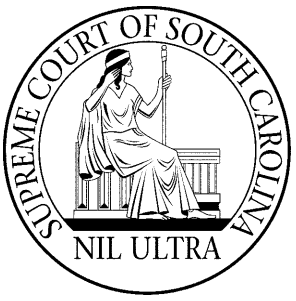

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 26, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27545 - The State v. Christopher Broadnax	Pending
27546 - The State v. Rushan Counts	Pending
27552 - The State v. Robert Palmer	Pending
27552 - The State v. Julia Gorman	Pending
27556 - Latoya Brown v. Dick Smith Nissan	Pending
27558 - The State v. Isaac Anderson	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Denied 08/21/15
5322-State v. Daniel D. Griffin	Denied 08/19/15
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Denied 08/20/15
5328-Matthew S. McAlhaney v. Richard K. McElveen	Denied 08/20/15
5331-State v. Thomas Stewart	Denied 08/20/15
5332-State v. Kareem S. Harry	Pending
5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Philip Flexon v. PHC-Jasper, Inc.	Pending
2015-UP-169-Hollander v. The Irrevocable Trust Est. by James Brown	Denied 08/20/15
2015-UP-245-Melissa Jean Marks v. Old South Mortgage	Pending
2015-UP-266-State v. Gary Eugene Lott	Denied 08/20/15
2015-UP-273-State v. Bryan M. Holder	Denied 08/20/15
2015-UP-275-State v. David Eugene Rosier, Jr.	Pending
2015-UP-279-Mary Ruff v. Samuel Nunez	Pending
2015-UP-280-State v. Calvin J. Pompey	Denied 08/20/15
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Denied 08/20/15
2015-UP-301-State v. William J. Thomas, Jr.	Denied 08/20/15

2015-UP-303-Charleston Cty. Assessor v. LMP	Denied	08/20/15
2015-UP-304-Robert K. Marshall v. City of Rock Hill	Denied	08/20/15
2015-UP-305-Tanya Bennet v. Lexington Medical Center	Denied	08/19/15
2015-UP-306-Ned Gregory v. Howell Jackson Gregory	Denied	08/20/15
2015-UP-307-Allcare Medical v. Ahava Hospice	Denied	08/20/15
2015-UP-310-State v. Christopher Miller	Denied	08/20/15
2015-UP-311-State v. Marty Baggett	Pending	
2015-UP-313-John T. Lucas v. The Bristol Condominium	Denied	08/20/15
2015-UP-314-Student No. 1 John Doe v. Board of Trustees	Denied	08/20/15
2015-UP-316-S.C. Second Injury Fund v. Sompo Japan Ins.	Denied	08/20/15
2015-UP-320-American Community Bank v. Michael R. Brown	Pending	
2015-UP-325-Tilbros, Inc. v. Cherokee County	Denied	08/20/15
2015-UP-327-State v. Shawn Justin Burris	Denied	08/20/15
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending	
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Denied	08/20/15
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending	
2015-UP-339-LeAndra Lewis v. L.B. Dynasty d/b/a Boom Boom Room	Pending	
2015-UP-344-Robert Duncan McCall v. State	Denied	08/20/15
2015-UP-345-State v. Steve Young	Denied	08/20/15
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending	
2015-UP-351-Elite Construction v. Doris Tummillo	Pending	

2015-UP-353-Selene RMOF v. Melissa Furmanchik	Pending
2015-UP-354-In re: Estate of Sylvia J. Reagan (Shelly v. Becker)	Denied 08/19/15
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-358-Thomas Osborne v. State	Denied 08/20/15
2015-UP-359-In the matter of the Estate of Alice Shaw-Baker	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Denied 08/20/15
2015-UP-364-Andrew Ballard v. Tim Roberson	Granted 08/26/15
2015-UP-365-State v. Ahmad Jamal Wilkins	Denied 08/19/15
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-372-State v. Sheldon Lamar Kelly	Pending
2015-UP-376-Ron Orlosky v. The Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grover Property Owners	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Denied 08/20/15
2015-UP-388-Joann Wright v. William Enos	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5231-Centennial Casualty v. Western Surety	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5278-State v. Daniel D'Angelo Jackson	Pending

5279-Stephen Brock v. Town of Mt. Pleasant	Granted 08/19/15
5286-State v. Graham F. Douglas	Pending
5291-Samuel Rose v. JJS Trucking	Denied 08/20/15
5297-Trident Medical Center v. SCDHEC	Pending
5298-George Thomas v. 5 Star	Pending
5299-SC Public Interest Foundation v. SCDOT	Pending
5301-State v. Andrew T. Looper	Pending
5302-State v. Marvin B. Green	Pending
5303-State v. Conrad Lamont Slocumb	Pending
5307-George Ferguson v. Amerco/U-Haul	Pending
5308-Henton Clemmons v. Lowe's Home Centers	Pending
5309-Bluffton Towne Center v. Beth Ann Gilleland-Prince	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5313-State v. Raheem D. King	Pending
5314-State v. Walter M. Bash	Pending
5315-Paige Johnson v. Sam English Grading	Pending
5317-Michael Gonzales v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-430-Cashman Properties v. WNL Properties	Pending
2014-UP-436-Jekeithlyn Ross v. Jimmy Ross	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending

2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-041-Nathalie Davaut v. USC	Pending
2015-UP-042-Yancey Env. v. Richardson Plowden	Pending
2015-UP-050-Puniyani v. Avni Grocers	Denied 08/20/15
2015-UP-051-Chaudhari v. S.C. Uninsured Employer's Fund	Denied 08/20/15
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending
2015-UP-065-Glenda Couram v. Lula Davis	Pending
2015-UP-066-State v. James Scofield	Denied 08/20/15
2015-UP-067-Ex parte: Tony Megna	Pending
2015-UP-068-Joseph Mickle v. Boyd Brothers	Denied 08/20/15
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-074-State v. Akeem Smith	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-102-SCDCA v. Entera Holdings	Pending
2015-UP-107-Roger R. Riemann v. Palmetto Gems	Pending
2015-UP-110-Deutsche Bank v. Cora B. Wilks	Pending
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-115-State v. William Pou	Pending
2015-UP-119-Denica Powell v. Petsmart	Pending

2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-127-T.B. Patterson v. Justo Ortega	Denied 08/20/15
2015-UP-138-Kennedy Funding, Inc. v. Pawleys Island North	Pending
2015-UP-139-Jane Doe v. Boy Scout Troop 292	Pending
2015-UP-141-Gregory Ulbrich v. Richard Ulbrich	Pending
2015-UP-146-Joseph Sun v. Olesya Matyushevsky	Pending
2015-UP-152-Capital Bank v. Charles Moore	Pending
2015-UP-155-Ashlie Outing v. Velmetria Weeks	Pending
2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-176-Charles Ray Dean v. State	Pending
2015-UP-178-State v. Antwon M. Baker, Jr.	Pending
2015-UP-191-Carmen Latrice Rice v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-203-The Callawassie Island v. Arthur Applegate	Pending
2015-UP-204-Robert Spigner v. SCDPPPS	Pending
2015-UP-205-Tri-County Dev. v. Chris Pierce (2)	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-212-State v. Jabari Linnen	Pending

2015-UP-228-State v. John Edward Haynes	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-249-Elizabeth Crotty v. Windjammer Village	Pending
2015-UP-256-State v. John F. Kennedy	Pending
2015-UP-259-Danny Abrams v. City of Newberry	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-281-SCDSS v. Trilicia White	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas Ryan Phillips, Respondent

Appellate Case No. 2015-000969

Opinion No. 27566
Heard August 5, 2015 – Filed August 26, 2015

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey M. Watson, III, Esquire, of Ballard & Watson, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School, Trust Account School and Advertising School within six (6) months of the imposition of a sanction. We accept the Agreement, issue a public reprimand, and impose conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent admits he engaged in a sexual relationship with Client while representing her in a divorce proceeding. Respondent maintains, however, he gave Client competent and diligent representation and the relationship did not impact the representation. Respondent counseled Client as to her options and the possible consequences and risks associated with the options. Client was adamant in her demands that her husband only have restricted visitation with their child and that she wanted to be divorced from her husband.

The divorce action was filed on Client's behalf alleging husband's habitual drunkenness as grounds for the divorce. The divorce was granted to Client on those grounds. Husband was granted very restricted visitation with the child based on his continued alcohol abuse. Alimony was not sought by Client as she earned considerably more than her husband. Alimony was barred as to the husband as he could not deny his contribution to the breakup of the marriage.

Respondent and Client ended the physical aspects of their relationship not long after the final decree was issued in July 2011. Respondent and Client communicated after the physical relationship ended as respondent answered Client's questions regarding the wording or application of the final divorce decree.

Sometime later, Client, represented by new counsel, brought another action against her now ex-husband to terminate his parental rights based on his continued abuse of alcohol and the threat he posed to the child. Although he did not represent Client, respondent admittedly became involved in the case when Client was presented with a crisis[1] and Client's new counsel was out of town and unavailable. Respondent's only involvement in this action consisted of counseling Client during the crisis.

ODC asserts respondent fully cooperated in its investigation of this matter, that he showed genuine remorse and fully admitted responsibility for his actions, and that his representation of Client was not adversely affected by his misconduct.

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[1] The crisis occurred when Client's ex-husband made persistent calls to Client threatening to injure himself over her latest domestic action.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.8(m) (lawyer shall not have sexual relations with client when client is in vulnerable condition or otherwise subject to control or undue influence of lawyer, when such relations could have harmful or prejudicial effect upon the interests of client, or when sexual relations might adversely affect lawyer's representation of client) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(A)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within six (6) months of the date of this opinion, respondent shall attend and complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School and, no later than ten (10) days after the completion of the programs, submit proof of completion to the Commission.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bonnie L. McKinney, f/k/a Bonnie L. Pedery,
Respondent,

v.

