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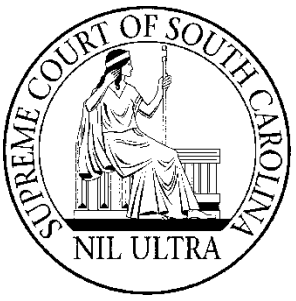

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
August 30, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Glenn Odom, Respondent,

v.

McBee Municipal Election Commission, Charles Short, Charles Sutton, and Hewitt Dixon, Appellants.

Appellate Case No. 2021-000165

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we withdraw the original opinion and substitute the attached opinion changing the original opinion only by adding text at the end of footnote 3.

s/ Donald W. Beatty C.J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

We would grant rehearing:

s/ John W. Kittredge J.

s/ Kaye G. Hearn A.J.

August 30, 2023
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Glenn Odom, Respondent,

v.

McBee Municipal Election Commission, Charles Short, Charles Sutton, and Hewitt Dixon, Appellants.

Appellate Case No. 2021-000165

Appeal from Chesterfield County
Roger E. Henderson, Circuit Court Judge

Opinion No. 28133
Heard March 17, 2022 – Filed February 8, 2023
Re-filed August 30, 2023

AFFIRMED

Robert E. Tyson Jr. and Vordman Carlisle Traywick III, of Robinson Gray Stepp & Laffitte, LLC, of Columbia; Wallace H. Jordan Jr., of Wallace H. Jordan, Jr., P.C., of Florence; and Karl Smith Bowers Jr., of Bowers Law Office, of Columbia, all for Appellants Charles Short, Charles Sutton, and Hewitt Dixon.

Richard Edward McLawhorn Jr., of Sweeny Wingate & Barrow, PA, of Columbia; Martin S. Driggers Jr., of

Driggers Law Firm, of Hartsville, both for Appellant McBee Municipal Election Commission.

John E. Parker and John Elliott Parker Jr., of Parker Law Group, LLP, of Hampton for Respondent.

JUSTICE FEW: The Town of McBee[1] Municipal Election Commission overturned the results of the town's September 2020 mayoral and town council elections after finding Sydney Baker violated a previous version of section 7-15-330 of the South Carolina Code (Supp. 2021)[2] by requesting applications to vote by absentee ballot on behalf of other voters. The circuit court found there was no evidence to support the election commission's decision and reversed. We affirm the circuit court.

I. Facts and Procedural History

Glenn Odom defeated Charles Short in the 2020 mayoral race by ten votes. James Linton and Robert Liles defeated Hewitt Dixon and Charles Sutton in the town council race by similar margins. The losing candidates from each race challenged the election results based on the allegation Sydney Baker violated section 7-15-330.

After the election, at a hearing before the election commission, Baker testified she "volunteered to help citizens" and used unpaid time off from work to "assist the citizens in voting" if they wanted to vote. Baker testified her actions included calling and going "door-to-door" to ask people if they "would like to vote absentee if they

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[1] McBee is a small town in Chesterfield County in the Pee Dee region of eastern South Carolina. The town's residents, many descendants of its patriarch Colonel "Bunch" McBee, and other students of correct pronunciation of local names will appreciate the readers of this opinion observing that the correct pronunciation of the word McBee is "MAK-bi." *See* Claude Neuffer & Irene Neuffer, *Correct Mispronunciations of Some South Carolina Names* 113 (Univ. of S.C. Press 1983) (including a short statement of the history of the town and noting, "The unknowing often say mak-BEE . . .").

[2] The General Assembly substantially rewrote section 7-15-330 in 2022. *See* Act No. 150, 2022 S.C. Acts 1587, 1596-98; S.C. Code Ann. § 7-15-330 (Supp. 2022).

were working or if they were over [sixty-five]." If someone said yes, Baker explained, she "helped them obtain an absentee ballot." She testified she "assist[ed] them in the application process." When specifically asked about what she did, Baker testified "I had an iPad . . . and a printer in my truck. If they wish[ed] to [obtain the application], we did so right then. And if not, I moved on." The election commission also heard testimony from voters whom Baker assisted, which we discuss below.

The election commission reversed the results of the election. It found Baker violated section 7-15-330 by requesting absentee ballots for other voters, relying on its determination Baker was not credible when she denied doing anything that violated the statute.

The circuit court reversed the election commission. The circuit court found there was no evidence Baker did "anything improper in assisting voters." The election commission and the losing candidates appealed directly to this Court pursuant to subsection 14-8-200(b)(5) of the South Carolina Code (2017) and Rule 203(d)(1)(A)(iv) of the South Carolina Appellate Court Rules.

II. Analysis

We begin with the text of the only provision of law applicable to this case: the version of section 7-15-330 in effect for the 2020 election.[3] The section provided

[3] The losing candidates argue Baker also violated subsections 7-13-770(A) and 7-15-380(A) of the South Carolina Code (2019) and those violations are a basis for overturning the election. While violations of subsections 7-13-770(A) and 7-15-380(A) were arguably raised to the election commission and circuit court, it is clear neither ruled on either issue. Accordingly, these issues are not preserved for our review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The losing candidates argued additional grounds other than Baker's conduct for overturning the election. The election commission rejected those arguments, however, and overturned the election only on the basis of Baker violating section 7-15-330.

