge and education to know that he had the right to remain silent. We find the evidence supports the trial court's finding that the timing and setting of the two rounds of questioning were sufficiently different for Frasier to appreciate that the second round of questioning was a new and distinct experience. Here, the initial questioning was informal and occurred while Frasier was standing next to the police cruiser and Officer Hall was several yards away. The postwarning questioning was more formal and took place after officers had placed Frasier in the back of the police cruiser, and Officer Hall sat in the front of the cruiser. In addition, there was a break of several minutes between the first and second round.

Officer Hall denied engaging in any tactic of delaying reading Frasier his *Miranda* warnings in order to elicit an incriminating response and denied threatening Frasier or promising him leniency or threatening to arrest Jones if Frasier did not claim the drugs. We find the foregoing supports the trial court's finding the timing and setting of the two rounds of questioning weigh in favor of admissibility.

Finally, as to the second and fourth *Seibert* factors, we acknowledge the same officer questioned Frasier both before and after he received his *Miranda* warnings and Frasier's statements contained overlapping content. Nevertheless, we find the foregoing evidence supports the trial court's conclusion that Frasier's postwarning statements were voluntary and admissible. *See Saltz*, 346 S.C. at 136, 551 S.E.2d at 252 ("When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.").

Further, we find evidence supports the trial court's rejection of Frasier's argument he claimed ownership of the jacket because he felt threatened officers would arrest Jones. Although the burden was upon the State to prove voluntariness, Frasier provided no testimony he felt coerced or threatened by the fact officers had placed Jones in handcuffs. The video recording shows Officer Hall made no express threat to arrest Jones if Frasier did not confess. Therefore, the trial court did not err by refusing to exclude the statement on this basis.

CONCLUSION

For the foregoing reasons, we find the trial court did not err by concluding officers lawfully extended the traffic stop, Frasier consented to the search of his person, and his statement was voluntary. We therefore affirm the trial court's denial of Frasier's motions to suppress. Accordingly, Frasier's conviction is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephanie Walker Weaver, Respondent,

v.

Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson, John Does and Richard Roe Corporations, Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and Terri Robinson are the Appellants.

Appellate Case No. 2017-002241

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

Opinion No. 5752
Submitted May 8, 2020 – Filed July 29, 2020

AFFIRMED

Robert Gerald Chambers, Jr. and Carmelo Barone Sammataro, both of Turner Padget Graham & Laney, PA, of Columbia; and Kimberly A. Ashmore and Richard Albert Simpson, both of Wiley Rein, LLP, of Washington, DC, all for Appellants.

Kenneth Luke Connor and Christopher Caleb Connor, both of Connor & Connor LLC, of Aiken; and Eliza

Hutto Cantwell and Joshua P. Cantwell, both of Cantwell Law Firm, LLC, of Charleston, all for Respondent.

HILL, J.: Bonnie S. Walker moved into Brookdale Charleston, a residential care facility, in early June 2016. One evening six weeks later, Walker wandered out of the facility. Brookdale did not realize she was missing from their care until around seven the next morning, whereupon they notified Walker's family of her disappearance. When Stephanie Walker Weaver, Walker's granddaughter, and other family members arrived, they embarked upon a search of Brookdale's grounds. Weaver's efforts led her to a retention pond, where she discovered her grandmother's body, which had been maimed and dismembered by an alligator.

Weaver brought this lawsuit in her personal capacity against Brookdale, its parent companies, and its administrator Terri Robinson (collectively Appellants) for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Appellants moved to dismiss Weaver's complaint on numerous grounds and also moved to compel Weaver to arbitration based on the arbitration provision in the residency agreement between her grandmother and Brookdale. The trial court denied Appellants' motions. Because we conclude Weaver is not bound by the arbitration provision, we affirm the denial of the motion to compel arbitration.

I.

Whether an arbitration agreement may be enforced against a nonsignatory is a question of law we review de novo, but we will not disturb the trial court's underlying factual findings reasonably supported by the record. *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). To compel Weaver to arbitrate her claims, Appellants must demonstrate (1) there is a valid arbitration agreement, and (2) the claims fall within its scope. *Id*. at 336, 827 S.E.2d at 173. This appeal turns on the first inquiry: whether Weaver and Appellants are bound by a valid arbitration agreement.

It is undisputed the residency agreement between Walker and Brookdale contained an arbitration provision subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2018) (FAA). Weaver was not a party to the agreement, nor is there any evidence she was aware of it. The arbitration provision purports that it "binds third parties not signatories to this Arbitration provision" including "family members, or other

persons claiming through the Resident, or persons claiming through the Resident's estate, whether such third parties make a claim in a representative capacity or in a personal capacity."

Appellants contend the trial court erred in denying their motion to compel arbitration because it overlooked the strong federal and state policy favoring arbitration. They contend that although Weaver did not sign the agreement, she is equitably bound by it due to the services her grandmother received and because the duties and standard of care Weaver frames her lawsuit upon are defined by the agreement.

A. The FAA

There is a potent public policy favoring arbitration, but this policy is deployed only as an aid in interpreting the scope and enforcement of validly entered arbitration agreements. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."). The policy does not kick in until the court determines a valid agreement to arbitrate exists. The FAA was Congress' response to the reluctance of courts to enforce arbitration agreements between commercial merchants trading in interstate commerce. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018); *see also id.* at 1643 n.10 (Ginsburg, J., dissenting). The FAA commands such arbitration agreements be treated the same as all other contracts—no more, no less. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). The FAA therefore places arbitration contracts on equal footing with other contracts, but it does not, as Appellants suggest, give the party seeking arbitration a leg up in the threshold determination of whether a valid arbitration agreement exists. The FAA ensures the even-handed enforcement of arbitration agreements implicating interstate commerce—that is, contracts where the parties have consciously chosen to resolve their disputes by private arbitration rather than the public justice system. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (FAA "establishes an equal-treatment principle" prohibiting state laws from discriminating against arbitration contracts). This choice, like any contract term, must be mutually agreed upon, for "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). This is the keystone of the FAA: as the Supreme Court recently reemphasized, "the first

principle that underscores all of our arbitration decisions is that [a]rbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (quotation marks omitted) (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)).

Accordingly, "[a]lthough arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Id.* (internal quotation omitted). In fact, if the party resisting arbitration is a nonsignatory, a presumption against arbitration arises. *Id*. at 337–38, 827 S.E.2d at 173.

B. Binding nonsignatories to arbitration agreements

State law controls when an arbitration agreement may be enforced against someone who has not signed it. *Id.* at 338, 827 S.E.2d at 173–74; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009). South Carolina law recognizes several theories whereby a nonsignatory can be bound by an arbitration agreement. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014) (listing theories as incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel). Appellants rely on just one: equitable estoppel. This theory, known also as direct benefits estoppel in the arbitration realm, estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability. *Wilson*, 426 S.C. at 340–44, 827 S.E.2d at 175–77.

Appellants insist direct benefits estoppel funnels Weaver's claims to arbitration because her ability to sue Appellants stems from Walker's residency agreement, which includes the arbitration provision. This argument is easily scotched, for "direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence." *Id*. at 343, 827 S.E.2d at 176. Yet Appellants go further and assert Weaver's claims are not only related to Walker's residency agreement but rely upon and are limited by its terms. Citing *Flinn v. Crittenden*, 287 S.C. 427, 339 S.E.2d 138 (Ct. App. 1985), they contend the scope of a nursing home's duty of care is a matter of contract. *Flinn* was a negligence case,

and the issue there was whether the nursing home breached its duty of care to decedent's husband because it "failed to constantly attend his wife while she was a patient." *Id*. at 428, 339 S.E.2d at 138. This court affirmed summary judgment to the nursing home, finding husband had signed an admission agreement on behalf of his wife that limited the scope of the nursing home's care to general duty—rather than continuous or special duty—nursing care.