Frank J. Pedery, Petitioner.

Appellate Case No. 2013-002601

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 27567
Heard May 7, 2015 – Filed August 26, 2015

REVERSED AND REMANDED

Kenneth C. Porter, of Porter & Rosenfeld, of Greenville, for Petitioner.

Kim R. Varner, of Varner & Segura, and J. Falkner Wilkes, both of Greenville, for Respondent .

CHIEF JUSTICE TOAL: Petitioner Frank J. Pedery argues the court of appeals erred in affirming the family court's termination of Respondent Bonnie

McKinney's alimony obligation to him and the family court's failure to award Pedery attorney's fees. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Pedery and McKinney divorced on May 3, 2006. In the family court's final order granting the divorce, the family court approved an agreement entered into by Pedery and McKinney, wherein McKinney agreed to pay Pedery permanent periodic alimony of $1,500 per month. In June 2009, McKinney sought a reduction or termination of her alimony obligation based on Pedery's continued cohabitation with his paramour, Cynthia Hamby, and a substantial change of circumstances. *See* S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2012) (providing that periodic alimony terminates upon the "continued cohabitation of the supported spouse" and is "terminable and modifiable based upon changed circumstances occurring in the future"). According to McKinney, a decrease in her income and deterioration of her health constituted the substantial change in circumstances.

The family court held a hearing on May 11, 2011. At the hearing, McKinney called a private investigator, Tim Greaves, as a witness to testify in support of her allegation that Pedery was cohabitating with Hamby. Greaves testified that he monitored Pedery's house in Mauldin, South Carolina, daily from January until June, 2009. According to Greaves, during that time, Hamby typically stayed at Pedery's house from Wednesday afternoon until Monday morning of each week. Greaves testified that on Monday mornings, Hamby commuted to Duncan, South Carolina, where she worked as a nanny for her grandchildren until Wednesday afternoons.

Greaves testified that inside Pedery's house,[1] Hamby's toiletries and "feminine items" such as curling irons occupied the bathroom, and the master bedroom closet held women's clothing.[2] Further, Greaves observed Pedery and Hamby buying groceries together, and it appeared that Pedery paid for the groceries.

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[1] Greaves gained access to the house when Pedery listed the house for sale.

[2] Pedery acknowledged that at least some of the items belonged to Hamby.

Pedery testified that he began a relationship with Hamby in 2007 or 2008. When Pedery met Hamby, she lived with her son in Duncan, and also worked there as a nanny for her grandchildren, as she still did at the time of the hearing. Pedery testified that Hamby began spending nights with him approximately six or eight months after they began seeing each other. According to Pedery, Hamby "lives" with her son, where she has a room of her own, and only "visits" Pedery at his house. Pedery stated that Hamby leaves her possessions in both places, and when she leaves Pedery's house to go to her son's house, she packs a "little overnight bag" containing underwear.

At the hearing, McKinney offered the testimony of her manager at work—Franklin Sharp, as well as that of an employee of a direct competitor—William Hall—to corroborate her claim that her alimony should be reduced or terminated as a result of her decrease in income. Hall, the direct competitor's employee, testified that beginning in 2008, the competition in their field of work—insuring trucks—increased, and forced businesses to lower insurance rates. Although Sharp did not testify as to McKinney's salary, he testified that because of the increase in competition, his own salary had decreased by fifty percent in the previous three or four years. McKinney testified that her income had decreased from $230,121 in 2007 to $119,605 in 2010. McKinney further stated that her health had declined since the divorce, and that she suffers from high blood pressure, diabetes, arthritis, osteoporosis, and lupus.

On August 26, 2011, the family court issued an order terminating McKinney's alimony obligation based on its finding that Pedery "continuously resided with [Hamby] for not only in excess of ninety days but on a continuous basis for an extended period of time . . . ." As for Hamby's absences from Pedery's house, the family court found that they "were a requirement of [her] job and that [Pedery] was not attempting to use them to circumvent the intent of the law . . . ." Therefore, the family court found that "any absences from her residence is in the line of her job and do not constitute a stop of the residency . . . ." Because McKinney prevailed, the family court found that neither party was entitled to attorney's fees.

The court of appeals affirmed the family court's order. *McKinney v. Pedery*, 406 S.C. 1, 12, 749 S.E.2d 119, 125 (Ct. App. 2013). The court of appeals found that Pedery and Hamby "shared a home on a continuous and uninterrupted basis for substantially longer than ninety days," and then held that "Hamby's departure was

more akin to a temporary absence for out-of-town travel than it was to routine separation based on separate residences." *Id.* at 8, 749 S.E.2d at 123. The court of appeals reasoned that

> to conclude the parties did not continuously cohabitate for at least ninety consecutive days because of Hamby's routine travel to care for her grandchildren in Duncan would run afoul of the legislative intent underpinning this section. To interpret this section as Pedery advances would allow *any* break in the ninety days to defeat a continuous cohabitation argument, rendering this section virtually unenforceable. For example, any time a paramour and supported spouse are briefly away from each other, whether it be for an out-of-town work trip, an overnight hospital stay, or for a weekend vacation, the family court would be prohibited from applying this section. We do not believe the Legislature intended for such a result.

Id. at 10–11, 749 S.E.2d at 124 (internal citations omitted).

Therefore, the court found that Pedery and Hamby's living arrangements amounted to "continued cohabitation" under section 20-3-130(B) of the South Carolina Code. *Id.* at 11, 749 S.E.2d at 125. Further, the court of appeals affirmed the family court's decision to deny Pedery's request for attorney's fees. *Id.* at 11–12, 749 S.E.2d at 125.

Judge Konduros dissented on the ground that the statutory requirements of section 20-3-130(B) were not satisfied under the plain language of the statute. *Id.* at 12–13, 749 S.E.2d at 125–26 (Konduros, J., dissenting). Judge Konduros pointed out that Hamby lived with her son prior to becoming romantically involved with Pedery and still had her own room there, and she spent approximately four to five nights per week at Pedery's house—a course of conduct which was a regular occurrence every week. *Id.* (Konduros, J., dissenting). In Judge Konduros's view, this evidence did not support a finding that Pedery and Hamby continually resided together for at least ninety consecutive days or that they separated to avoid the termination of his alimony. *Id.* at 13, 749 S.E.2d at 126 (Konduros, J., dissenting).

This Court granted Pedery's petition for writ of certiorari to review the court of appeals' opinion pursuant to Rule 242, SCACR.

ISSUES PRESENTED

I. Whether the court of appeals erred in affirming the family court's termination of Pedery's alimony based on its finding that Pedery continuously cohabitated with his paramour under section 20-3-130(B) of the South Carolina Code?

II. Whether the court of appeals erred in affirming the family court's decision to decline to award Pedery attorney's fees?

STANDARD OF REVIEW

"In appeals from the family court, this Court reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414–15, 709 S.E.2d 666, 667 (2011). To that end, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Dickert v. Dickert*, 387 S.C. 1, 5–6, 691 S.E.2d 448, 450 (2010). "'However, this broad scope of review does not require this Court to disregard the findings of the family court,'" as the family court "was in a superior position to make credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 384–85, 709 S.E.2d 650, 651–52 (2011) (quoting *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)).

"Questions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion." *Eason*, 384 S.C. at 479, 682 S.E.2d at 807 (citing *Degenhart v. Burriss*, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004)). An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support. *Id.*

LAW/ANALYSIS

I. Section 20-3-130(B)(1)

Where the family court has previously awarded periodic alimony, the periodic alimony terminates "on the remarriage or continued cohabitation of the supported spouse" and is "terminable and modifiable based upon changed circumstances occurring in the future." S.C. Code Ann. § 20-3-130(B)(1). The family court may terminate or modify the award based upon changed

circumstances when there is a substantial or material change in circumstances, such as changes in a party's health or income. S.C. Code Ann. § 20-3-130(B)(1); *Thornton v. Thornton*, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997).

According to McKinney, her periodic alimony obligation to Pedery should be terminated based upon both Pedery's continued cohabitation with Hamby as well as a change in McKinney's circumstances.

a. Continuous Cohabitation

i. Ninety or More Consecutive Days

Pedery argues that McKinney failed to meet her burden of proof with regard to her argument that Pedery continuously cohabitated with Hamby for purposes of section 20-3-130(B). We agree.

Under section 20-3-130(B)(1) of the South Carolina Code, periodic alimony terminates on the "continued cohabitation of the supported spouse." S.C. Code Ann. § 20-3-130(B)(1). The party seeking modification has the burden to show by the preponderance of the evidence that a change has occurred. *Miles v. Miles*, 393 S.C. 111, 120, 711 S.E.2d 880, 885 (2011); *Cartee v. Cartee*, 295 S.C. 103, 104, 366 S.E.2d 269, 269 (Ct. App. 1988) (quoting *Boney v. Boney*, 289 S.C. 596, 597, 347 S.E.2d 890, 891 (Ct. App. 1986)); *see Feldman v. Feldman*, 380 S.C. 538, 670 S.E.2d 669 (Ct. App. 2008) (finding that testimony produced at trial supported the family court's conclusion that the husband failed to carry his burden of proof that the wife continuously cohabitated with her boyfriend under section 20-3-130(B)).