In their petition for rehearing, the losing candidates argue they raised subsections 7-13-770(A) and 7-15-380(A) to the circuit court in a motion to alter or amend pursuant to Rule 59(e), SCRCP, asking the circuit court to rule on the claims arising from those subsections even though the court did not do so in its initial order. If that

that "a qualified elector," a "member of his immediate family," or "the . . . elector's authorized representative" may "request an application to vote by absentee ballot." Because Baker does not fit into one of those categories as to any of the voters at issue in this case, the section did not permit her to actually make the request for an absentee ballot application on behalf of any of them. However, there is nothing in section 7-15-330 that prohibits anyone—including Baker—from "assisting" a voter in requesting an application for an absentee ballot.

The applicable law, therefore, is straightforward. The former version of section 7-15-330 did not allow Baker to "request applications for absentee voting," but did not prohibit her from assisting someone else in requesting an application. The question before the election commission was whether Baker made the "request" for an application to vote absentee on behalf of any voter.[4] If she did, she violated section 7-15-330. On the other hand, if she merely assisted a voter in requesting an application, she did not violate the section.

The commission made the factual finding that Baker requested an application to vote by absentee ballot on behalf of "at least" ten voters.[5] The sole question before this Court is whether there is any evidence to support the election commission's finding. *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 307, 831 S.E.2d 429, 430

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were true, at least at the circuit court stage of the proceedings, the losing candidates did not fail to preserve the issues for appeal. However, we have carefully reviewed the text of the Rule 59(e) motion and cannot find any mention of the statutes themselves or any argument related to the substance of the requirements they impose. Thus, the issues are not preserved.

[4] The election commission addressed other issues not important to this appeal, such as whether Baker was paid for her volunteer work and whether she worked for Odom at the time of the election. While there was disputed evidence on both questions, it does not matter whether she was a paid volunteer or worked for Odom. In either circumstance, she was not permitted to request absentee ballot applications for others. The sole question is whether she did that or merely assisted voters in requesting them.

[5] The commission wrote in its order, "Baker applied for at least 10 and up to 28 absentee ballots."

(2019). If there is any evidence that supports the commission's finding, we must uphold the finding. *Id.*

Baker's testimony before the election commission was, "I volunteered to help citizens," "I helped [those who wanted to] obtain an absentee ballot," and "I help them obtain a ballot." She denied she ever requested any ballot application herself. In addition to Baker's testimony, the election commission heard from voters whom she assisted. Elizabeth Murphy, for example, testified Baker helped her with the absentee process because Murphy did not use the internet. She stated "two young people came to my house to assist with the registration and voting." Murphy did not testify Baker made the actual request for the application to vote absentee. Rayshawn Bracey testified he went to Baker's place of employment "to vote" so his "ballot could be sent to [his] address," but he did not mention Baker and he did not testify that anyone requested an application for him. Michael Williams testified he voted and requested his own ballot. He did not mention Baker. June Wright—who cannot read—testified he received an absentee ballot after he "sent for help."[6] Wright testified, "I asked them to help me . . . because I can't read," and "Sydney, she helped me out." When asked specifically on cross-examination, "You didn't request it, she did?," Wright answered—again—"No. She helped me, I asked her to help me to, you know, vote."

Each witness who appeared before the commission—including Baker—testified only that Baker assisted another person in requesting an application to vote by absentee ballot. No witness presented any evidence Baker violated the statute by making the request herself. Baker was asked numerous questions as to whether she requested an application for other people, as opposed to simply assisting those people in requesting ballots on their own. Each time, Baker gave an answer that was the equivalent of "no." Thus, neither Baker nor any other witness provided the commission with any evidence that Baker violated the statute. The commission decided, however, it did not believe Baker's testimony. On the basis of no witness providing any evidence of a violation and the election commission finding Baker's

[6] Wright discussed an affidavit stating he received an unsolicited absentee ballot. Wright testified he might have signed an affidavit, but was unsure. Wright also testified he told a private investigator he received an unsolicited absentee ballot. In his testimony before the election commission, however, he was clear that Baker assisted him with the process of requesting an application.

denial of a violation not credible, the election commission found a violation. It does not work that way. Baker's testimony that no violation occurred does not become evidence that a violation did occur simply because the factfinder finds the testimony not credible.