Unlike the husband in *Flinn*, Weaver did not sign the residency agreement. And *Flinn* did not hold nursing home contracts supplant common law duties imposed by the law of ordinary negligence; it is better viewed as holding the contractual duty was commensurate with those duties, and husband's claim failed because there was no evidence the nursing home had breached the duty of reasonable care, nor had they agreed to assume duties beyond those required by negligence law. After all, the court emphasized nursing homes were not insurers of patient safety. The net effect of Appellants' interpretation of *Flinn* would be that something akin to the economic loss rule governs claims against nursing homes involving residency agreements, limiting recovery to contract losses and barring tort recovery altogether. *See Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) (discussing economic loss rule). We have never accepted the economic loss rule in cases involving personal injuries and do not believe it now arrives as a stowaway aboard *Flinn*. *See id.*

Appellants' equitable estoppel argument is better analyzed against the backdrop of *Malloy*, which involved claims by Malloy against Thompson and his employer, Merrill Lynch, alleging they had interfered with an inheritance Malloy expected from decedent. According to Malloy, Thompson and Merrill Lynch disrupted decedent's estate plan and diverted his assets to themselves. Merrill Lynch moved to compel Malloy to arbitrate his claims, maintaining any duty it owed derived from its client relationship agreement (CRA) with decedent, even though Malloy was not a party to the CRA. Rejecting this argument, our supreme court explained:

> Merrill Lynch's argument that a derivative "duty" from the CRAs binds Malloy, a non-signatory to the CRAs, conflates the duties created by the CRA contracts and general tort duties. Malloy does not claim that Merrill Lynch breached a duty created by the CRAs, but rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance.

> The contractual duties between Decedent and Merrill Lynch are irrelevant to whether Merrill Lynch intentionally interfered with Malloy's expected inheritance.

Malloy, 409 S.C. at 562, 762 S.E.2d at 692–93.

Likewise, here Weaver's claims rely on general tort duties owed by Appellants to everyone, not any provision of the residency agreement. For instance, one of her emotional distress claims alleges she was injured because Appellants mishandled and failed to safeguard Walker's remains. Our review of the residency agreement reveals no provision regarding the handling of a deceased resident's remains (although it did grant Walker the right to terminate the agreement if she gave "written notice in the event of your death"). Weaver's claims arise from the duties that arose when Appellants failed to locate Walker; called Walker's family, including Weaver, to notify them of Walker's disappearance; enlisted Weaver's help in searching for Walker; and failed to warn her of the danger of the alligator pond that Appellants knew or should have known about when Weaver began searching for Walker. These duties do not flow directly from the residency agreement. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (explaining a benefit is direct if it "flows directly from the agreement," but it is indirect where the nonsignatory's claim relates to "the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself").

Weaver has not "exploited" or otherwise sought to enforce or benefit from the residency agreement, any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck. We have addressed this argument before in the nursing home context. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) (declining to apply equitable estoppel against Respondent nonsignatories to arbitration agreement between nursing home and decedent, Mable: "The only agreement from which Respondents even arguably received a benefit was the Admission Agreement because Mable was admitted to the Facility as a result of it. However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted. Respondents are not seeking to enforce the Arbitration Agreement nor have they previously tried to do so"). Like the nonsignatories in *Wilson*, Weaver has not "attempted to procure any direct benefit" from the residency agreement "while attempting to avoid its

arbitration provision." 426 S.C. at 345, 827 S.E.2d at 177; *cf. Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 296–97, 733 S.E.2d 597, 605 (Ct. App. 2012) (applying direct benefits estoppel to bind nonsignatory doctor to arbitration provision in hospital's contract with another entity because doctor directly benefited from contract by being able to work at the hospital and receive payments under the contract).

Equitable estoppel is "a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Born of equity, the heart of the theory "is that the party entitled to invoke the principle was misled to his injury." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017) (quoting *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981)). There is no evidence Weaver misled Appellants; in fact, the only contact Weaver had with Appellants shown by the record was when she led them to the scene of her grandmother's tragic demise. We also point out that in support of their motion of dismiss, Appellants state Weaver has not alleged Appellants were aware of her or had "purposefully directed any conduct towards" her. This portrayal of Weaver as a stranger to Appellants contradicts their depiction of her, in their equitable estoppel argument, as actively exploiting the residency agreement by looting its benefits. Equity does not reward irony.

We conclude Appellants may not use equitable estoppel to bind Weaver to the arbitration provision. Because no valid arbitration agreement existed between Appellants and Weaver, we affirm the denial of the motion to compel arbitration.

II.

Appellants have also appealed the denial of their Rule 12(b)(6), SCRCP, motions to dismiss Weaver's claims for failure to state a cause of action. Denials of Rule 12(b)(6) motions are not immediately appealable, and we decline to exercise our discretion to address them as we believe the issues raised would benefit from further factual development. We decide this case without oral argument. Rule 215, SCACR.

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beneficial Financial I, Inc., successor by merger to Beneficial Mortgage Co. of South Carolina, Appellant,

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker; Carolina Bank a/k/a Carolina Bank & Trust Co., The United States of America, by and through its agency, the Internal Revenue Service; and The Citizens Bank, Defendants,

Of whom Jon Windham a/k/a Jon D. Windham is the Respondent.

Appellate Case No. 2017-001954

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5753
Heard December 10, 2019 – Filed August 5, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Rebecca Kinlein Lindahl and Richard L. Farley, both of Katten Muchin Rosenman, LLP, of Charlotte, North Carolina, for Appellant.

Penny Hays Cauley, Esquire of Hays Cauley, PC of Florence, for Respondent.

KONDUROS, J.: In this foreclosure action, Beneficial Financial I, Inc. (Beneficial), lender, challenges the grant of summary judgment to Jon Windham, borrower, on his counterclaims for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), fraud, negligent misrepresentation, intentional infliction of emotional distress, and negligent and reckless training and supervision. Beneficial argues Windham was not entitled to the award because Windham did not meet his burden of proof for any of his counterclaims, even though Beneficial did not submit evidence in opposition at the hearing. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Windham entered into a Loan Repayment and Security Agreement (Agreement) and a mortgage (Mortgage) with Beneficial Mortgage Company of South Carolina dated June 25, 2002, in the amount of $191,912.61, to secure a loan for real property in Florence County, South Carolina. The Agreement required Windham to obtain title insurance and hazard insurance on the property, name Beneficial as loss payee, and provide Beneficial with an endorsement. The Agreement also stated Beneficial could place hazard insurance on the property if Windham failed to maintain the insurance or failed to provide proof of the insurance. The Agreement mandated Windham pay Beneficial the "[p]rincipal and [i]nterest computed at the [c]ontract [r]ate . . . and any monthly insurance premium, if elected."