For purposes of section 20-3-130, "continued cohabitation means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days." S.C. Code Ann. § 20-3-130(B). We further defined "continuous cohabitation" in *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007), stating that within this context, the term "resides with" "sets forth a requirement that the supported spouse *live under the same roof* as the person with whom they are romantically involved for at least ninety consecutive days." *Id*. at 89, 650 S.E.2d at 472 (emphasis added). As we stated, "[a]ny other interpretation essentially takes the 'cohabitation' out of 'continued cohabitation.'" *Id.*

This Court and the court of appeals have applied *Strickland's* rationale in several cases. *See Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (2009); *Biggins v. Burdette*, 392 S.C. 241, 708 S.E.2d 237 (Ct. App. 2011); *Fiddie v. Fiddie*, 384 S.C. 120, 681 S.E.2d 42 (Ct. App. 2009); *Feldman*, 380 S.C. at 538; 670 S.E.2d at 669; *Semken v. Semken*, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008).

These cases demonstrate that since *Strickland*, this Court and the court of appeals have strictly interpreted the language of section 20-3-130(B). For example, in *Biggins v. Burdette*, the wife and her boyfriend spent approximately sixty nights together during their relationship; however the wife spent the night apart from him on several occasions, including when various family members visited and when she traveled out of town to care for her ailing mother. 392 S.C. at 243, 708 S.E.2d at 238. The court of appeals affirmed the family court's denial of the husband's motion to terminate alimony based on continued cohabitation because: the wife and her boyfriend testified that they did not spend ninety consecutive nights together; the boyfriend maintained his own residence where he kept most of his personal items; and the private investigator confirmed that they merely spent the night together on a recurring basis,. *Id.* at 245, 708 S.E.2d at 239; *see also Fiddie*, 384 S.C. at 124, 681 S.E.2d at 44 (upholding the family court's refusal to terminate a husband's alimony obligation where the husband contended that the wife continuously cohabitated with a male friend, but the wife maintained that she spent time with a friend at least twice a month and with her sister once a month so that she did not stay full-time with her male friend, and thus, "wear out her welcome").

Similarly, in *Eason*, the husband argued that the family court erred in not terminating the wife's alimony based on continuous cohabitation with her boyfriend. 384 S.C. at 482, 682 S.E.2d at 808. While the wife and her boyfriend admitted that they had lived together at times, they never cohabitated for more than two to four weeks at a time—a contention supported by other testimony at trial. *Id.* Therefore, citing the language in *Strickland*, we affirmed the family court's finding that the wife was not barred from receiving alimony based on continuous cohabitation with her boyfriend. 384 S.C. at 482, 682 S.E.2d at 808.

Semken v. Semken involves facts similar to the present case. In *Semken*, the husband sought to terminate his obligation to pay permanent periodic alimony because he claimed that the wife had resided with her boyfriend for more than ninety consecutive days. 379 S.C. at 73, 664 S.E.2d at 495. In that case, the wife

lived in one of her boyfriend's residences, paying him $500 per month in rent. *Id.* The boyfriend stored some of his belongings in the house and kept a car in the garage. *Id.* Although the family court found that the boyfriend maintained two residences—one of which was where the wife resided—and found that the wife and boyfriend had not spent every night together for more than ninety consecutive days, the family court terminated the husband's alimony obligation. *See id.* at 77, 664 S.E.2d at 497. The family court reasoned that the wife and her boyfriend resided together because both claimed the same home as a residence at the same time. *See id.*

The court of appeals reversed, finding that while the wife and her boyfriend were romantically involved, they did not engage in continuous cohabitation as defined by *Strickland*. *Id.* at 77–78, 664 S.E.2d at 497. According to the court of appeals, the evidence showed that the boyfriend did not live under the same roof as the wife for ninety consecutive days, and therefore, the wife's relationship with her boyfriend did not amount to "continuous cohabitation" under *Strickland*. *See id.*

Here, because McKinney sought termination of her alimony obligation to Pedery, she bore the burden to show by a preponderance of the evidence that Hamby resided with Pedery for at least ninety days. *See Miles*, 393 S.C. at 120, 711 S.E.2d at 885; *Cartee*, 295 S.C. at 104, 366 S.E.2d at 269 (quoting *Boney*, 289 S.C. at 597, 347 S.E.2d at 891). We find that McKinney did not satisfy that burden; accordingly, the family court should have denied her motion for termination of her alimony obligation.

We do not deny that the facts indicate that Pedery and Hamby's living situation is a permanent arrangement of a romantic nature. Rather, we focus on the specific requirement under the plain language of section 20-3-130(B). If the statute merely required the supported spouse to "reside with" his paramour, then termination of McKinney's alimony obligation would be proper. However, the statute mandates cohabitation for ninety *consecutive* days.

The evidence presented at the hearing indicates that Hamby maintained two residences during the time in question. Before she began a relationship with Pedery, she lived in Duncan with her son, and apparently maintained a residence there even after she began seeing Pedery. For us to conclude that Hamby's only actual residence was with Pedery—arguably leading to the conclusion that she resided with Pedery for ninety or more days for purposes of section 20-3-130(B)—

McKinney would have needed to show that Hamby had completely relocated from her son's house in Duncan to Pedery's house. McKinney presented no such evidence. Instead, according to Pedery's testimony, Hamby maintained enough possessions in Duncan such that she took only an overnight bag with her when she went from Pedery's house to her son's house in Duncan.

During the time in question, Hamby lived at her son's house in Duncan approximately two days of every week, which means that under a literal interpretation of the statute, Pedery and Hamby could not have lived "under the same roof" for ninety consecutive days. *See Strickland*, 375 S.C. at 89, 650 S.E.2d at 472. Like the court of appeals found in *Semken*, the statute's ninety-day requirement—as interpreted in *Strickland*—controls any claim that residence was established in a particular place.

The court of appeals essentially proclaimed a new definition under the statute when it considered whether Pedery and Hamby "shared a home on a continuous and uninterrupted basis for substantially longer than ninety days." *See McKinney*, 406 S.C. at 9, 749 S.E.2d at 123. This definition is not consistent with *Strickland* and the plain language of section 20-3-130(B). Additionally, the court of appeals did not support its "holding" that Hamby's weekly departure from Pedery's house "was more akin to a temporary absence for out-of-town travel than it was to routine separation based on separate residences" with any authority, and this analysis does not further the inquiry required by the statutory test. *See id.* at 8, 749 S.E.2d at 123. Similarly, McKinney's interpretation of the statute would remove the word "consecutive" from the statute and would classify Hamby's time away from Pedery's house each week as analogous to work-related travel. However, neither McKinney's nor the court of appeals' interpretation is faithful to the language of the statute.

If we were to uphold the court of appeals' analysis, our decision would render section 20-3-130(B) a nullity.[3] The language of the statute is clear and

[3] We agree with the concurrence that the plain language of the statute makes it almost impossible for a family court to find continued cohabitation for purposes of section 20-3-130(B) and therefore terminate a supported spouse's alimony award. Regardless, the language of the statute is a choice made by the Legislature and creates a result to which we are confined, as the plain meaning of section 20-3-130(B) cannot accord with the so-called "common sense application" of the statute.

unambiguous. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citations omitted)). Therefore, because the ninety-day requirement under the plain language of the statute is not satisfied, we reverse the court of appeals' decision upholding the family court's termination of McKinney's alimony obligation.

ii. Exception to Section 20-3-130(B)

The family court may also find "that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement." S.C. Code Ann. § 20-3-130(B).[4]

The family court found that Hamby's absences from Pedery's house were "being used deliberately and intentionally because there was never any removal of her property to the other location and she returned on a regular basis . . . ." Similarly, the family court stated that "any absence[] from [Pedery's house] is in the line of her job and do[es] not constitute a stop in her residence and that the use of this at trial is clearly to circumvent the statute."

In contrast, we find that McKinney presented no evidence that Pedery and Hamby periodically stayed apart from each other before the litigation began[5] to circumvent the ninety-day requirement of section 20-3-130(B). According to Pedery's testimony, Hamby worked as a nanny for her grandchildren and lived with

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[4] Because the court of appeals found that McKinney established that Hamby and Pedery continuously cohabitated for longer than ninety days, it did not reach this issue. *See McKinney*, 406 S.C. at 9, 749 S.E.2d at 123.

[5] Pedery acknowledged that after the litigation began, Hamby began staying at his house only on weekend nights.

her son in Duncan prior to her relationship with Pedery,[6] indicating that Hamby's travel to Duncan was unrelated to the ninety-day requirement of section 20-3-130(B). Therefore, we find that Pedery and Hamby's weekly separation as a result of her work in Duncan did not amount to a separation intended to circumvent the ninety-day requirement of section 20-3-130(B).

b. Change in Circumstances - Two Issue Rule

According to McKinney, the family court found that she suffered a substantial change in circumstances because of a decrease in her earnings and a decline in her health. Therefore, McKinney contends that because Pedery did not appeal the family court's finding on this issue, under the two issue rule, we should affirm the family court's termination of her alimony obligation because the change in circumstances is an additional sustaining ground for the family court's termination of alimony. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). We disagree.

As the court of appeals recognized, the family court did not find that McKinney's changed circumstances supported its decision terminating alimony, and therefore, did not rule on this issue. Instead, the family court merely made factual findings summarizing the testimony presented at the hearing regarding the economic downturn that affected McKinney's change in income and McKinney's health problems.

We find that the testimony in the record concerning McKinney's changed income and health issues could support, at least, a reduction in McKinney's

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[6] While the family court found that Pedery's testimony was not wholly credible, the family court based that finding on the fact that "he did not bring [Hamby] to the hearing to substantiate any of the allegations"—reasoning which we find unpersuasive. Nevertheless, there was no testimony to refute Pedery's testimony on this point, and Greaves actually observed Hamby caring for children while she was in Duncan.

alimony obligation. Therefore we remand the case for the family court to determine whether McKinney's alimony obligation should be reduced or terminated on the basis of a change in circumstances in her health and income.

II. Attorney's Fees

Finally, Pedery argues that if we reverse the court of appeals' decision, we should hold that the family court erred in failing to award Pedery attorney's fees.