The dissent makes several points that warrant a response. First, it labels as "artificial dichotomy" the distinction between actually making a request for an absentee ballot for another person and assisting a person in making their own request. In recognizing this distinction, however, we have simply interpreted the applicable statute. In other words, we did not create the distinction; it is in the statute. Second, as the dissent notes, June Wright and Elizabeth Murphy—who also testified on behalf of her husband, Melvin Murphy—each testified only that Baker "assisted" them in requesting a ballot. Rayshawn Bracey said nothing about Baker in his testimony. Third, the dissent makes fun of our comment, "It does not work that way." It is a serious comment. The losing candidates bore the factual burden of proving Baker violated the statute. No witness testified Baker violated the statute and Baker herself denied violating the statute. No factfinder may take the denial of a fact, find the denial not credible, and treat its credibility finding as evidence of the fact. Finally, the dissent attributes to us "a rather selective view of the facts." However, the dissent has not recited a single piece of evidence that would support a finding Baker requested an application for another voter. Under that circumstance, our standard of review requires we reverse.

III. Conclusion

Because there is no evidence to support the election commission's finding that Baker violated the statute, the circuit court was correct to reverse and reinstate the results of the election.

AFFIRMED.

BEATTY, C.J., and JAMES, J., concur. Acting Justice Kaye G. Hearn dissenting in a separate opinion in which KITTREDGE, J., concurs.

ACTING JUSTICE HEARN: Because I believe election commissions are better equipped to determine an election's validity than this Court, and that evidence supports the factual findings here, I dissent. The McBee Municipal Election Commission ("Commission") invalidated the town's 2020 election after hearing from witnesses and determining their credibility. That decision was not made in a vacuum; rather, it was reached after a lengthy hearing which resulted in credibility determinations, together with substantial knowledge of Baker's relationship with Odom[7] as well as the recent tortured history of municipal elections in McBee. Sitting in its appellate capacity, the circuit court determined there was "no evidence" to support the decision of the Commission and reversed. Under a rather selective view of the facts, the majority affirms the circuit court. I would honor our standard of review and reinstate the decision of the Commission.

An appellate court's review of decisions of a municipal election commission is very limited. "In municipal election cases, we review the judgment of the circuit court only to correct errors of law." *Taylor v. Town of Atlantic Beach Election Comm'n*, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005). Likewise, a circuit court will not invalidate an election commission because, when "sitting in appellate capacity . . . it must accept the factual findings of the commission unless they are wholly unsupported by the evidence." *Id.* at 14, 609 S.E.2d at 503. Further, in all trials, the trier of fact possesses the fundamental authority to determine a witness is not credible when there is reason for disbelief. *See Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 639, 842 S.E.2d 349, 350 (2020) ("Our courts have frequently held that when the [workers compensation] commission makes a credibility determination based on substantial evidence, the credibility finding itself is substantial evidence, and factual findings properly based on the credibility finding are binding on the [appellate] courts").

Today, the majority disregards our limited standard of review and holds there is no evidence that Sydney Baker committed illegal activity. To bolster this decision, the majority creates a distinction between mere "assistance" in the ballot

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[7] From the record, Baker's precise relationship with Odom is somewhat unclear. While Odom claimed he was no longer affiliated with Alligator Water Co., and therefore not Baker's co-coworker, the Commission disagreed with this assertion after being presented with evidence that his name still appeared on the company website on election day.

requesting process and the actual requesting of a ballot, one being permissible and the other being impermissible.[8] And in applying this artificial dichotomy to the facts here, the majority, contrary to the Commission, completely accepts Baker's version of her conduct. Finding that she only assisted voters in requesting absentee ballots—not that she actually requested them on their behalf—the majority finds no violation of our voting law. I do not agree with supplanting the factual findings made by the Commission as to Baker's credibility, and I would hold that Baker's actions in traveling about the town in her van—armed with a computer and printer—requesting absentee ballots for voters, required her to comply with section 7-15-330's registry requirements.

The majority's version of the facts discounts the multiple witnesses who, by their own admission, were incapable of requesting their own ballots. For example, Rashawn Bracey testified he did not know how to go about requesting a ballot on his own and therefore went to Alligator Water Co.—Baker's place of employment—as he had in a previous election. Another witness, June Wright, stated that he was illiterate and therefore incapable of requesting his own ballot until Baker assisted him in doing so. Additionally, there was Elizabeth Murphy who testified that she voted absentee for herself and her husband after Baker came to her door and helped her request an absentee ballot. Her husband, Melvin Murphy, had suffered a major "massive heart attack stroke" and needed assistance in voting which both Baker and Mrs. Murphy provided him.

While it is certainly true that individuals with conditions inhibiting their ability to vote may receive assistance with the process, section 7-15-330 requires the volunteer to be registered as a qualified elector so that nefarious conduct, such as that alleged here, does not taint the election process. *See* S.C. Code Ann. § 7-15-330 (2019). Baker could have become registered simply by complying with the law—by being a registered voter, abstaining from paid campaign activity, and filing the requisite paperwork with the state. Instead, the clear inference from her conduct in this election as well as in past elections, was that she used her professional relationship with Odom and his business to request absentee ballots for voters without complying with the law.

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[8] Even the majority concedes that if Baker in fact requested ballots for individuals, that would be illegal conduct as she was not registered with the state and not related to the individuals involved.