On April 11, 2014, Beneficial filed a complaint against Windham to foreclose on the Mortgage, claiming Windham failed to pay "installments of principal and interest which became due on July 29, 2012," and seeking "the entire balance of said principal and interest due and payable at once" and attorney's fees and costs. Beneficial claimed in its "Notice Required by the Fair Debt Collection Practices

Act," the total debt Windham owed as of April 9, 2014, was $230,522.96. Beneficial also sought reformation of the deed and Mortgage.[1]

Windham answered, asserting Beneficial "wrongfully force-placed insurance" on the property "even though [Beneficial] had knowledge that said property was already insured." Windham argued this added insurance cost "caused [his] payment to increase and also resulted in [his] payments to only be credited to the additional insurance cost rather than to the principal and interest due on the mortgage" and "began the process of [his] initial delinquency." Furthermore, Windham alleged Beneficial represented to him "that if he were to make bi-monthly payments of $1,000.00 on the loan for six months, he would be offered a loan modification"; however, Windham alleged Beneficial stopped accepting his payments and did not contact him to modify the loan as promised. Windham counterclaimed against Beneficial alleging violation of the SCUTPA, intentional infliction of emotional distress, negligent training and supervision, reckless and wanton training and supervision,[2] breach of implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation.

Beneficial responded to Windham's counterclaims, admitting it "force[-]placed insurance on its collateral and charged Windham with the cost of force-placed insurance" but it did so "as permitted by the loan documents." Moreover, Beneficial admitted Windham made some payments of $1,000 and those payments were applied in accordance with the Mortgage.

During the discovery process, Beneficial repeatedly delayed Windham's deposition of a Beneficial corporate witness. Ultimately, the parties entered into a consent order (Consent Order) dated June 9, 2017, in which Beneficial agreed to produce the corporate witness pursuant to Rule 30(b)(6), SCRCP, on July 10, 2017. The parties also agreed that failure on the part of Beneficial to produce the witness

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[1] Beneficial named Frances Windham, Jerry Coker, Carolina Bank, the United States of America by and through the Internal Revenue Service, and the Citizens Bank, in addition to Windham, in its complaint. Jon Windham, however, is the sole respondent in this appeal.

[2] The circuit court awarded Windham summary judgment "on his claims of negligent and reckless training and supervision," without expressly stating the term "wanton." The parties also refer to negligent and reckless training and supervision on appeal.

would "result in [Beneficial] being prohibited from offering any testimony in support of [Beneficial's] foreclosure action and also prohibit [Beneficial] from offering any testimony in defense of . . . Windham's counterclaims."

Beneficial's corporate representative did not appear for the deposition on July 10, 2017, and Windham filed a motion for summary judgment, a memorandum in support, and his own affidavit. The circuit court held a hearing on August 31, 2017, and found Beneficial "failed to overcome the facts and law set forth by [Windham]" and "there is no genuine issue of material fact in this matter and that summary judgment is due to be granted in [Windham's] favor." This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Id.* (quoting *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)).

> Rule 56(c), SCRCP, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." "On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party."

Id. at 211-12, 826 S.E.2d at 290 (alteration in original) (quoting *George*, 345 S.C. at 452, 548 S.E.2d at 874).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). "When reasonable minds

cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." *Id.*

> When a motion for summary judgment is made *and supported* as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP (emphasis added).

Our supreme court has addressed the initial burden the moving party carries to succeed on a summary judgment motion:

> The grant of summary judgment is appropriate only if it is clear that no genuine issue of material fact exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law.
>
> A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (citations omitted).

LAW/ANALYSIS

I. Preservation

Initially, Windham argues Beneficial did not preserve any issue on appeal. Windham alleges because Beneficial "did not object to [his] affidavit and failed to file any memorandum of law in opposition" to his motion, Beneficial failed to preserve any issue regarding the summary judgment award on appeal. We disagree.

> [A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. . . . Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."

Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

However, our supreme court has found an issue is preserved for appeal when

> [t]he trial judge's order granted respondents' motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing. While that order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents "owed no duty or obligation" to petitioner. This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e)[, SCRCP,] motion to alter or amend in order to preserve the issue for appeal.

Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009).

The Consent Order precluded Beneficial from "offering any testimony in defense of . . . Windham's counterclaims," and it did not file a memorandum or affidavit related to the summary judgment. However, the circuit court considered the pleadings in its review of the evidence, including Beneficial's pleadings, which attached the Agreement and Mortgage. Furthermore, the circuit court granted Windham summary judgment on the grounds Windham argued at the hearing. Therefore, the issue of whether summary judgment was proper based solely on the evidence put forth by Windham was raised to and ruled upon by the circuit court. Accordingly, we hold Beneficial's issue alleging error in the award is preserved for review on appeal.

II. Judgment by Default

Beneficial contends the circuit court erred in granting Windham summary judgment on his claims on the basis Beneficial did not submit evidence in opposition to Windham's motion for summary judgment. Beneficial asserts the circuit court granted summary judgment to Windham "by default." We disagree.

On a motion for summary judgment, the moving party carries the burden of proof even when the nonmoving party does not submit any evidence in opposition.

> A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment *even though his adversary does not come forward with opposing materials*.

Standard Fire Ins. Co., 301 S.C. at 422, 392 S.E.2d at 462 (emphasis added) (citations omitted).

Windham submitted a memorandum and an affidavit in support of his motion for summary judgment, and the circuit court heard the motion on August 31, 2017. The circuit court's order provided it had reviewed "the pleadings, affidavits on file, [Windham's] brief, and arguments of counsel." Additionally, Beneficial expressly

agreed in the Consent Order if it did not provide a Rule 30(b)(6), SCRCP, witness it would be prohibited "from offering any testimony in defense of . . . Windham's counterclaims." We, therefore, find Beneficial's argument the circuit court granted summary judgment by default to be without merit.

III. Burden of Proof

Beneficial contends the circuit court erred in granting summary judgment to Windham because he did not meet his burden of proof required by Rule 56(c), SCRCP. We agree in part, disagree in part, and address each cause of action in turn.[3]

A. SCUTPA

Beneficial maintains the circuit court erred in granting summary judgment to Windham on his counterclaim for a violation of the SCUTPA. We disagree.

The SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (quoting *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005)). "In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest. . . . 'An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace.'" *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018) (quoting *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986)), *cert. denied*, S.C. Sup. Ct. Order dated Nov. 9, 2018.

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[3] On appeal, Beneficial argues Windham is not entitled to summary judgment on his claim of breach of the implied covenant of good faith and fair dealing, in addition to Windham's counterclaims addressed herein. However, Windham did not seek summary judgment on this claim, and the circuit court did not award summary judgment on this claim.

"After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest . . . the plaintiff need not allege or prove anything further in relation to the public interest requirement." *Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998).

> An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Id. at 453-54, 814 S.E.2d at 655 (quoting *Singleton v. Stokes Motors*, *Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004)). However, these are not the only two ways impact on the public interest may be shown, rather "each case must be evaluated on its own merits." *Crary*, 329 S.C. at 388, 496 S.E.2d at 23.

In the present case, we evaluate whether Windham proved there was no genuine issue of material fact regarding his SCUTPA counterclaim. Windham asserted Beneficial's conduct violated the SCUTPA by (1) "foreclosing on a tract of land which [Beneficial] knows, or should know, was not to be secured by any mortgage between [Beneficial] and [Windham]"[4]; (2) "force-placing insurance on [Windham's] property when [Windham] already had insurance, causing [Windham's] monthly payment to increase"; (3) "taking monthly payments from [Windham] and applying them all to alleged interest and fees"; (4) "unilaterally ceasing acceptance of payments from [Windham] on his loan"; and (5) "refusing to offer [Windham] a loan modification, even after stating it would do so."