In considering whether to award attorney's fees, a family court should consider the following factors: (1) the party's ability to pay his or her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) (citation omitted). The family court's decision regarding attorney's fees and costs is a discretionary matter not to be overturned absent an abuse of discretion. *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (citations omitted).

"Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered." *Griffith v. Griffith*, 332 S.C. 630, 646–47, 506 S.E.2d 526, 534–35 (Ct. App. 1998) (citing Rule 26(a), SCRFC; *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993); *Atkinson v. Atkinson*, 279 S.C. 454, 309 S.E.2d 14 (Ct. App. 1983) (per curiam)). If, on appeal, there is inadequate evidentiary support for each of the factors supporting the family court's decision, the appellate court should reverse and remand so the trial court may make specific findings of fact. *Id.* (citing *Blumberg*, 310 S.C. at 492, 427 S.E.2d at 659). However, when a family court issues an order in violation of Rule 26(a), SCRFC, the appellate court "'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" *Id.* (quoting *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)).

Because we reverse and remand the court of appeals' decision on the first issue, we also remand the attorney's fees issue for the family court to make specific findings of fact upon its decision on McKinney's alimony obligation. *See Griffith*, 332 S.C. at 646–47, 506 S.E.2d at 534–35 (citations omitted).

CONCLUSION

Based on the foregoing, we reverse the court of appeals' decision and remand to the family court.

REVERSED AND REMANDED.

PLEICONES and BEATTY, JJ., concur. HEARN, J., concurring in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE HEARN: I concur in the result reached by the majority and in the reasoning to support it. I write separately to express my disagreement with one statement in the majority opinion.

I am cognizant of our rules of statutory construction and agree with the majority that we are confined to a plain-meaning of the statute. However, I part company with the majority in its conclusion that, "If we were to uphold the court of appeals' analysis, our decision would render section 20-3-130(B) a nullity." I find this criticism unwarranted, as I believe the opposite is true. In my opinion, the family court and court of appeals' interpretation attempts to reconcile the language of the statute with the realities of our mobile society. Few people live under the same roof for ninety consecutive days; indeed, I would venture to say that because of their work schedule, none of the members of this Court could be considered to have resided with his or her spouse for ninety consecutive days. While I cannot say that our construction is absurd so as to allow this Court to ignore the plain language, I nevertheless recognize that the practical application of the statute distorts the intent of the General Assembly. As the statute is written, it is virtually impossible to terminate any award of alimony as a result of the continued cohabitation of the supported spouse. Therefore, although I concur with the majority's analysis and ultimate conclusion, I disagree that the court of appeals' common-sense application of the statute would render it a nullity.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2015-001108

ORDER

The Chief Justice's Commission on the Profession has proposed several amendments to the South Carolina Appellate Court Rules to address issues with lawyers who are suffering from cognitive impairments. The goal of these amendments is to clarify the duties and responsibilities of lawyers and judges who notice problems, provide compassionate assistance to lawyers in need, and protect the public.

Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt Rule 428, SCACR, and amend Rule 5.1, RPC, Rule 407, SCACR, and Canon 3, CJC, Rule 501, SCACR, as set forth in the attachment to this Order. These amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
August 24, 2015

Rule 428, SCACR, is adopted and provides:

RULE 428
INTERVENTION TO PROTECT CLIENTS

(a) The Executive Director of the South Carolina Bar, upon receipt of a written report or referral pursuant to Rule 5.1, RPC, Rule 407, SCACR; pursuant to Canon 3, CJC, Rule 501, SCACR; or from a member of the South Carolina Bar expressing concern about cognitive impairment of another lawyer shall take such actions as he or she deems advisable. Upon the Executive Director's recommendation, the President of the Bar may appoint one or more Attorneys to Intervene. The Attorneys to Intervene shall attempt to meet with the lawyer alleged to be impaired and, if in the best interest of both the lawyer and the public, propose a course of conduct to be followed.

(b) The Attorneys to Intervene shall promptly report to the Executive Director whether any actions were recommended to the lawyer, whether the lawyer agreed to any recommendations, and whether further action is recommended. Further action may include action under Rule 28, RLDE, Rule 413, SCACR. In the event a referral to the Commission on Lawyer Conduct is recommended by the Attorneys to Intervene, that referral shall be made by them promptly.

(c) The Attorneys to Intervene, the Executive Director of the South Carolina Bar, and the President of the Bar shall be immune from civil action for their actions taken in good faith under this rule. Information received by those Attorneys shall not be forwarded to the Office of Disciplinary Counsel in the event that a referral is not recommended under paragraph (b).

Rule 5.1(d), RPC, Rule 407, SCACR, and Comment 9 to the Rule are amended to provide:

> (d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer's cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.
>
> . . .
>
> [9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(b) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

Canon 3, CJC, Rule 501, SCACR, is amended to add section (G) and the following Commentary:

G. Disability and Impairment. A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to an appropriate lawyer or judicial assistance program.

Commentary:

Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program, such as Lawyers Helping Lawyers or the South Carolina Bar in accordance with Rule 428, SCACR.

Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate disciplinary authority. See Canon 3(D)(1) and (2).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jacklyn Donevant, Respondent,

v.

Town of Surfside Beach, Appellant.

Appellate Case No. 2014-000457

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

Opinion No. 5345
Heard June 1, 2015 – Filed August 26, 2015

AFFIRMED

Charles Franklin Thompson, Jr., of Malone Thompson Summers & Ott, LLC, of Columbia, for Appellant.

Henrietta U. Golding and James Keith Gilliam, both of McNair Law Firm, PA, of Myrtle Beach, for Respondent.

LOCKEMY, J.: In this wrongful termination action, the Town of Surfside Beach appeals the trial court's denial of its motion for a directed verdict. The Town argues that by denying its motion for a directed verdict, the trial court erred in expanding the public policy exception to at-will employment beyond situations where the employer requires the employee to violate criminal law or the reason for the employee's termination itself is a violation of criminal law. The Town further asserts the trial court's denial of its motion was error because the public policy

exception does not apply to terminations of government employees who insist on performing an act that is discretionary. We affirm.

FACTS

This appeal arises from the employment termination of Jacklyn Donevant—the former building official and Director of Planning, Building, and Zoning for the Town. Donevant sued the Town for wrongful termination, alleging it fired her in violation of a clear mandate of public policy. Specifically, Donevant asserted she was fired in retaliation for issuing a stop-work order[1] to a restaurant that was performing construction with only a demolition permit and not a construction permit. At trial, the Town claimed it terminated Donevant for attendance issues, punctuality issues, and insubordination.

A. Donevant's Case

In 2005, the Town hired Donevant as its building official. In this capacity, Donevant served as the head of the building department and was the only Town employee who could approve building permits or issue stop-work orders. In December 2010, the Town hired Jim Duckett as its town administrator. During Duckett's tenure as administrator, there was an ongoing controversy with the vacancy of the Pier Restaurant—a restaurant located on a pier in Surfside Beach. The Town acquired ownership of the Pier Restaurant in 2008. Shortly thereafter, a long-time tenant of the Pier Restaurant vacated the premises, leaving the space vacant and depriving the Town of expected revenue. The Town had trouble finding a new tenant for the restaurant. The vacancy of the Pier Restaurant became a prominent, public issue in the Town, with stories appearing in several newspaper articles. As administrator for the Town, Duckett worked to help find a new tenant for the restaurant.

Donevant testified that throughout her employment with the Town, she regularly inspected construction sites on her way to and from work. On June 17, 2011, Donevant conducted an inspection on her way to work. She called a member of her staff to inform her that she was conducting an inspection and would be in the office after she finished. When Donevant arrived at work, Duckett stopped her before she could walk in her office. Duckett wrote the following sentence on a

[1] A stop-work order "is an order given by the building official to stop work, just completely shut the work down."

sheet of paper: "Since Jim Duckett has a poor memory[,] I will . . . in the future send him an email if I will not be in to work by [9:00] a.m. each workday." Duckett gave the paper to Donevant and made her write the sentence five times in front of the employees she supervised.

In December 2011, Donevant was diagnosed with breast cancer and received twelve weeks of medical leave from work. During her absence, the Town was forced to contract with the City of Myrtle Beach to perform Donevant's building official duties because no other Town employee was qualified to perform those duties. The City of Myrtle Beach assumed the responsibility of reviewing plans, issuing permits, conducting inspections, and issuing stop-work orders within the Town's jurisdiction.

While Donevant was on leave, Duckett found a new tenant to occupy the vacant Pier Restaurant space. The new tenant wanted to remodel the interior of the space. Because Donevant was on leave, the City of Myrtle Beach issued a demolition permit to the tenant that allowed for "demo interior of building only." This demolition permit was the only permit issued to the Pier Restaurant during Donevant's sick leave; however, the tenant had applied for a construction permit that was pending under "plan review." While Donevant was on leave, Duckett visited the restaurant frequently and remained in contact with the City of Myrtle Beach about the construction plans.

On March 13, 2012, Donevant returned from sick leave. Before allowing her to resume her duties as building official, Duckett required Donevant to meet with him and requested that Debra Hermann, the Town clerk, witness the meeting. During the meeting, Duckett informed Donevant she would resume all of her job duties, but he warned her if she "change[d] anything that was done . . . in [her] absence," he would fire her. Duckett testified the reason for this instruction was to prevent Donevant from revisiting any decisions made by the City of Myrtle Beach during her absence. Hermann prepared a memorandum after the meeting that stated:

> Duckett explained that [Donevant] was now officially returned to work; however, he gave her a direct order that she could not and would not change, ameliorate, or in any other manner amend any action that was taken during her absence. That if she did so, she would be fired.