I profoundly disagree with the majority's dismissal of the Commission's findings stemming from its credibility determination of Baker's testimony, particularly its statement that "this is not how it's supposed to work." The credibility of the witnesses, including Sydney Baker, was crucial to the resolution of this case, and was within the peculiar province of the Commission as the fact-finder. I would not second-guess the credibility findings of the Commission, which not only had the opportunity to view the witnesses but possessed a wealth of historical knowledge about Baker's relationship with Odom and her prior participation in municipal elections. The Commission, in an exercise of its discretion, found that Baker's testimony was less believable than other witnesses due to her bias and previous pattern of conduct. This finding was peculiarly within the province of the Commission, and, unlike the majority, I believe that is precisely how it is supposed to work.

The Commission coupled this evidence of violations with Baker's name appearing on up to 28 ballots. Similar to the *Broadhurst* case, scope is assessed not by looking to individual ballots, but by considering whether the election's outcome could be in doubt. *See Broadhurst v. Myrtle Beach Election Comm'n*, 342 S.C. 373, 382, 537 S.E.2d 543, 547 (2000) ("[E]ven though it may have been mathematically unlikely [the losing candidate] would have received 212 of the 231 uncounted votes, the Court has determined the best method to safeguard the purity of election is to add the irregular votes to the losing side." (footnote omitted) (citation omitted) (internal quotation marks omitted)). The Commission found that any ballot which listed Baker's name was irregular and that the election was decided by insufficient a margin to ignore the impact of this irregularity. I would hold that this determination is supported by the evidence and would reinstate the decision of Commission.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tyrone Anthony Wallace Jr., Petitioner.

Appellate Case No. 2021-000332

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 28175
Heard April 5, 2022 – Filed August 30, 2023

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Melody Jane Brown, W. Jeffrey Young, and William Joseph Maye, of Columbia; Isaac McDuffie Stone III, of Bluffton, all for Respondent.

JUSTICE FEW: Tyrone Anthony Wallace Jr. appealed his convictions for murder and kidnapping, challenging the trial court's ruling that a witness who placed Wallace's phone near the two crime scenes based on cell site location information (CSLI)[1] was "qualified as an expert by knowledge, skill, experience, training, or education" under Rule 702 of the South Carolina Rules of Evidence. The court of appeals affirmed. We granted Wallace's petition for a writ of certiorari to address only this issue. We find the trial court acted within its discretion. We affirm.

I. Facts and Procedural History

On October 25, 2015, Andre Frazier went to a house on Greene Street in the City of Beaufort looking for his friend Vermone Steve, whom everyone called Mony. Mony lived at the Greene Street house with Varsheen Smith. At the house, Frazier found only Wallace and Smith. Wallace and Smith tied up Frazier and held him at gunpoint. They released Frazier a few minutes later when they learned police officers were in the area on an unrelated call. Frazier left Greene Street without immediately speaking to the officers. Three days later, a Beaufort police investigator interviewed Frazier about Mony's disappearance. Frazier told the investigator Wallace and Smith tied him up at gunpoint. On November 18, Beaufort County Sheriff's deputies discovered remains of Mony's body near Pea Patch Road on Saint Helena Island in Beaufort County.

At trial, the State presented evidence Wallace waited for Mony at the Greene Street house, and shot and killed Mony when he arrived not long after he and Smith kidnapped and released Frazier. The State also presented evidence Wallace and three other men took Mony's body to the Pea Patch Road location and attempted to

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[1] CSLI can be used to track the general location of a cell phone. As the Supreme Court of the United States recently explained, "Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area." *Carpenter v. United States*, 585 U.S. ___, ___, 138 S. Ct. 2206, 2211, 201 L. Ed. 2d 507, 515 (2018).

burn it using gasoline. Wallace eventually admitted to being present during Frazier's kidnapping and Mony's murder.

The State called an investigator in the Solicitor's office named Dylan Hightower as an expert witness. Hightower used CSLI to create a map showing Wallace's cell phone was near the Greene Street house and then traveled to and from the Pea Patch Road area at specific times on the night of the murder and early the following morning. The State proposed to have Hightower testify—using the map—Wallace's phone connected to four cell towers during the trip, two in particular: one 327 yards from the Greene Street house and the other 2.67 miles from the Pea Patch Road location.

The trial court conducted a lengthy pre-trial hearing and ruled Hightower was qualified as an expert under Rule 702. The jury found Wallace guilty of murder and kidnapping, and the trial court sentenced him to life in prison for murder and twenty-five years for kidnapping. The court of appeals affirmed. *State v. Wallace*, Op. No. 2021-UP-029 (S.C. Ct. App. filed Jan. 27, 2021).