[4] Windham asserted in his answer and counterclaim the Mortgage wrongly covered one and one-half acres, even though Windham "alerted the loan officer that the Note was only to be secured by a mortgage on one acre of [his] property, not the entire 1.5 acre lot." The Mortgage Windham signed, however, indicated the property subject to the Mortgage is "approximately 1 ½ acres."

Windham asserted in his affidavit he maintained the required insurance on his property and it was in effect when Beneficial force-placed insurance on the property. He also attested he repeatedly provided proof the insurance was in effect to Beneficial. Windham's counterclaim alleged the actions of Beneficial "have a real and substantial potential for repetition and are a threat to the public interest," arguing Beneficial's actions "were in line with its policies and procedures," Beneficial "services numerous loans in South Carolina, as well as across the country," and Beneficial's actions were "done under the authority of the same policies, procedures, and leadership that are in effect relating to every other loan managed, serviced and/or written by [Beneficial]." Significantly, in its motions to dismiss and reply, Beneficial "admit[ted] that it force placed insurance on its collateral and charged Windham with the cost of force-placed insurance, as permitted by the loan documents."

We recognize the information provided to the circuit court consisted of the pleadings, Windham's affidavit and memorandum, and a brief hearing and did not include exhibits or testimonial evidence; however, accepting this uncontroverted proof as presented, and giving the benefit of all reasonable inferences to Beneficial as we must when reviewing a grant of summary judgment, we find there is no dispute—Windham met his burden of proof on his counterclaim for a violation of the SCUTPA by Beneficial. In its answer, Beneficial admitted it was in the business of providing mortgages to homeowners. According to the pleadings and Windham's affidavit, Beneficial force-placed hazard insurance on Windham's home in breach of its contract with Windham, prejudicing Windham by raising his mortgage payments so substantially Windham was no longer able to pay down his principal. Instead, Windham found himself with a pending foreclosure. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition. *See Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). Therefore, we affirm the circuit court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA.

B. Fraud

Beneficial contends the circuit court erred in granting summary judgment to Windham on his counterclaim for fraud. We agree.

Windham asserted Beneficial committed fraud by orally representing to him if he made $1,000 payments twice each month for six months, Beneficial would modify his loan; however, Beneficial did not modify the loan.

> To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. The failure to prove any element of fraud or misrepresentation is fatal to the claim.

Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007) (citations omitted). "Failure to prove any element of fraud is fatal to the action. Furthermore, '[f]raud cannot be presumed; it must be proved by clear, cogent, and convincing evidence.'" *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (citation omitted) (quoting *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991)).

Our supreme court's decision in *Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766 (2011), provides targeted guidance. In *Turner*, the supreme court elaborated upon the precept that neither a broken promise nor making a statement to do something in the future, that is not done, can qualify as a fraudulent or negligent representation: "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Id.* at 123, 708 S.E.2d at 769-70 (quoting *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003)).

In addressing the difference between that which is actionable or that which does not qualify as fraudulent, the *Turner* court noted "to be actionable, a statement must relate to a present or preexisiting fact, and cannot be predicated on unfulfilled promises or statements as to future events." *Id.* at 123, 708 S.E.2d at 770. On the other hand, "where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is fraudulent misrepresentation of a fact, and actionable as such." *Id.* (quoting *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967)).

The *Turner* court also noted breaking a contract does not constitute fraud, it is rather the component of making a representation without any intention of going through with the agreement that is actionable. *Id.* at 123-24, 708 S.E.2d at 770. The party alleging such fraud must therefore provide additional evidence than simply stating his opponent did not do that which he promised to do: "'Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform.' An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is coupled with other evidence." *Id.* (quoting *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993)). *See also Bishop Logging Co. v. John Deere Indus. Equip. Co*., 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) ("Not every statement made in the course of a commercial dealing is actionable at law. It is well settled that to establish actionable fraud there must first be a false representation. The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention or an expression of confidence that a bargain will be satisfactory." (citations omitted)).

Conversely, this court has reversed the award of summary judgment for fraud when the record contained testimony from an employee admitting intentional wrongdoing. *Charleston Lumber Co. v. Miller Housing Corp*., 318 S.C. 471, 480-81, 458 S.E.2d 431, 437 (Ct. App. 1995). With such testimony, this court found "there was sufficient evidence to create a question of fact as to whether or not [the respondent] had made promises to the [appellants] with the present intention not to fulfill them." *Id.* at 481, 458 S.E.2d at 437; *see also Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985) ("The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." (citations omitted)).

Windham has not put forward evidence that Beneficial acted with knowledge that it had no intention of keeping its promise to modify Windham's loan at the time the representation was made. Therefore, we reverse the circuit court's award of summary judgment on Windham's counterclaim for fraud in order for further discovery and litigation to resume.

C. Negligent Misrepresentation

Beneficial argues the circuit court erred in granting summary judgment to Windham on his counterclaim for negligent misrepresentation. We agree.

Windham summarily stated in his answer and counterclaim for negligent misrepresentation Beneficial made a false representation in the course of its business and Beneficial had a pecuniary interest in making those statements and owed a duty to Windham to communicate truthful information, which Beneficial breached. Further, Windham contended he relied upon Beneficial's representations that if he made the $1,000 payments, Beneficial would offer a loan modification. Windham asserted the result of Beneficial's actions caused him "pecuniary losses including mental anguish, physical sickness and suffering, embarrassment and humiliation."

> In a claim for negligent misrepresentation, a plaintiff must prove that:
>
> > (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Robertson, 350 S.C. at 349, 565 S.E.2d at 314 (quoting *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 266-67, 536 S.E.2d 399, 405 (Ct. App. 2000)).

"Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation any more than it is sufficient to prove fraudulent misrepresentation." *Winburn*, 287 S.C. at 442, 339 S.E.2d at 147.

In *Sauner*, 354 S.C. at 408, 581 S.E.2d at 167, the supreme court determined a company's statement about what it would do in the future did not constitute a misrepresentation.

> [The company's] statement that it would establish fair market value for the lots is a statement about the future. The appraisals had not been conducted at the time it made the statement. As such, it is not actionable as a misrepresentation. To be actionable, "the representation must relate to a present or pre-existing fact and be false when made."

Id. (quoting *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999)). The court held, "Representations based on statements as to future events or unfulfilled promises are not usually actionable." *Id.*

As with the claim for fraud, Windham did not prove Beneficial made a false representation. Windham asserted Beneficial offered him a loan modification if he made the payments. We find this statement was a representation as to a future event, and Windham did not prove the representation was false when made. Therefore, we reverse the finding of the circuit court granting summary judgment to Windham on his claim for negligent misrepresentation.

D. Intentional Infliction of Emotional Distress

Beneficial contends the circuit court erred in granting summary judgment to Windham on his counterclaim for intentional infliction of emotional distress. We agree.

Our supreme court set forth the elements of the cause of action for the intentional infliction of emotional distress in *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)):

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
> (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
> (3) the actions of the defendant caused plaintiff's emotional distress; and
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

"[W]hen ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress." *Id*. at 358, 650 S.E.2d at 71.

Our supreme court also established the claim of intentional infliction of emotional distress carries with it a higher level of proof:

> To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this [c]ourt's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"—in the form of third party witness testimony and other corroborating evidence—in order to make a prima facie showing of "severe" emotional distress.

Id. at 358-59, 650 S.E.2d at 72.