On March 19, 2012, Duckett instructed Micki Fellner, the Town's deputy administrator, to inform Donevant that she could no longer report to Fellner and was required to report directly to Duckett. Duckett had previously informed all employees, including Donevant, that Fellner "was in charge when [Duckett] wasn't there" and Fellner "had the same authority [Duckett] had when [Duckett] was there."

Donevant testified that shortly after returning to work from her sick leave, she discovered by reading a local newspaper article that new construction was underway at the Pier Restaurant. Upon reading the article, Donevant contacted the City of Myrtle Beach and learned no construction permit had been issued. Thereafter, Donevant drove to the Pier Restaurant to inspect the premises. She testified new construction had started at the restaurant. According to Donevant, the contractors had cut openings for doors and windows; studded a new wall; and installed plumbing, electrical, and subflooring. In Donevant's opinion, this work constituted "construction" and therefore required a construction permit before it could be lawfully performed. Donevant testified that allowing unpermitted construction to continue within the Town's jurisdiction posed a significant safety risk to the public. She stated:

> [I]t was unsafe and it was dangerous. They had openings that anybody could step in and fall. There was loose wires and plumbing. There was stuff that had [not] been inspected, how do you know whether it [was] safe or not. We have to protect the public. The pier is a busy place. A lot of kids go [out] there . . . .

Donevant issued a stop-work order to halt construction at the Pier Restaurant and taped the stop-work order to the door. After issuing the stop-work order, Donevant called Fellner on her way back to the office. Donevant testified she called Fellner to discuss an unrelated matter and was not "reporting" to Fellner that she had issued a stop-work order. During the conversation, however, Donevant told Fellner about the stop-work order for the unpermitted construction at the Pier Restaurant.

The next day Duckett called Donevant into his office for a meeting. During the meeting, Duckett told Donevant he could not believe she stopped work at the Pier Restaurant after all the work he had done on the project. Duckett turned his attention to three pieces of paper lying face-down on his desk. Duckett turned over

the first piece of paper, which was a written reprimand, stating Donevant had disobeyed his order to report all matters to him and not Fellner. Donevant refused to sign the reprimand, claiming it was untrue because she had not "reported" the stop-work order to Fellner. Donevant further stated Duckett never told her she was required to report the fact that she issued a stop-work order. After Donevant refused to sign the reprimand, Duckett turned over the second piece of paper, which was an order of suspension. Donevant testified that although she disagreed with the suspension, she signed the document and served a three-day suspension because she "needed to work" and suspected the third document on Duckett's desk was a termination notice. According to Donevant, Duckett suspended her "for putting a stop-work order, for doing [her] job."

Donevant returned to work following her suspension on March 25, 2012, and on that date, she delivered a letter to Duckett that stated:

> My suspension was not right. All I did was follow the law, which you did [not] want me to follow. Like I told you the other day, I will follow the law even if that means not following your instructions. You have been picking on me and treating me badly for a long time even though I do my work by the book and I am dedicated to the [T]own.

On April 4, 2012, Duckett terminated Donevant. Donevant testified Duckett did not provide her with a reason for her termination. Duckett later informed the South Carolina Department of Employment and Workforce that her termination was due to "operational changes." Donevant asserted Duckett fired her in retaliation for issuing the stop-work order for unpermitted construction at the Pier Restaurant.

At trial, Donevant claimed she was required by law to issue the stop-work order at the Pier Restaurant. She presented the testimony of Gary Wiggins, a former director of the South Carolina Building Codes Council. Wiggins testified that Chapter One of the International Building Code (IBC), which the Town had adopted by ordinance, sets forth a building official's authority to issue stop-work orders. He explained "any time there is a potential of life safety or fire safety or there [is] a direct violation of the law, the building official is obligated to issue a stop-work order." If construction is commenced without a construction permit, "[t]hat's a violation of the law. . . . [a]nd anytime there's a violation of the law, a stop-work order must be issued." According to Wiggins, a town administrator

does not have the authority to issue stop-work orders. The building official "is charged with that responsibility specifically and no other person . . . can perform that function or task." Wiggins stated that "starting work in any capacity is a violation of the law unless a permit is issued for it." He testified that if a building official neglected to issue a stop-work order when construction is ongoing with only a demolition permit, she could be disciplined by the South Carolina Building Codes Council, with discipline ranging from a letter of caution to a revocation of her license as a building official.

B. The Town's Case

Duckett testified he was Donevant's immediate superior, and she was required to report directly to him. He stated that as town administrator, he was not involved in permitting or building inspection decisions. Duckett described Donevant as a "problem employee." He testified Donevant was frequently absent from, or late to, work and "[a] lot of times [her] staff didn't know where she was or when she would be back." Duckett eventually required Donevant to be at work by 9:00 a.m. or to let him know "if she was going to be out for any reason." According to Duckett, Donevant continued to miss work and he attempted to bring her attendance under control by issuing warnings, giving her a negative performance review, and requiring her to tell him when she was not going to be in the office during normal operating hours.

On her first day back to work following her sick leave, Duckett stated he informed Donevant she was not to interfere with any decisions made by the City of Myrtle Beach during her absence. Specifically, he told her "whatever had been approved by Myrtle Beach was done, and that she needed to focus her attention when she came back on new things that were coming in." He informed her of this in writing and warned that termination might result if she interfered with any decisions made during her leave. Duckett also reminded Donevant that she was to report to him and not to Fellner. Duckett felt Donevant had been avoiding him—preferring to report to Fellner. Fellner testified she also told Donevant to report to Duckett and not to her.

Duckett stated he first learned of the stop-work order at the Pier Restaurant when a member of the town council called him asking what was going on there. About the same time, Fellner called Duckett to report her conversation with Donevant about the stop-work order. Duckett immediately went to the pier and, to his surprise, was greeted by a television crew and members of council. Duckett testified Donevant

had exercised poor judgment by not telling him what was going on at the pier and not reporting to him as instructed. He stated that "if [he] had simply been told whenever [the stop-work order] was issued . . . that would have been fine." According to Duckett, he ultimately suspended Donevant for three days "due to her inability to follow directions."

Duckett testified that several weeks after Donevant returned from her suspension, a town election was held and a new mayor was elected. Duckett stated he did not want to continue in his position with the changes and decided he would resign. He also decided he did not think it was right to pass a "problem employee" to the next administrator, and he therefore decided to terminate Donevant.

C. Directed Verdict/JNOV

The Town moved for a directed verdict, asserting that even if Donevant was fired for issuing the stop-work order at the Pier Restaurant, it would not constitute a discharge in violation of public policy because that cause of action "has not been expanded beyond situations in which the employer requires the employee to violate a criminal law or where the reason for the employee's termination is itself a violation of criminal law . . . ." The Town also argued a directed verdict should be granted because under *Antley v. Shepherd*,[2] a government employee fired for exercising discretionary authority cannot assert a claim for public policy discharge. On the other hand, Donevant argued *Antley* was inapplicable because she was required by law—specifically, the building code as adopted by the Town—to issue a stop-work order when she saw unpermitted construction ongoing at the Pier Restaurant.

After taking the matter under advisement, the trial court denied the Town's motion for directed verdict and later denied the Town's motion for judgment notwithstanding the verdict (JNOV). The trial court concluded that whether Duckett instructed Donevant not to issue a stop-work order at the Pier Restaurant was a question of fact for the jury. The trial court determined there was evidence Donevant was fired in retaliation for issuing the stop-work order at the Pier Restaurant and that such a discharge fell within the public policy exception to at-will employment.

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[2] 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000), *aff'd as modified by* 349 S.C. 600, 564 S.E.2d 116 (2002).

In the directed verdict stage, the trial court stated it was not expanding the public policy exception to at-will employment and that Donevant's claim "comes clearly within what our courts have already articulated what the law is"—that "she was required by her employer to violate the law." In the JNOV stage, however, the court explained there was evidence

> [Donevant] was instructed not to issue anything . . . that would interfere with what was going on at the pier, which dealt with her responsibilities as a building official. In her estimation, being told not to enforce the building code was instructing her to act contrary to public policy, and in addition to that, there is another layer to that which is [Duckett is] basically telling [her] to disregard the law, which the [T]own adopted in the nature of these International Building Codes, and to not do [her] job and not enforce the law, which is arguably a violation of public policy and [a] violation of the law.

Donevant's claim for retaliatory discharge went to the jury with the only issue tried being whether the Town fired Donevant in violation of public policy because she issued a stop-work order on a construction project at the Pier Restaurant. The jury returned a verdict in favor of Donevant in the amount of $500,000, which was later reduced to $300,000 pursuant to the South Carolina Tort Claims Act. This appeal followed.

STANDARD OF REVIEW

"The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Jones v. Lott*, 379 S.C. 285, 288-89, 665 S.E.2d 642, 644 (Ct. App. 2008), *aff'd by* 387 S.C. 339, 692 S.E.2d 900 (2010). "In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Id.* "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* "The appellate court must determine whether a

verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Id.* "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Id.*

LAW/ANALYSIS

I. Expansion of Public Policy Exception

The Town first argues that by denying its motion for a directed verdict, the trial court erred in expanding the public policy exception to at-will employment beyond situations where the employer (1) requires the employee to violate criminal law or (2) the reason for the employee's termination itself is a violation of criminal law. The Town asserts that although the public policy exception has not been expressly limited to these two situations, it has not been "applied beyond them." According to the Town, Donevant's claim that she was fired for issuing a stop-work order at the Pier Restaurant does not fall under the public policy exception as applied by our courts because the building code merely "authorizes" Donevant, as building official, to issue stop-work orders but does not subject her to *criminal* punishment for failing to do so. We disagree.