II. Standard of Review

We review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard. *See, e.g.*, *State v. Phillips*, 430 S.C. 319, 340, 844 S.E.2d 651, 662 (2020) (citing *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011)); *State v. Council*, 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999) (citing *State v. Von Dohlen*, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996)). We will not reverse a trial court's ruling on an evidence question unless we find the court abused its discretion, or—recognizing the term "abuse of discretion" can be a bit harsh[2]—unless we find the trial court has not acted within the discretion we grant to trial courts. *State v. Williams*, 430 S.C. 136, 149, 844 S.E.2d 57, 64 (2020). In most cases, we have stated a trial court acts outside of its discretion when the ruling is not

[2] *See Barrett v. Broad River Power Co.*, 146 S.C. 85, 96, 143 S.E. 650, 654 (1928) (calling the phrase "abuse of discretion" an "old unfortunate statement" and clarifying that the phrase "does not mean any reflection upon the presiding Judge, and it is a strict legal term, to indicate that the appellate Court is simply of the opinion that there was commission of an error of law in the circumstances").

supported by the evidence or is controlled by an error of law. *See, e.g.*, *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law.").[3] We have also stated that a trial court's failure to exercise its discretion as to the admissibility of evidence is itself an abuse of discretion. *See State v. King*, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29 (2017) (holding the trial court's refusal to listen to the disputed phone call recording left the court unable to carry out the required balancing under Rule

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[3] In some cases, this Court and our court of appeals have misstated when a trial court has not acted within its discretion as to expert testimony. *See, e.g.*, *State v. Cope*, 405 S.C. 317, 344, 748 S.E.2d 194, 208 (2013) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." (quoting *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003))); *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (same) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)); *Ray v. City of Rock Hill*, 428 S.C. 358, 369, 834 S.E.2d 464, 470 (Ct. App. 2019) (same) (citation omitted), *aff'd as modified*, 434 S.C. 39, 862 S.E.2d 259 (2021); *State v. Simpson*, 425 S.C. 522, 537-38, 823 S.E.2d 229, 237 (Ct. App. 2019) (same) (citation omitted); *State v. Jones*, 417 S.C. 319, 327, 790 S.E.2d 17, 21 (Ct. App. 2016) (same) (citation omitted), *aff'd as modified*, 423 S.C. at 636, 817 S.E.2d at 270; *Duncan v. Ford Motor Co.*, 385 S.C. 119, 131, 682 S.E.2d 877, 883 (Ct. App. 2009) (same) (citation omitted); *State v. White*, 372 S.C. 364, 372-73, 642 S.E.2d 607, 611 (Ct. App. 2007) (same) (citations omitted), *aff'd but criticized*, 382 S.C. 265, 676 S.E.2d 684 (2009); *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006) (same) (citations omitted), *aff'd in part, rev'd in part*, 380 S.C. 499, 671 S.E.2d 606 (2009); *McDill v. Mark's Auto Sales, Inc.*, 367 S.C. 486, 490, 626 S.E.2d 52, 55 (Ct. App. 2006) (same) (citation omitted); *Ellis v. Davidson*, 358 S.C. 509, 525, 595 S.E.2d 817, 825 (Ct. App. 2004) (same) (citations omitted). This line of cases goes back to *Means*, which cited no South Carolina authority for the point but relied on a case from Colorado. *Means*, 348 S.C. at 166, 558 S.E.2d at 924. Today we reject the *Means* explanation of what is outside of a trial court's discretion. While an "arbitrary" or "unreasonable" ruling clearly is outside of a court's discretion, an "unfair" ruling may or may not be. Thus, we overrule *Cope*, *Fields*, *Ray*, *Simpson*, *Jones*, *Duncan*, *White*, *Douglas*, *McDill*, *Ellis*, *Grubbs*, and *Means* to the extent they use the *Means* definition of an abuse of discretion.

403, SCRE); 422 S.C. at 71, 810 S.E.2d at 31 (Kittredge, J., concurring) ("agree[ing] with the majority that the trial court abused its discretion in admitting the . . . telephone call recording").

Our statements in cases like *Jones* and *King* mean the trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it. We recently discussed the thought process inherent in the exercise of discretion in *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). As we explained in *Morris*, if the record reflects the trial court "exercise[ed] its discretion according to law," we will almost always affirm the ruling. *Morris*, 438 S.C. at 585-86, 885 S.E.2d at 396; *see also State v. Gibbs*, 438 S.C. 542, 551-53, 885 S.E.2d 378, 383-84 (2023) (discussing in detail a trial court's exercise of discretion in ruling on the admissibility of evidence); *State v. Herrera*, 425 S.C. 558, 562, 823 S.E.2d 923, 925 (2019) (although the witness's "qualifications as an expert present a close question, under our deferential standard of review, we find no abuse of discretion in qualifying him as an expert"); *Phillips*, 430 S.C. at 340-41, 844 S.E.2d at 662 (reversing a trial court's ruling to admit expert testimony when the trial court did not "meaningfully exercise that discretion" and "we are actually conducting the analysis for the first time"); *Hamrick v. State*, 426 S.C. 638, 648-49, 828 S.E.2d 596, 601 (2019) (holding the trial court erred because it "failed to make the necessary findings that the State established the foundation required by Rule 702"). As we will explain, the trial court in this case thoughtfully applied a sound view of Rule 702 to the facts and circumstances involved in Hightower's testimony.