The *Hansson* court found the court of appeals erred in reversing the award of summary judgment to Hansson's employer on Hansson's intentional infliction of emotional distress cause of action when Hansson alleged losing sleep, a diagnosis of grinding his teeth while sleeping, and expenses for dental work. *Id*. at 359-60, 650 S.E.2d at 72. The supreme court ruled Hansson "failed to provide any legally sufficient evidence in this case to show that his resulting emotional distress was

'severe' within the contemplation of this [c]ourt's mental anguish jurisprudence." *Id.*

Here, Windham claimed intentional infliction of emotional distress in his answer and counterclaims, asserting Beneficial either "intentionally or recklessly inflicted severe emotional distress," or knew such would result from its conduct. Windham asserted Beneficial's conduct was "part of a conscious scheme . . . to take [Windham's] home away from him after [Beneficial] was the cause of the initial delinquency by wrongfully force-placing insurance on [Windham's] home." Windham alleges the resulting emotional distress was "so severe that no reasonable person could be expected to endure it" and included "mental anguish, anxiety, and humiliation" and seeks actual and punitive damages. In his affidavit, Windham asserted:

> I have spent the last three years suffering with the constant fear that my home was going to be taken away from me . . . . I have spent the last several years in emotional distress, dealing with anxiety, embarrassment, humiliation, and fear. I have also suffered physical distress, including loss of sleep, headaches, pain and suffering.

Windham did not sufficiently meet his burden to prove his distress was so extreme to render summary judgment of his claim appropriate. "Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, [276 S.C. at 161, 276 S.E.2d at 778,] a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72. Therefore, we reverse the circuit court's award of summary judgment on Windham's claim for intentional infliction of emotional distress.

E. Negligent and Reckless Training and Supervision

Finally, Beneficial asserts the circuit court erred in granting summary judgment to Windham on his counterclaim against Beneficial for the negligent and reckless training and supervision of its employees. We agree.

In his memorandum in support of his motion for summary judgment, Windham asserted Beneficial "should have known that its failure to properly supervise the individuals to which it assigned [Windham's] loan could result in the conduct happened upon [Windham]."

> In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages.

Madison ex rel. Bryant v. Babcock Ctr., *Inc*., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006).

Our supreme court "has long noted the 'troublesome question of the distinction to be made in the degrees of negligence.'" *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Hicks v. McCandlish*, 221 S.C. 410, 414, 70 S.E.2d 629, 631 (1952)). "'[N]egligence is the failure to use due care,' i.e., 'that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances.' It is often referred to as either ordinary negligence or simple negligence." *Id.* (alteration by court) (quoting *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)).

> "Recklessness implies the doing of a negligent act knowingly"; it is a "conscious failure to exercise due care." If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care. . . . The element distinguishing actionable negligence from willful tort is inadvertence.

Id. (quoting *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)).

"[N]egligence may be so gross as to amount to recklessness, and when it does, it ceases to be mere negligence and assumes very much the nature of willfulness."

Id. (quoting *Jeffers v. Hardeman*, 231 S.C. 578, 582-83, 99 S.E.2d 402, 404 (1957)).

> A plaintiff in a civil case may have a number of causes of action at his disposal through which he may seek to hold a tortfeasor or other responsible party liable for his injury, and this is no less the case when a plaintiff alleges that he has been injured by an employee acting in the course and scope of his employment.

James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008).

> Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.

Id.

We note the decision in *Rickborn v. Liberty Life Insurance Co.* also provides guidance. 321 S.C. 291, 468 S.E.2d 292 (1996). In *Rickborn*, our supreme court found the negligence of a life insurance company's employee "was imputable to" the company. *Id*. at 305, 468 S.E.2d at 301. The supreme court considered acts of wrongdoing on the part of the employee that were known to the company, such as knowledge an application for insurance was incomplete, failure to determine a corrected application was submitted, and evidence the company knew the employee had "mishandled the preparation of other applications and was considered by [the company] to be a below average sales agent." *Id.* at 303, 468 S.E.2d at 299. The supreme court found these facts proved the company "was alerted to the fact that [the employee's] carelessness could cause harm and, therefore, it breached a duty of care owed to [the applicant] by failing to properly supervise [the employee]." *Id.*

Here, the record does not support Windham's award of summary judgment for negligent or reckless supervision and training. Windham offered only his general and unspecific assertion Beneficial failed to train and supervise its agents, without any evidence of acts of wrongdoing by an employee, and without evidence an employee's actions were imputable to Beneficial. Reviewing the evidence in the light most favorable to Beneficial, Windham failed to show there was no genuine issue of material fact as to whether Beneficial negligently or recklessly trained and supervised its employees. Accordingly, we reverse the circuit court's grant of summary judgment on Windham's negligent and reckless training and supervision counterclaim against Beneficial.

CONCLUSION

We affirm the circuit court's award of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA, finding Windham proved there was no genuine issue of material fact regarding this claim. We reverse the circuit court's award of summary judgment to Windham on his counterclaims for fraud, negligent misrepresentation, intentional infliction of emotional distress, and negligent and reckless training and supervision because Windham failed to prove there were no genuine issues of material fact regarding these counterclaims, and we remand these claims to the circuit court. Therefore, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and HILL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lindsay Allison Sellers, Appellant,

v.

Douglas Anthony Nicholls, Respondent.

Appellate Case No. 2017-001108

Appeal From Greenville County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5754
Submitted April 1, 2020 – Filed August 5, 2020

AFFIRMED

Lindsay Allison Sellers, of Lexington, pro se.

Marcus Wesley Meetze, of Law Office of Marcus W. Meetze, LLC, of Simpsonville, for Respondent.

LOCKEMY, C.J.: In this child custody action, Lindsay Allison Sellers (Mother) appeals the family court's order denying her motion for a continuance, finding it was in the children's best interest to be placed with Douglas Anthony Nicholls (Father), and granting Father $15,000 in attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Mother and Father married in August 2006. During their marriage, they lived in Greenville and had two children: a daughter, who is now twelve years old (Daughter) and a son, who is now eight years old (Son) (collectively, Children). Mother and Father separated in 2012 and divorced on June 6, 2014. The original final order (the Original Order) incorporated an agreement that provided for joint legal custody and joint week-to-week physical custody. It ordered that neither party pay child support; however, Mother was to pay for medical insurance and childcare costs. The Original Order also restrained the parties from having Children overnight in the presence of members of the opposite sex.

One year later, Mother filed a complaint requesting sole custody and that Father receive supervised visitation with no overnights. Father filed an answer and counterclaim alleging there had been a change in circumstances and he should be awarded sole custody of Children, child support, and attorney's fees. Thereafter, Mother filed a motion for temporary relief requesting sole custody of Children. The family court ordered the Original Order remain in effect.

The guardian ad litem (the GAL) subsequently filed a second motion for temporary relief after Mother relocated to Columbia. The family court then issued a temporary order granting Mother custody, finding the move was for legitimate purposes and based on Mother's reported ability to make more money if she was promoted to a management position. The temporary order granted Father standard visitation, but it did not address child support.

On June 13, 2016, Mother's first attorney was relieved by order of the family court. On October 14, 2016, Mother filed an emergency motion for temporary relief requesting child support, which included Mother's affidavit stating she informed her attorney that Son was having stomach pain, issues defecating, and had wet the bed multiple times. Her affidavit stated her attorney believed these were red flags of sexual abuse and she asked her attorney to conduct a forensic interview. The affidavit detailed that during Son's forensic interview, he disclosed "something" to Mother's attorney that was then reported to law enforcement. The South Carolina Department of Social Services (DSS) conducted an investigation. DSS determined the allegations were unfounded.