"In South Carolina, an at-will employee may be terminated for any reason or no reason at all." *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013) (Lockemy, J., concurring in part and dissenting in part). "Under the public policy exception to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) (internal quotation marks omitted). "The public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate the law . . . or (2) the reason for the employee's termination itself is a violation of criminal law." *Id.* at 614, 713 S.E.2d at 637 (citation omitted). "While the public policy exception applies to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law, the public policy exception is not limited to these situations." *Id.* Thus, "an at-will employee may have a cause of action for wrongful termination even if the discharge itself did not violate criminal law or the employer did not require the employee to violate the law." *Id.* at 614-15, 713 S.E.2d at 637. The public policy exception, however, "has not yet been extended beyond [these two situations]." *McNeil*, 404 S.C. at 192, 743 S.E.2d at 846; *see*

also Taghivand v. Rite Aid Corp., 411 S.C. 240, 243, 768 S.E.2d 385, 387 (2015) ("While we have made clear that the exception is not limited to these situations, we have specifically recognized no others." (internal quotation marks omitted)).

The trial court did not err in denying the Town's directed verdict motion on this ground. Initially, we find it helpful to identify the scope of the Town's appeal. In her complaint, Donevant alleged the Town fired her in retaliation for issuing a stop-work order at the Pier Restaurant. The jury awarded Donevant damages based on her complaint. At oral argument, the Town conceded that the reason Donevant was fired is not an issue on appeal. Consequently, the Town's arguments are all questions of law. It first asserts Donevant's claim for discharge in violation of public policy fails as a matter of law because she was not subject to criminal punishment for not issuing a stop-work order. We do not believe the public policy exception to at-will employment requires a criminal punishment. The plain language of our supreme court's decision in *Barron* states an action for retaliatory discharge applies when "the employer requires the employee to violate *the law* . . . ." 393 S.C. at 614, 713 S.E.2d at 637 (emphasis added). Nothing in *Barron* or later decisions by our supreme court hold the employer must require the employee to violate a criminal law in order for the public policy exception to apply. *See id*; *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (stating the public policy exception to at-will employment applies when "an employer requires an employee, as a condition of continued employment, to break *the law*" (emphasis added)). Thus, even if Donevant violated a law that only carried a civil penalty, it would not be fatal to her claim for retaliatory discharge.

Next, the Town asserts the trial court erred in not granting a directed verdict because the public policy exception has not been *applied* beyond situations where (1) the employer requires the employee to violate criminal law or (2) the reason for the employee's termination itself is a violation of criminal law. The Town's argument fails because *Barron* holds the public policy exception is not limited to these two situations. *See* 393 S.C. at 614, 713 S.E.2d at 637. In *Barron*, our supreme court specifically overruled our court to the extent we limited the public policy exception to these two situations. *See id.* at 615-16, 713 S.E.2d at 637 ("We find the court erred, however, in holding the exception is limited to these situations where our courts have explicitly held the public policy exception is not so limited. Accordingly, we overrule the Court of Appeals' opinion to the extent it holds the public policy exception applies only in situations where the employer asks the employee to violate the law or the reason for the termination itself is a violation of

criminal law." (citations omitted)). Although the public policy exception has not been applied outside the two situations described above, if we were to reverse the jury's verdict on this ground, we would effectively be limiting the public policy exception to these two situations in direct contravention of our supreme court's holding in *Barron*. Moreover, as discussed below, Donevant's claim falls within the public policy exception to at-will employment as applied in this state because Duckett fired her for refusing to violate the law. Therefore, the trial court did not err in denying the Town's motion for a directed verdict on this ground.

II. *Antley v. Shepherd*

The Town next argues that by denying its motion for a directed verdict, the trial court disregarded the rule from *Antley v. Shepherd* that the public policy exception "does not apply to terminations of employees who insist on performing an act that is discretionary, i.e., that the law does not require them to perform." We disagree.

In *Antley*, a county tax assessor refused to comply with a county administrator's order not to initiate an appeal from a decision by the board of assessment appeals. 340 S.C. at 545-46, 532 S.E.2d at 296. When the tax assessor refused to dismiss a pending appeal, the county administrator fired the tax assessor for not following his order. *Id.* at 546, 532 S.E.2d at 296. The tax assessor filed a claim for wrongful termination against the county, alleging she, as tax assessor, maintained the statutory right to file appeals from decisions by the board of assessment appeals, and the directive that she not file any appeals from board decisions placed her "in a position of being required to disobey the law" as a condition of her employment. *Id.* She asserted this requirement constituted a public policy tort and her termination for refusing to follow the directive was unlawful. *Id.* In support of her argument that she had a right to file appeals, the tax assessor relied on sections 12-37-90 and 12-60-2540 of the South Carolina Code (2014). *Id.* at 549, 532 S.E.2d at 298. Subsection 12-37-90(f) states the tax assessor "is responsible for the operations of his office and shall . . . have the right of appeal from a disapproval of or modification of an appraisal made by him." Subsection 12-60-2540(A) provides that within thirty days of a decision by the board of assessment appeals, "a property taxpayer or county assessor may appeal a property tax assessment."

The county moved for summary judgment, claiming Antley was an at-will employee fired for cause. *Antley*, 340 S.C. at 546, 532 S.E.2d at 296. The trial court granted summary judgment to the county, finding that because the statutes permitted, rather than required, Antley to file appeals, the administrator's directive

did not require her to violate the law. *Id.* Our court affirmed the trial court. *Id.* at 549, 532 S.E.2d at 298. We stated:

> [S]ections 12-37-90 and 12-60-2540 gave Antley, as county tax assessor, the *right* to file appeals to the ALJD and established her status as a real party in interest in such appeals. These sections thus permitted, but did not require, Antley to appeal adverse board decisions. Moreover, nothing in sections 12-37-90 or 12-60-2540 gave Antley the sole discretion in determining which cases to appeal. If the General Assembly had intended the assessor's right of appeal to be unfettered by the county administrator or county council, it certainly could have provided that the decision of whether or not to appeal a board's determination is solely that of the assessor.

Id.

We read *Antley*'s holding that summary judgment was proper on the tax assessor's claim for retaliatory discharge in violation of public policy as based on three grounds: (1) Antley had the statutory right to file appeals, but was not required to do so; (2) the statutes she relied on for her authority did not give her the sole discretion to determine which cases to appeal; and (3) the General Assembly had not provided that the assessor's right of appeal was unfettered; therefore, nothing prevented the county from adopting a policy that defined the cases to be appealed. Our review of these grounds indicates *Antley* is distinguishable from this case.

We first address whether Donevant had sole discretion to decide whether to issue a stop-work order for violations of the building code. Unlike *Antley* where the tax assessor or "a property taxpayer" could appeal a property tax assessment, Donevant claims "[t]he building code does not grant any other individual any discretion or any right to make the determination of whether to issue a stop work order." The Town argues "the scope of her authority is a legal question . . . for the court to decide"; however, it does not cite any authority that gives another party authority to issue a stop-work order. Based on our review of the building code, the building official is the only party authorized to issue a stop-work order for code violations. Thus, Donevant had sole discretion to determine whether to issue a stop-work order.

We next address whether Donevant was required by law to issue a stop-work order. The Town points out Donevant's authority came from a building code provision that states "[w]henever the building official finds any work regulated by this code being performed in a manner either contrary to the provisions of this code or dangerous or unsafe, the building official *is authorized* to issue a stop work order." (emphasis added). Similar to *Antley*'s "right" of appeal, at first glance it appears Donevant was permitted but not required to issue a stop-work order for building code violations. After considering other statutory and building code provisions in light of the facts in this case, we believe that unlike the tax assessor in *Antley*, the law required Donevant to take action to enforce compliance with the building code when she saw unpermitted construction at the Pier Restaurant.

Subsection 6-9-10(A) of the South Carolina Code (Supp. 2014) states:

> All municipalities . . . and counties in this State *shall enforce* . . . building codes in this chapter, relating to the construction, livability, sanitation, erection, energy efficiency, installation of equipment, alteration, repair, occupancy, classification, or removal of structures located within their jurisdictions and *promulgate regulations to implement their enforcement*.

(emphasis added).

Section 6-9-30 of the South Carolina Code (Supp. 2014) requires all municipalities and counties to appoint a building official or contract for a building official within the municipal limits. Pursuant to subsection 6-9-50(A) of the South Carolina Code (Supp. 2014), the International Building Code (IBC), with the exception of Chapter One, is adopted in every municipality or county in the State. The Town adopted Chapter One of the IBC by passing an ordinance. Thus, Chapter One of the IBC, which provides for certain duties and responsibilities for the building official, applies within the Town's jurisdiction.

Under Chapter One of the IBC, "[t]he building official is hereby authorized and directed to enforce the provisions of this code." Int'l Bldg. Code § 104.1 (2012). "The building official shall . . . issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of the code." Int'l Bldg. Code § 104.2 (2012). "The building official shall issue all

necessary notices or orders to ensure compliance with this code." Int'l Bldg. Code § 104.3 (2012). Section 105.1 of the IBC (2012) provides:

> Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

In addition, it is unlawful "for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code." Int'l Bldg. Code § 113.1 (2012).

First, it is undisputed the contractors at the Pier Restaurant had not obtained a construction permit when Donevant issued the stop-work order. The contractors only had a demolition permit that allowed for "demo interior of building only." *See* § 105.1 ("Any owner or authorized agent who intends to construct . . . shall first make application to the building official *and obtain the required permit*." (emphasis added)). Furthermore, Donevant testified the contractors had started construction by cutting openings for doors and windows; studding a new wall; and installing plumbing, electrical, and subflooring. Because the contractors had started construction without the required permit, the construction was unlawful under the building code. *See* § 113.1.