III. Analysis

Wallace argues Hightower was not qualified to testify as an expert in the analysis of CSLI. Rule 702 of the South Carolina Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: "the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Council*, 335 S.C. at 20,

515 S.E.2d at 518. In this case we are concerned with only the second *Council* element: whether "the expert witness is qualified."[4] *Id.* (referring to the statement "a witness qualified as an expert by knowledge, skill, experience, training, or education" in Rule 702).

We begin by addressing an undercurrent in Wallace's arguments that the fact Hightower was employed by the prosecutor in the case renders him unqualified under Rule 702. This fact is certainly important, and trial counsel for Wallace stressed in her closing argument to the jury that Hightower "works for the prosecution." We have no doubt the jury considered this potential bias in determining whether to believe Hightower's testimony. This fact, however, does not relate to whether Hightower was "qualified" under Rule 702. In some other case under other circumstances, perhaps the objecting party may convince the trial court that similar bias is important in analyzing an expert witness's qualifications or the reliability of the underlying science. In this case, however, Hightower's potential bias was a credibility matter for the jury.

A trial court's analysis of whether an expert is qualified is affected by the complexity of the "scientific, technical, or . . . specialized knowledge" to which the witness will be called to testify. When expert testimony is scientific in nature, or when it is based on more complex technical or specialized knowledge, the witness providing the testimony will need a greater degree of "knowledge, skill, experience, training, or education" to be qualified. *Compare Hamrick*, 426 S.C. at 649, 828 S.E.2d at 602 (stating, "Accident reconstruction is a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge," and noting attendance at a few classes was not sufficient "to satisfy the 'qualified as an expert' element of the Rule 702 foundation"), *with Herrera*, 425 S.C. at 563, 823 S.E.2d at 925 (finding a witness qualified to identify marijuana in bags—which "it does not appear that Herrera disputes"—based on nothing but his experience as a police officer). As a comparison between cases like *Hamrick* and *Herrera* indicates, on the other hand, when expert testimony is based on less complex knowledge, a trial court may find the degree of qualification required to satisfy the second element of Rule

[4] For a thoughtful discussion of the third *Council* element—"the underlying science is reliable"—in the context of CSLI, see *State v. Warner*, 430 S.C. 76, 83-89, 842 S.E.2d 361, 364-67 (Ct. App. 2020), *aff'd in part and remanded on other grounds*, 436 S.C. 395, 872 S.E.2d 638 (2022).

702 is not as high. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016) ("The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." (quoting *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004))).

In this case, Hightower testified about issues ranging from quite simple to fairly complex. For example, Hightower testified the phone number in question belonged to Wallace and explained what phone numbers the cell phone records showed Wallace's phone called that night. This testimony required a relatively low degree of expertise because it was based on mechanical interpretations of the information in the call records.[5] Hightower's more complex testimony, however, required a greater level of expertise. Hightower created a map that showed the Greene Street house, the Pea Patch Road location, and four cell towers. He explained to the jury which cell towers Wallace's phone connected to at what times on the night of the crimes. He also explained the reasons a phone would connect to one cell tower as opposed to another and concluded that a phone at the Greene Street house would connect to the same tower and use the same "sector" he already stated Wallace's phone had connected to and used.

Our court of appeals has analyzed the testimony of CSLI experts in several cases. In each of those cases, the witness provided expert testimony—using a methodology similar to Hightower's—that a defendant's phone traveled to and from a crime scene. In each case, the expert the trial court found "qualified" had different levels of knowledge, skill, experience, training, and education. In *Warner*, for example, the CSLI expert was an FBI special agent who had 800 hours of CSLI training; had been trained by all major cell carriers; and was an instructor to federal, state, and local agencies. 430 S.C. at 84, 842 S.E.2d at 364-65. In *State v. Young*, 432 S.C. 535, 854 S.E.2d 615 (Ct. App. 2021), the court of appeals found a South Carolina Law

[5] Some courts treat relatively simple CSLI-based testimony as ordinary knowledge, not subject to Rule 702. *See, e.g.*, *United States v. Graham*, 796 F.3d 332, 364 (4th Cir. 2015) (explaining the witness's "testimony that signal strength determines which cell tower will connect to a phone and that cell towers in urban areas have a two-mile maximum range of operability was not opinion testimony"), *vacated upon granting reh'g en banc on other grounds*, 824 F.3d 421 (4th Cir. 2016). We respect the view of courts that have done so, but we find the better approach is to treat the interpretation of CSLI as technical or specialized knowledge, subject to Rule 702.

Enforcement Division (SLED) expert "has the requisite knowledge, skill, experience, and training" because he "performed cell phone location analysis in over 200 cases[,] . . . was trained by the FBI's Cellular Analysis Survey Team[,] and received additional training from private entities." 432 S.C. at 543-44, 854 S.E.2d at 619. In *State v. Franks*, 432 S.C. 58, 849 S.E.2d 580 (Ct. App. 2020), the court of appeals found a Sheriff's Office sergeant who used a software called "GeoTime" qualified as an expert because "he had fifteen years' experience working with call records and cell phone technology," went to "several" seminars about the software, and used it in "approximately fifty cases over . . . three or four years." 432 S.C. at 76, 849 S.E.2d at 590.