Father filed a motion to disqualify Mother's attorney, arguing she had become a necessary fact witness regarding custody based on her forensic interview of Son. Neither Mother nor her attorney attended the hearing on Father's motion to disqualify. At the hearing, the GAL and Father asked the court not to continue the final hearing based on the disqualification. In its November 17, 2016 order, the family court granted Father's motion and stated, "The disqualification of [Mother's] counsel shall not, under any circumstances, be a basis for continuing the trial in this matter . . . . This case remains set for trial on December 13[, 2016]."

On November 28, 2016, Mother filed a Rule 59(e), SCRCP motion to reconsider, arguing the disqualification created substantial hardship because she would be unable to find an attorney in time for the hearing. The family court did not rule on the motion. On December 7, 2016, Mother and her disqualified attorney signed a consent order relieving Mother's attorney as counsel. In the consent order, Mother agreed she would "represent herself pro se in this action in the event she is unable to obtain counsel."

At the outset of the December 13, 2016 hearing, Mother requested to continue the hearing based on her attorney's disqualification. The family court stated the disqualification order indicated "that this case remains set for trial and shall not be continued" and "I believe only the[] Administrative Judge[] can continue this case." Mother stated she filed a motion for reconsideration of the disqualification order, but there had been no resolution of that motion. The family court reiterated it could not continue the case because the previous order stated the case "shall not" be continued.

Mother testified that during the marriage she worked as a manager at Walmart and earned $54,500 a year. Mother explained she was selected to be promoted but needed to move to a Columbia store first. She stated she took a new position in Columbia but did not receive a raise.

Mother explained Father hired a private investigator to place a GPS tracking device on her car while she was at work, and a customer reported that it was a bomb. She recalled she took medical leave from Walmart because Father continually distracted and stalked her. Mother testified that after she left her employment with Walmart, she worked for her former attorney from September 2016 until November 2016. She explained she then took a job working for a

plastic surgeon making $39,000 a year, received rental income of $350 a month, and earned another $500 a month from work as a guardian ad litem.

Mother stated Father made it difficult to coordinate the drop-off of Children and other plans; however, Mother also stated the week-to-week visitation was a nonissue and worked. Mother admitted she violated the Original Order by having her boyfriend stay overnight when Children were with her. Mother asserted Father failed to pay Children's medical bills as required by the Original Order.

Connie Drake, Mother's stepmother, testified she and George Sellers, Mother's father, (Grandfather) (collectively, Grandparents) allowed Mother to move into their home in Lexington County. She explained that during Mother's stay, Grandfather was the primary caretaker for Children and was responsible for picking them up from daycare, providing them dinner, and putting them to bed while Mother was at work. Drake stated Mother would get into irrational screaming matches with Children. She testified Mother left Children in Grandparents' care so she could travel to Europe and stay overnight with her boyfriend. Drake also stated Mother and Children spent nights at Mother's boyfriend's house. She explained Mother stopped letting Children see her and Grandfather as of February 2016. She testified Father arranged for Children to visit with Grandparents, and she believed placement with Father was in Children's best interest because Mother was unable to discipline them.

Grandfather testified Mother and Children argued every morning while at his house. He recalled that on one occasion, Mother got into an argument with Children because they did not want to stay the night alone with Grandfather while she spent the night with her boyfriend. He recalled Children cried for hours following Mother's departure, and Mother refused to come back to get them. Grandfather recalled Children behaved well around Father and enjoyed spending time with him. He testified he and Father made amends following the divorce, and Father allowed Grandparents to see Children after Mother stopped letting them visit. Grandfather stated he was Children's primary caregiver at least two days a week.

Father testified he worked as a school resource officer on weekdays from 7:30 a.m. to 4:00 p.m. Father explained he hired a private investigator who placed a GPS tracking device on Mother's car after she refused to disclose where she lived. He testified Mother filed an order of protection in Lexington County, which was

dismissed. Father stated he never went to Mother's work following the divorce. Father testified Mother failed to inform him about any of Son's ADHD medical appointments or prescriptions. He explained he was on a waiting list for a three-bedroom apartment and expected to be able to move into that apartment two weeks after the hearing. Father stated Mother did not inform him she was moving, and he did not find out until six months after she moved when she filed this action. He believed Mother moved to Columbia to be closer to her former boyfriend. Father testified the temporary order removing Children from Greenville hurt his relationship with Children. He explained Mother failed to inform him about Children's extracurricular activities.

Father explained that after Mother accused him of sexually abusing Son, the results of law enforcement's forensic interview showed "no signs of sexual abuse in [Son]." He believed Mother and her attorney accused him of sexual abuse after Son had "grabbed himself in the anal area several times during a soccer game, complain[ed] of stomach hurting, dance[d] around when he ha[d] to defecate and began to wet his bed." Father stated he believed Son acted this way because of his ADHD medication, which caused constipation. Father recalled Mother initially failed to inform him that Son was taking medication and failed to provide the medication during his week of custody. He testified he never failed to pay medical bills as Mother alleged. Father stated Mother's behavior was erratic and unpredictable, she had moved multiple times since the temporary hearing, and her changing romantic relationships created instability in Children's lives. He testified placement with him was in Children's best interest because he had remained consistent in how he lived, worked a schedule that matched theirs, and continued to live in Greenville where Children had grown up and developed friends. Father testified the week-to-week arrangement had worked well for Children. Father requested $25,000 in attorney's fees, and his attorney's fees affidavit was admitted without objection.

Karen Sykes, Children's maternal grandmother, testified she lived in Aiken but took a job in Richland County to be closer to Children. She stated Children had been living a consistent life and doing well in Columbia. Sykes recalled Children had many friends and participated in extracurricular activities in Columbia.

Grace Morgan, Children's former daycare provider in Greenville, testified that on one occasion, Mother dropped off Children and said she was going to work, but instead, she left on an overnight trip to Disney World with her boyfriend. She

stated Mother did not leave her any clothes for Children, and Father had to bring them clothing and pick them up at night. Morgan testified Father was very caring and worked to build memories with Children. Jennifer Worley, Mother's supervisor at Walmart, testified Mother was no longer employed with Walmart because she chose not to return after taking medical leave.

The GAL testified Father's one-bedroom apartment was clean and organized, but she admitted Children would do better with separate bedrooms. The GAL stated she had no concerns with Mother's home and had no recommendation for placement. The GAL described Mother as argumentative and dismissive of anyone who disagreed with her. She stated she had concerns about Mother's overnight visits with her boyfriend and that Mother changed Children's daycare five times since the Original Order. The GAL explained she was concerned that both parents would likely struggle financially. The GAL stated she did not believe week-to-week placement was in Children's best interest.

The family court found there had been "a change in circumstances as far as the parties remaining in joint physical custody" because the parents did not get along. The family court also found Mother failed to meet her burden that it was in Children's best interest to remain in Columbia. Specifically, the family court found it was not in Children's best interest for Mother to end their relationships with Grandparents; change their daycare five times; fail to properly parent or discipline Children; or fail to care for Children by handing them off to Grandfather because she wanted to spend the evening with her boyfriend. The family court also found it was not in Children's best interest for Mother to fail to inform Father about Son's medication as the temporary order required, which the court believed possibly led to the report of sexual abuse and DSS investigation. The family court found Mother's father and stepmother's testimony was credible and found Father was commendable for his ability to put aside his differences and mend his relationship with Grandfather for the benefit of Children. The family court further found Morgan's testimony that Father was good with Children was credible.