Because the construction at the Pier Restaurant violated the building code, the law required Donevant, as building official, to take action to enforce compliance with the code. *See* § 104.2 (stating "[t]he building official *shall* . . . issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued *and enforce compliance with the provisions of the code*" (emphasis added)). In order to carry out her legal duty to "enforce compliance" with the building code, Donevant issued a stop-work order as she was required to do by law. *See* § 104.3 (stating "[t]he building official shall issue all necessary notices or orders to ensure compliance with this code"). Thus, unlike *Antley*, where the statutes "permitted but did not require" the tax assessor to

take action, the statutory and building code provisions at issue here *required* Donevant's actions of enforcing compliance with the building code.

We agree with the trial court that Donevant's claim "comes clearly within what our courts have already articulated what the law is"—that "she was required by her employer to violate the law." By instructing Donevant not to "change, ameliorate, or in any other manner amend any action that was taken during her absence[,]" Duckett was requiring Donevant not to perform her legal duty as a building official to enforce compliance with the building code. If Donevant had followed Duckett's directive and not taken action in response to the unlawful construction at the Pier Restaurant, she could have been charged with misconduct in office for failing to discharge this legal duty. *See State v. Hess*, 279 S.C. 14, 20, 301 S.E.2d 547, 550 (1983) (recognizing "[m]isconduct in office occurs *when duties imposed by law* have not been properly and faithfully discharged" (emphasis added)). By suspending Donevant and ultimately terminating her for issuing the stop-work order at the Pier Restaurant, Duckett effectively discharged Donevant for refusing to violate the law. Accordingly, Donevant's claim for retaliatory discharge falls within a recognized exception to the doctrine of at-will employment in this state because she was required by her employer, "as a condition of continued employment, to break the law." *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387; *see also Barron*, 393 S.C. at 614, 713 S.E.2d at 637.

Notwithstanding the fact that Donevant was fired for refusing to violate the law, she also presented a cognizable claim that she was terminated "in violation of a clear mandate of public policy." *Barron*, 393 S.C. at 614, 713 S.E.2d at 637 (stating "[a]n at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy" (internal quotation marks omitted)).

In *Barron*, our supreme court explained that "[w]hile the public policy exception applies to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law, the public policy exception is not limited to these situations." *Id.* The court stated:

> The determination of what constitutes public policy is a question of law for the courts to decide. *See Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of public policy of the state is the General Assembly; the courts

> assume this prerogative only in the absence of legislative declaration."). It is not a function of the jury to determine questions of law such as what constitutes public policy. Rather, once a public policy is established, the jury would determine the factual question whether the employee's termination was in violation of that public policy.

Id. at 617, 713 S.E.2d at 638.

Thus, the *Barron* court recognized there could be situations where an employee was terminated in violation of public policy even if she was not required by her employer to violate the law or the reason for her termination was not a violation of criminal law. As our supreme court explained in *Taghivand*, "any exception to [the doctrine of at-will employment,] which is itself firmly rooted in the public policy of this state, should emanate from the General Assembly, and from this Court only when the legislature has not spoken." 411 S.C. at 248, 768 S.E.2d at 389. The determination of what constitutes public policy for purposes of the public policy exception to at-will employment is a question of law for the court. *See Barron*, 393 S.C. at 617, 713 S.E.2d at 638. We defer to the General Assembly in making this determination and find the public policy exception applicable in this case.

Subsection 6-9-5(A) of the South Carolina Code (Supp. 2014) entitled, "Public policy for building codes," states:

> The public policy of South Carolina is to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens. To secure these purposes, a person performing building code enforcement must be certified by the South Carolina Building Codes Council, and this act is necessary to provide for certification.

To implement the policy of maintaining reasonable construction standards, the General Assembly has declared "[a]ll municipalities . . . and counties in this State shall enforce . . . building codes in this chapter, relating to the construction, livability, sanitation, erection, energy efficiency, installation of equipment, alteration, repair, occupancy, classification, or removal of structures located within

their jurisdictions and promulgate regulations to implement their enforcement." S.C. Code Ann. § 6-9-10.

We believe the General Assembly's use of the words "[t]he public policy of South Carolina" and its mandate that all municipalities enforce the building code indicates a legislative intent to make enforcement of the building code a public policy of this state. It is difficult to imagine a more clear declaration of public policy than language stating "[t]he public policy of South Carolina *is* . . . ." (emphasis added). We cannot ignore the significance of such clear language in a statute. Here, Donevant was enforcing the building code and therefore enforcing a clear mandate of public policy when she issued the stop-work order for unpermitted construction at the Pier Restaurant. Duckett initially suspended her and ultimately terminated her for taking this action. The Town has not appealed the reason for Donevant's firing. Thus, Donevant presented a cognizable claim that she was fired in violation of a clear mandate of public policy.

CONCLUSION

Based on the foregoing, the trial court did not err in denying the Town's motion for a directed verdict. Therefore, the trial court is

AFFIRMED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lamont Antonio Samuel, Appellant.

Appellate Case No. 2013-001342

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5346
Heard February 12, 2015 – Filed August 26, 2015

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

HUFF, J.: Lamont Antonio Samuel appeals his conviction for murder, arguing the trial judge erred in refusing to allow him to represent himself. We affirm.

FACTUAL/PROCEDURAL HISTORY

Samuel, who was indicted for the murder of Taneris Hamilton, was provided appointed counsel. Prior to trial, Samuel moved to represent himself. The trial judge conducted a hearing to consider the motion. Samuel explained he wanted to represent himself because he had been in jail for fourteen months despite maintaining his innocence. He complained his appointed counsel would not let him contact the solicitor on the case and bring the solicitor a letter Samuel's co-defendant had written in which the co-defendant confessed. Samuel asserted he understood he was charged with murder and the maximum sentence the charge carries. He stated he was twenty-one years old and graduated from high school in 2010 with a 4.0 in honors classes. He claimed he was enlisted and waiting to go into the Navy. He declared while he was waiting, he worked with the recruiting office at Fort Jackson.

Samuel testified he had been reading a book entitled *Criminal Law Handbook*, which his mother helped him obtain at the recommendation of attorney Carl Grant. He also claimed Grant had coached him on the South Carolina Rules of Evidence. Samuel acknowledged Grant was not representing him but maintained the attorney was going to coach him. He explained:

> [M]y mama, basically paid Mr. Grant a good bit amount of money. The reason why he couldn't represent me is because my family--I guess his paralegal is related, you know, in some manner. So he had decided to just go over the steps with me day by day. I go through the trial, I got back to him. I talk to him, he'll tell me things or he won't -- he's not going to be in the courtroom, present.

After completing the *Faretta*[1] colloquy, the trial judge noted Samuel was bright, educated, and did not have drug, alcohol, or mental health problems. She acknowledged to Samuel: "You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself." The judge then summoned Grant to come to the courtroom to explain his relationship with Samuel.

[1] *Faretta v. California*, 422 U.S. 806 (1975).

Grant testified he had not been retained to represent Samuel. He explained the only discussion he had with Samuel's mother pertained to the legal fees to represent Samuel but the mother never brought him the fees. He maintained he had not given Samuel a copy of the rules of evidence or of criminal procedure or offered his assistance in any way. He stated: "Either you're going to retain me to represent you or you're not." He informed the judge he would not be available to provide Samuel with any assistance in any capacity if Samuel represented himself.

Samuel thanked Grant "for your information you provided me. I thank you for your advice and everything . . . ." When the judge asked him what advice and information he meant, Samuel responded: "Everything he said." The judge further questioned Samuel if he meant what was said that day. Samuel stated: "I'm just saying in general. Everything he said makes a whole lot of sense." Samuel acknowledged he understood the extent of Grant's relationship and he could not depend on Grant's assistance. However, after Grant left the courtroom, Samuel claimed the reason Grant testified as he did was because of the kinship between Grant's paralegal and Samuel and Grant's "reputation was on the line." Samuel explained the reason his expression did not change during Grant's testimony was "because he already had told me and stated if it came down to him coming in front of a judge in front of the attorneys he was going to state that."

After taking a brief recess, the trial judge informed Samuel she did not believe what Samuel had told her concerning his relationship with Grant and Grant's willingness to coach him. She ruled: "The reason that I am disallowing your self-representation is because it is impossible for me to [try] a case if I do not have candor from those who are making representations to the court." Even after the judge made the ruling, Samuel continued to claim Grant said what he did because "he did not want his reputation ruined."

After delays unrelated to Samuel's request for self-representation, the case proceeded to trial with appointed counsel representing Samuel. The jury found Samuel guilty of murder. The trial judge sentenced him to fifty years imprisonment. This appeal followed.

ISSUE

Did the trial judge err by refusing to allow Samuel to represent himself?

STANDARD OF REVIEW

"The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge. Only in a case of abuse of discretion will this [c]ourt interfere." *State v. Sims*, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991); *see State v. Barnes*, 407 S.C. 27, 48, 753 S.E.2d 545, 556 (2014) (Toal, C.J., dissenting) (applying abuse of discretion standard to review of denial of motion for self-representation). An abuse of discretion occurs when the decision of the trial judge is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Samuel argues the trial judge erred in refusing to allow him to represent himself. We disagree.

A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments. *Faretta v. California*, 422 U.S. 806, 807 (1975). However, the right of self-representation is not absolute. *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000). The Supreme Court in *Faretta* noted "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. It explained: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* "Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000).

A defendant's assertion of his right to self-representation must be: "(1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." *Frazier-El*, 204 F.3d at 558 (citations omitted). The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process. *Id.* at 560. A trial judge may refuse to permit a criminal defendant to represent himself when he is "'not able and willing to abide by rules of procedure and courtroom protocol.'" *United States v. Lopez-Osuna*, 242 F.3d 1191, 1200 (9th Cir. 2001) (quoting *Savage v. Estelle*, 924 F.2d 1459,

1463 (9th Cir. 1991)). "A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." *Frazier-El*, 204 F.3d at 560.