In this case, Hightower had fewer hours of training and years of experience than the FBI special agent in *Warner*, the SLED expert in *Young*, and perhaps the Sheriff's sergeant in *Franks*. However, the trial court conducted a robust pre-trial review of Hightower's qualifications and listened to a proffer of his testimony to determine whether he was nevertheless qualified. The court stated at the outset of the pre-trial hearing, "I . . . know what the science is," and then—speaking to the assistant solicitor—stated, "I just want to know what you're trying to get out of him at trial." The court asked "how close of a location or where [Hightower] put[s] . . . any of these people at any specific time, how close to a site?" The court was clearly attempting to gauge the complexity of the knowledge underlying Hightower's testimony, and specifically asked whether Hightower would "go into triangulation," a much more complex use of CSLI from which an expert might be able to determine the precise location of a phone, instead of simply determining the cell tower and sector the phone was using.[6] The assistant solicitor explained the State intended to have Hightower testify—not as to the precise location of Wallace's phone—but that

[6] *See United States v. Beverly*, 943 F.3d 225, 230 n.2 (5th Cir. 2019) ("CSLI should not be confused with GPS data, which is far more precise location information derived by triangulation between the phone and various satellites."); *United States v. Smith*, No. 21-CR-30003-DWD, 2022 WL 17741100, at *3 (S.D. Ill. Dec. 16, 2022) (differentiating between the use of CSLI "to precisely determine the geographical location of a cell device and analyses that determine when a cell device connected to a particular cell site"); *In re Application of the U.S. for an Ord. for Prospective Cell Site Location Info. on a Certain Cellular Tel.*, 460 F. Supp. 2d 448, 451 (S.D.N.Y. 2006) (explaining "the long established process known as triangulation").

Wallace's phone was connected to the tower near the Greene Street house, then connected to two towers near the Pea Patch Road location, and then connected back to the tower near Greene Street, at specified times on the night of the murder corresponding to when other evidence showed the kidnapping, murder, and disposal of Mony's body occurred.

Hightower then explained his training and education in CSLI which included: an internship with SLED; a four-week "on-the-job training" at the SLED Fusion Center, including training for basic knowledge of cell phone forensics and cellular analyses; a one-week "PenLink" call analysis training school at SLED about how to read and map cell phone records; a two-day course called "Fundamentals of Call Detail Records Analysis," which he testified taught him "how to read the records, how to map them, [and] an understanding of how sectors work"; another one-day training class on mobile forensics; a two-day class through the FBI "CAST" Unit on historical cell site analysis; and other courses. He explained these courses totaled at least seventy-two hours of training, and they included training by the FBI in the CASTViz program.[7] He testified these classes included "sector analysis," in which he learned the cell records will show which of three sectors of a cell tower a phone is using at any one time.[8] Finally, he testified he had analyzed at least 100 other sets of cell phone data, and taken continuing education. At one point the trial court interrupted his testimony to inquire "does someone then go in and check and test you and certify you for this tower information?" Hightower answered, "Yes," and explained the testing and his certification from the FBI CAST Unit for completing the "Cell Site Analysis Course." The trial court followed up, "So a one-week course, a two-week course, and then, at the end of the day, they test you to see if you do it correctly." The trial court continued to inquire, asking "So how many practicals can you do [during a one-week class and a two-day class]?"

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[7] "CAST" is an abbreviation for the FBI's Cellular Analysis Survey Team, which specializes in cell phone record analysis. CASTViz is a software application developed by the FBI and provided to law enforcement agencies for visualization and basic analysis of cell phone records.

[8] Hightower explained each cell tower has three "sectors" that "encompass[] 120 degrees of coverage." He explained the CSLI indicates which sector the cell phone was using, which, in turn, indicates which direction—in relation to the cell tower—the phone was located.

The trial court then required Hightower to make "a full proffer" of his testimony because—she stated—her ruling would depend on "the science of it" and "how close he can get" to placing Wallace near the site of the murder and where the body was found. At various times during his proffer, the trial court interrupted him to ask questions, such as, "How can you get that specific? How can you get to 2.67?" On this point, Hightower explained the basis of his conclusion that one of the towers Wallace's phone connected to was 2.67 miles from the Pea Patch Road location.

After the proffer, the trial court again discussed with the attorneys the complexity of the testimony the State sought from Hightower. "So the State is asking that he be qualified as an expert in historical cell phone data, okay? That would allow him to just interpret what the cell phone records say. That doesn't allow him to testify to the location services." The trial court thus remained focused on understanding the complexity of Hightower's testimony, distinguishing between "the simple fact of just extracting the data from the cell phones" and the more complex task of "tracking" the phone's exact location using "triangulation." The trial court stated, "I think [it is] really important exactly what [the testimony] is, because whatever he's qualified in, it only allows him to the extent he can testify."