The family court granted parents joint custody of Children and granted Father primary placement. It ordered alternating weekend visitation, ordered Mother to

pay $689.00 per month in child support and $15,000 in attorney's fees within ninety days. The family court weighed both the *E.D.M.*[1] and *Glasscock*[2] factors.

Father filed a Rule 59(e), SCRCP motion, which the family court granted, altering child support to $963.00 a month. Mother also filed a Rule 59(e) motion, arguing the family court erred by (1) denying her motion to continue, (2) failing to rely on the temporary order, (3) failing to find Father violated the order by stalking and harassing her, (4) failing to grant her sole custody, (5) failing to consider Father did not provide child support for the last year, and (6) awarding Father attorney's fees. The family court dismissed Mother's motion as untimely. This appeal followed.

ISSUES ON APPEAL

1. Did the family court abuse its discretion by denying Mother's request for a continuance?

2. Did the family court err by awarding Father primary custody of Children?

3. Did the family court err by awarding Father $15,000 in attorney's fees to be paid in ninety days?

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). "Our standard of review, therefore, is *de novo*." *Id.* "[W]hile this court has the authority to find facts in accordance with its own view of the preponderance of the evidence, 'we recognize the superior position of the family court . . . in making credibility determinations.'" *Lewis v. Lewis*, 400 S.C. 354, 361, 734 S.E.2d 322, 325 (Ct. App. 2012) (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655). "Further, de novo review does not relieve an appellant of his burden to 'demonstrate error in the family court's findings of fact.'" *Id.* (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655). "Consequently, the family court's factual findings will be affirmed unless [the] appellant satisfies

[1] *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992).
[2] *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (second alteration in original) (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655).

When "reviewing a family court's evidentiary or procedural rulings," appellate courts apply "an abuse of discretion standard." *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018). "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). A motion for a continuance is a procedural matter involving the progress of a case. *See* Rule 40(i)(1), SCRCP. "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

LAW/ANALYSIS

I. Continuance

Mother argues the family court abused its discretion when it denied her motion for a continuance. She contends she demonstrated good cause for the continuance because her attorney was disqualified from representing her four weeks prior to the final hearing and she had not had sufficient time to secure new counsel for the hearing. Mother asserts the family court never ruled on her motion to reconsider her attorney's disqualification, which prohibited her from obtaining new counsel for the hearing. We disagree.

"As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court." Rule 40(i)(1), SCRCP. "A failure to exercise discretion amounts to an abuse of that discretion." *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). "There is a long-standing rule in this State that one judge of the same court cannot overrule another." *Charleston Cty. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

> [T]he prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases where the right to do so has been

> reserved to the succeeding Judge, when it is allowed by rule or statute, or when the subsequent order does not substantially affect the ruling or decision represented by the previous order.

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 410, 581 S.E.2d 161, 168 (2003) (quoting *Dinkins v. Robbins*, 203 S.C. 199, 202, 26 S.E.2d 689, 690 (1943)). However, "an interlocutory order [that] merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered . . . by the court before entering a final order on the merits." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). "[A]n order [ruling upon] a motion for a continuance is an interlocutory order not affecting the merits [of a case]." *Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996). "In any case, we will not set aside a judge's ruling on a motion for a continuance unless it clearly appears there was an abuse of discretion *to the prejudice of the movant.*" *Id.*

In *Varn v. Green*, our supreme court reversed the circuit court's denial of a motion to continue the trial because the court failed to exercise its discretion. 50 S.C. 403, 27 S.E. 862 (1897). At trial, the appellant moved for a continuance because his two attorneys were sick: one was confined to bed rest and the other could barely speak. *Id.* at 403, 27 S.E. at 862. The trial court denied the motion stating "that under such circumstances it was his custom to require clients to employ other counsel." *Id.* Another attorney volunteered to represent the appellant, and the trial proceeded the next day. *Id.* On appeal, our supreme court found new counsel was unprepared, which prejudiced the appellant. *Id.* Our supreme court reversed the trial court, ordered a new trial, and held the appellant was entitled to a continuance. *Id.* Our supreme court explained "that the circuit judge abused his discretion in forcing the case to trial under the circumstances." *Id.*

Here, Mother requested a continuance at the beginning of the hearing, which the family court denied, relying on the order disqualifying Mother's counsel. The order stated Mother's attorney's disqualification "shall not" under any circumstances be a basis for continuing the trial. The family court stated *only* the administrative judge could continue this case.

We hold the family court judge who decided the disqualification could not usurp the discretion of the family court judge hearing the case at trial. First, Rule 40(i)(1), SCRCP, provides counsel may request a continuance "as actions are called." We hold the "as" in "as actions are called" means "at the time" actions are called, which indicates the discretion to grant a continuance rests with the judge currently hearing the case, and a preceding judge cannot usurp this discretion.

Second, an order granting or denying a continuance is an interlocutory order that does not affect the merits of a case; instead, a continuance delays the progress of a case and the discretion to grant or deny the motion vests with the judge with whom the case is before. *See Townsend*, 323 S.C. at 313, 474 S.E.2d at 427 (providing an order ruling upon on a motion for a continuance is an interlocutory order not affecting the merits of a case). Here, the substantial issue addressed in the order was counsel's disqualification, and the prospective denial of a motion for a continuance was therefore an interlocutory order. As such, this order could not prevent the family court from considering Mother's motion to continue. Therefore, the family court erred by determining it was bound by such order and abused its discretion by failing to exercise any discretion in ruling upon Mother's motion for a continuance. *See Samples*, 329 S.C. at 112, 495 S.E.2d at 216 ("A failure to exercise discretion amounts to an abuse of that discretion."); *Varn*, 50 S.C. at 403, 27 S.E. at 862 (holding the trial court erred by relying on custom rather than exercising its discretion in denying a motion for a continuance).

Nevertheless, we find Mother was not prejudiced because the family court reached the correct result when it denied Mother's request for a continuance. During the course of this litigation, Mother was represented by two attorneys: the first moved to be relieved because Mother failed to pay her attorney's fees, and Mother relieved the second attorney following the attorney's disqualification. Further, Mother signed a consent order seven days prior to the final hearing on the merits of the custody issue, which stated she would represent herself pro se if she were unable to find new counsel. Based on the foregoing, we find Mother failed to show "good and sufficient cause" to grant a continuance. *See* Rule 40(i)(1), SCRCP ("If good and sufficient cause for continuance is shown, the continuance may be granted by the court."). Thus, we affirm the family court's ruling denying Mother's request for a continuance. As to Mother's argument the family court failed to rule on her Rule 59(e) motion to reconsider the disqualification of her counsel, we find this issue is moot because she signed a consent order relieving counsel. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass

on moot and academic questions or make an adjudication where there remains no actual controversy.").

II. Child Custody

Mother argues the family court erred in awarding primary custody to Father. She asserts her move from Greenville to Columbia was a substantial change of circumstances warranting a review of Children's best interests. We disagree.