In *United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989), the Fourth Circuit held a trial court was not required to make a finding the defendant disrupted a trial to support its removal of him as pro se counsel. It found the defendant "directly attacked the [trial] court's integrity and dignity by characterizing it as the 'home team' on the side of the government and accusing it of imposing upon him a presumption of guilt." *Id*. The Fourth Circuit explained, "By asserting his right of self-representation, [the defendant] assumed the responsibility of acting in a manner befitting an officer of the court. By flouting the responsibility, he forfeited the right." *Id*.

As the Fourth Circuit recognized in *West*, a defendant like Samuel who chooses self-representation assumes the responsibility of acting as an officer of the court. *See id*. This responsibility includes displaying candor toward the court. *See* Rule 3.3(a)(1), RPC, Rule 407, SCACR (stating a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"). The trial judge considered Samuel's and Grant's conflicting testimony concerning Grant's alleged assistance for Samuel's trial and found Samuel not credible. It was within the province of the trial judge, as the fact-finder in the *Faretta* hearing, to weigh the credibility of the witnesses. *See State v. Dorce*, 320 S.C. 480, 483, 465 S.E.2d 772, 773 (Ct. App. 1995) ("The trial judge was presented with contradicting testimony, and it was within his province, as the trier of fact, to weigh the credibility of the evidence presented to determine which witnesses he deemed credible."). As the record supports the trial judge's determination Samuel displayed an unwillingness to act as an officer of the court through his lack of candor, we find the trial judge did not abuse her discretion in denying his request to represent himself.

AFFIRMED.

FEW, C.J., and WILLIAMS, J., concur.

The South Carolina Court of Appeals

Wells Fargo Bank, N.A., successor-by-merger to Wachovia Bank, N.A., Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon, Susan C. Fallon, Fallon Luminous Products Corporation, GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, FSD Repurchase Solutions, LLC, and South Carolina Department of Revenue, Defendants,

Of Whom Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon are the Appellants.

Appellate Case No. 2015-000157

ORDER

PER CURIAM: In this appeal from the court of common pleas, we find that an e-mail from the office of the master-in-equity with the order on appeal as an attachment constitutes written notice of entry of the order under Rule 203(b)(1) of the South Carolina Rules of Appellate Procedure. Because Appellants served their notice of appeal more than thirty days after receipt of the email, we find the appeal is untimely and deny the petition to rehear the dismissal of this appeal.

This appeal arises out of a foreclosure action. After the foreclosure sale, Appellants filed a petition for an order of appraisal pursuant to section 29-3-680 of the South Carolina Code (2007). On December 15, 2014, the master filed an order denying the petition. The same day, the administrative assistant to the master sent attorneys for both sides an e-mail stating, "Please see attached copy of signed and

clocked Form 4 and Order. I have also mailed a copy to all listed on the Form 4." The "signed and clocked" copies of the Form 4 and order were attached to the e-mail. The court[1] sent the parties a printed copy of the order through the United States Postal Service, which Appellants received on December 18, 2014.

On January 15, 2015, Appellants served Respondent with the notice of appeal from the December 15 order. The notice was served thirty-one days after Appellants received the email, but only twenty-eight days after they received the printed copy of the order. Respondent moved to dismiss the appeal as untimely. In an order signed by a single judge, we granted the motion and dismissed the appeal. The Appellants filed a petition for rehearing. We deny the petition.

Pursuant to Rule 203(b)(1), SCACR, a party wishing to appeal an order from the court of common pleas must serve the notice of appeal on the respondents "within thirty . . . days after receipt of written notice of entry of the order." Since the adoption of Rule 203 in 1990, the only limitation ever expressed on how notice must be received is that it must be "written notice." For the reasons set forth below, this court finds the e-mail constitutes written notice.

The circumstances in this case are analogous to those in *Canal Insurance Co. v. Caldwell*, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct. App. 1999), in which this court held a fax constituted written notice under Rule 203(b)(1). In *Canal*, the trial court issued its order on March 17, 1997; however, counsel for the appellants apparently did not receive a copy. 338 S.C. at 4, 524 S.E.2d at 417. Counsel contacted the respondent in June 1997 to inquire about the status of the order. *Id.* On July 8, 1997, counsel for the respondent "responded via fax and mail," stating the order "had been entered on March 19 as Judgment Roll Number 211763." *Id.* Counsel for the appellants waited a month to request a copy of the order from the clerk of court and did not serve the notice of appeal until March 17, 1998. 338 S.C. at 5, 524 S.E.2d at 417-18. This court dismissed the appeal due to the appellants' failure to timely serve the notice of appeal, noting "there is no question that [counsel for the appellants] received written notice of the entry of the judgment . . . on July 8, 1997." 338 S.C. at 5-6, 524 S.E.2d at 418. July 8, 1997, is the date counsel for the appellants received the fax from opposing counsel. 338 S.C. at 4, 524 S.E.2d at 417.

[1] This court's file does not indicate whether the printed copy was sent by the master or the clerk of court.

Respondent's argument in this case that the e-mail was "written notice of entry of the judgment" is more persuasive than the argument we adopted in *Canal* that the fax was written notice. First, the e-mail in this case was sent from the court itself, rather than an opposing party. Second, the e-mail included a copy of the signed and clocked order, whereas the fax in *Canal* did not.[2] *See* 338 S.C. at 4, 524 S.E.2d at 417. Finally, although neither the rules of civil nor appellate procedure specifically authorized service by fax, e-mail has actually been contemplated by the rules. *See, e.g.*, Rule 410(e), SCACR (providing that both "[t]he mailing and e-mail address shown in the AIS [Attorney Information System] shall be used for the purpose of notifying and serving" an attorney).[3] Counsel for Appellants was notified of entry of the order through the e-mail address he kept on file with the AIS.

Appellants rely on *White v. South Carolina Department of Health and Environmental Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011). In *White*, this court interpreted Rule 203(b)(6), SCACR, which governs appeals to this court from the administrative law court (ALC) and provides the notice of appeal must be served on all parties of record within thirty days after "receipt of the decision." 392 S.C. at 252-55, 708 S.E.2d at 814-16. In *White*, the appellant received an e-mail on January 28, 2009, containing a signed and filed copy of the decision. 392 S.C. at 252, 708 S.E.2d at 814-15. This court held Rule 203(b)(6) contemplates receipt of the decision through proper service by mail or hand delivery; accordingly, the time for serving the notice of appeal "did not commence on the day that counsel received the decision via e-mail." 392 S.C. at 253, 708 S.E.2d at 815.

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[2] In *Canal*, the court stated that the fax from the respondent's counsel merely "express[ed] surprise that opposing counsel had not been notified of the judgment and stat[ed] that it had been entered on March 19 as Judgment Roll Number 211763." 338 S.C. at 4, 524 S.E.2d at 417. The court noted the appellants waited over a month to request a copy of the order. 338 S.C. at 6, 524 S.E.2d at 418.

[3] Attorneys practicing in South Carolina have been required since November 18, 2011 to keep a valid e-mail address on file with the AIS. Order RE: Attorney Information System Amendments and Requirements, No. 2011-10-17-01 (S.C. Sup. Ct. Order filed Oct. 17, 2011).

White is distinguishable from this case for two reasons. First, this appeal falls under Rule 203(b)(1), rather than 203(b)(6). The court in *White* stressed that service of the ALC decision via the Postal Service was imperative because Rule 203(b)(6) requires actual "receipt of the decision," noting this is a different requirement than "receipt of written notice of entry of the order" as provided in Rule 203(b)(1). 392 S.C. at 254-55, 708 S.E.2d at 815-16. Here, because this is an appeal from the court of common pleas, the time for initiating the appeal began to run from "receipt of written notice of entry of the order," not "receipt of the decision." *See* Rule 203(b)(1); Rule 203(b)(6).

Second, the due process concerns addressed by the court in *White* are not present in this case. The court in *White* reasoned that due process would not allow it to recognize an e-mail as "receipt of the decision" under Rule 203(b)(6) because there is nothing "that authorizes service of a decision of the ALC by electronic mail." 392 S.C. at 254, 708 S.E.2d at 815. The court explained that in a prior case, we declined to hold a fax of an agency's decision sufficient to initiate the time for serving a notice of appeal under Rule 203(b)(6); and thus, due process would not allow the court to then recognize service by electronic mail when "there was no official written rule or notice about the binding effect of the service of an order by electronic mail." 392 S.C. at 253-54, 708 S.E.2d at 815 (citing *Trowell v. S.C. Dep't of Pub. Safety*, 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009)). Conversely, in an appeal from the court of common pleas, the parties are on notice that a fax is written notice for initiating the time for serving a notice of appeal under Rule 203(b)(1). *See Canal*, 338 S.C. at 5-6, 524 S.E.2d at 417-18.

Receipt of written notice is the critical event under Rule 203(b)(1), and Appellants received written notice on December 15, 2014—the date of the e-mail. Appellants failed to timely serve the notice of appeal "within thirty . . . days after receipt of written notice." Rule 203(b)(1). Therefore, this court lacks appellate jurisdiction, and we were required to dismiss the appeal. *See* Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); *Canal*, 338 S.C. at 5, 524 S.E.2d at 418 (providing that the

failure of a party to serve the notice of appeal within thirty days after receiving written notice of the entry of the order divests this court of jurisdiction and requires the dismissal of the appeal). For these reasons, the petition for rehearing is denied.

s/John Cannon Few C.J.

s/Thomas E. Huff J.

s/Paul E. Short, Jr. J.

Columbia, South Carolina
August 26, 2015

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The Honorable Gordon G. Cooper