A parent's relocation from one city to another when a true joint physical custody arrangement is in place is an issue of first impression in this state. We hold, as other jurisdictions have, that when one parent relocates when there is joint physical and legal custody, we must first address a modification of primary physical custody. *See Potter v. Potter*, 119 P.3d 1246, 1249 (Nev. 2005) (providing a relocation from joint physical custody is first governed by the law modifying primary physical custody); *Voit v. Voit*, 721 A.2d 317, 326 (N.J. Super. Ct. Ch. Div. 1998) (holding when a father requested the right to remove his son to another state and a change in custody, the case was "first and foremost a request for modification of [custody]"); *Maynard v. McNett*, 710 N.W.2d 369, 376 (N.D. 2006) (providing that before a motion to relocate can be granted in joint custody cases, the court must "first determine[that] the best interests of the child require a change in primary custody to that parent").

Relocation from joint physical custody is inherently a change to primary physical custody because one parent must lose the primary physical custody that was granted in the Original Order. Thus, we must determine whether there was a substantial change of circumstances affecting Children's welfare that occurred after the entry of the Original Order. "The change of circumstances relied on for a change of custody must be such as would substantially affect the interest and welfare of the child." *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004). "A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change." *Id.* (quoting *Stutz v. Funderburk*, 272 S.C. 273, 278, 252 S.E.2d 32, 34 (1979)).

When a change in custody is sought, the moving party "must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of

the child." *Id.* "[A] change in custody analysis inevitably asks whether the transfer in custody is in the child's best interests." *Id.* "The presumption against relocation is a meaningless supposition to the extent a custodial parent's relocation would, in fact, be in the child's best interest." *Id.* Thus, the overriding consideration as in all child custody matters is the children's best interests. *Id.*

First, we agree with the family court's finding there was a substantial change in circumstances. Specifically, the parties were not amicable toward each other and were unable to continue joint physical custody because they no longer lived near each other. We note relocation of a custodial parent alone is not enough to constitute a substantial change in circumstances. *See Walrath v. Pope*, 384 S.C. 101, 105-06, 681 S.E.2d 602, 605 (Ct. App. 2009) ("A change in the custodial parent's residence is not in itself a substantial change in circumstances affecting the welfare of the children that justifies a change in custody."). However, because both parents had true joint physical custody when Mother moved to Columbia, the relocation rendered compliance with the Original Order impossible. Thus, Mother's relocation to Columbia was a substantial change in circumstances.

Next, we must determine what custodial arrangement is in Children's best interest. Although South Carolina courts have not outlined the criteria for evaluating a child's best interests when a custodial parent relocates, our supreme court has acknowledged several factors that other states have considered when making this determination. *See Latimer*, 360 S.C. at 382–83, 602 S.E.2d at 35–36. Our supreme court weighed the following factors from the New York Court of Appeals: (1) each parent's reason for seeking or opposing the relocation; (2) the relationship between the children and each parent; (3) the impact of the relocation on the quality of the children's future contact with the non-custodial parent; (4) the economic, emotional, and educational enhancements of the move; and (5) the feasibility of preserving the children's relationship with the non-custodial parent through visitation arrangements. *Id.* (citing *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996)). Our supreme court also weighed the following factors from the Pennsylvania Superior Court: (1) the economic and other potential advantages of the move; (2) the likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a whim of the custodial parent; (3) the motives behind the parent's reasons for seeking or opposing the move; and (4) the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between the non-

custodial parent and the children. *Id.* at 383, 602 S.E.2d at 36 (citing *Gancas v. Schultz*, 683 A.2d 1207, 1210 (Pa. Super. Ct. 1996)).

Applying these factors and considering Children's overall best interests, we affirm the family court's order granting Father primary physical custody.

Here, the record shows both parents had strong, loving relationships with Children. Although Mother's motive for relocating from Greenville to Columbia was to reap the financial benefit of a promotion at Walmart, we must acknowledge this benefit did not accrue. Mother blamed Father for the fact she no longer worked at Walmart; however, Mother's manager testified her employment was terminated because she chose not to return after taking medical leave and that Mother could be rehired at Walmart. Thus, Mother failed to show Children would see the economic benefit, which was her basis for the move.

The GAL expressed concern that Mother was argumentative, had overnight visitation with her boyfriend in violation of the Original Order, and changed Children's daycares five times since the Original Order. We find it especially troubling that Mother was willing to violate the family court orders, failed to inform Father of Son's medication, and failed to provide that medication when Son was in Father's custody. We agree with the family court that Mother's decision to date following the divorce should be given no weight. Nevertheless, the record indicates Mother placed her personal interests ahead of Children's by choosing to spend time with her boyfriend during specific instances when Children needed her. We find these acts were not in Children's best interest.

Moreover, Drake testified she believed placement with Father was in Children's best interest because Mother was unable to discipline them. Grandfather also testified Mother had issues with Children's discipline, and he frequently had to act as Children's caregiver when Mother had custody of them. We appreciate our de novo review allows us to determine the weight to give to this testimony; however, we recognize the family court was in a superior position to assess the witnesses' credibility. *See Stoney*, 422 S.C. at 595, 813 S.E.2d at 487 (recognizing "a trial judge is in a superior position to assess witness credibility"). We agree with the family court that Father's willingness to put aside his differences with Grandparents for the benefit of Children was commendable.

We find Children's move from Greenville would significantly impact Father's relationship with them because he previously benefitted from week-to-week custody; however, we note this impact would be true for either parent. Although we agree with the family court's concerns regarding Father living in a one-bedroom apartment, we also agree that Father's testimony that he was on a waiting list for a three-bedroom apartment was credible.

As to Mother's argument the family court failed to consider she financially supported Children, the Original Order stated neither parent was to pay child support because they had week-to-week, divided physical custody, and Mother admitted she made more money than Father. Finally, as to her argument the family court failed to consider maternal grandmother's bonding with Children, we find Children and maternal grandmother enjoy a positive relationship; however, this bonding did not outweigh the other factors presented at the hearing.

After considering all of the evidence, we find granting Father primary physical custody was in Children's best interests; thus, we affirm the family court's order granting Father primary custody.

III. Attorney's Fees

Mother argues the family court abused its discretion in awarding Father attorney's fees. She asserts the family court failed to discuss any of the *Glasscock* factors in determining whether to award Father attorney's fees. We find Mother's arguments are unpreserved for appellate review.

In *Buist v. Buist*, our supreme court held that raising an alleged error regarding the award of attorney's fees for the first time in a Rule 59(e) motion was sufficient to preserve the issue for appellate review. 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014).

> A failure to object to the affidavit only indicates the party's acceptance of the affidavit as a reasonable representation of the amount of fees the opposing party owes his or her attorney, thus obviating any need for the opposing party to produce additional evidence or testimony on the matter. The family court must still apply the *Glasscock* or *E.D.M.* factors to determine

> whether to award a fee, as well as the amount of the fee to award.

Id. "If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal." *Id.* at 575, 766 S.E.2d at 384.

Here, Mother challenged attorney's fees for the first time in her Rule 59(e) motion. Ordinarily, this would be sufficient to preserve the issue for review, but here, the family court dismissed Mother's Rule 59(e) motion as untimely and never ruled on her attorney's fees argument. Mother's failure to challenge the family court's dismissal of her Rule 59(e) motion on appeal renders her argument regarding attorney's fees unpreserved. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Therefore, we affirm the family court's award of $15,000 in attorney's fees to Father.

CONCLUSION

For the foregoing reasons, we affirm the family court's order denying Mother's motion for a continuance, granting Father primary physical custody of Children, and ordering Mother to pay $15,000 in attorney's fees. According, the family court's order is

AFFIRMED.[3]

HILL and HEWITT, JJ., concur.

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