From the trial court's "robust" examination of Hightower, this Court can clearly see the trial court understood and exercised its responsibility as gatekeeper. *See Phillips*, 430 S.C. at 334, 844 S.E.2d at 659 ("We have repeatedly enforced the requirement that trial courts exercise their gatekeeping responsibility in admitting expert testimony."). The court understood the second Rule 702 element "the expert witness is qualified," inquired deeply into the complexity of the witness's proposed testimony, thoroughly familiarized herself with the facts and circumstances of the case, came to a clear understanding of Hightower's intended testimony and the knowledge on which it was based, carefully thought through Wallace's objection to Hightower's qualifications, soundly applied the law, and articulated in detail her thought process in concluding that Hightower did possess the necessary qualifications to give the testimony he was being asked to give. This thorough analysis of the evidentiary objection before the court was, in fact, the "textbook" exercise of discretion.

IV. Conclusion

We affirm the court of appeals and hold the trial court acted within its discretion by admitting Hightower's testimony because he was sufficiently qualified as an expert to testify about his analysis of Wallace's cell site location information.

AFFIRMED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daufuskie Island Utility Company, Inc., Appellant,

v.

South Carolina Office of Regulatory Staff, Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., Blood Point Property Owner's Association, and Beach Field Properties, LLC, Respondents.

Appellate Case No. 2022-000463

Appeal from the Public Service Commission

Opinion No. 28176
Heard March 30, 2023 – Filed August 30, 2023

AFFIRMED

Thomas P. Gressette Jr. and George Trenholm Walker, both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Appellant.

Andrew McClendon Bateman, Benjamin Parker Mustian, and Steven W. Hamm, all of Columbia, for Respondent the South Carolina Office of Regulatory Staff; and John Julius Pringle Jr. and Lyndey Ritz Zwing Bryant, both of Adams and Reese LLP, of Columbia, for Respondents the Haig Point Club and Community Association, Inc.,

Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association.

JUSTICE KITTREDGE: This case is the third appeal of the Daufuskie Island Utility Company (DIUC) from decisions by the Public Service Commission (PSC) regarding DIUC's 2015 application for ratemaking. In the PSC's first two decisions, it granted only part of the 109% rate increase requested by DIUC. DIUC appealed both decisions, and both times, this Court reversed and remanded to the PSC for further consideration. On the final remand, the parties entered a settlement agreement allowing DIUC to recover rates equivalent to the 109% rate increase it initially requested in 2015. However, the parties continued to disagree over the propriety of DIUC's additional request for a "reparations surcharge"—essentially, a request to retroactively recover the 109% rate increase from the date of the PSC's first order, rather than from the date of the PSC's acceptance of the settlement agreement. The PSC rejected DIUC's request for the reparations surcharge, finding it would amount to impermissible retroactive ratemaking. The propriety of the reparations surcharge is the only matter at issue in this appeal.

We find the General Assembly has not authorized the PSC to grant utilities relief via a reparations surcharge, and the PSC therefore correctly rejected DIUC's request. A utility's exclusive remedy to collect higher rates during the pendency of an appeal (or multiple appeals, as in this case) is set forth in section 58-5-240(D) of the South Carolina Code, which requires the utility to either secure an appellate bond or make "other arrangements satisfactory to the [PSC]."[1] DIUC chose not to avail itself of the statutory remedy prior to this final appeal. Accordingly, we affirm the decision of the PSC and end this lengthy ratemaking process.

I.

A.

DIUC provides water and sewer service to Daufuskie Island in Beaufort County. In

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[1] *See* S.C. Code Ann. § 58-5-240(D) (2015) ("If . . . the utility shall appeal from the [PSC's] order[] by filing with the [PSC] a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case . . . or there may be substituted for the bond other arrangements satisfactory to the [PSC] for the protection of parties interested.").

June 2015, DIUC filed a ratemaking application (the 2015 application), seeking an increase in revenue of $1,182,301—a 109% increase in its prior rates.[2] In December 2015, the PSC granted DIUC around 39% of the revenue increase requested, which amounted to an approximate 43% increase in the prior rates charged to ratepayers (the first order).

DIUC appealed the first order. Simultaneously, it filed a motion with the PSC for approval of an appellate bond pursuant to section 58-5-240(D). The PSC granted the motion and set a bond amount that would cover a one-and-a-half-year period, specifically leaving open the possibility for DIUC to extend the bonding period beyond that date if necessary depending on the length of the appeal. Thereafter, DIUC began charging under bond the full 109% increase in rates sought in the 2015 application.

This Court heard oral arguments in December 2016 and issued its decision in July 2017, reversing the first order on the merits and remanding to the PSC for a de novo hearing. *See Daufuskie Island Util. Co. v. S.C. Off. of Regul. Staff* (*DIUC I*), 420 S.C. 305, 320, 803 S.E.2d 280, 288 (2017).

B.

Following the remand, DIUC's appellate bond approached the initial expiration date, and DIUC claimed it was financially unable to secure the appellate bond for a longer period of time. DIUC therefore requested an expedited proceeding so it could continue collecting the higher rates requested in the 2015 application. While declining to rule outright that DIUC could not afford an extension of its appellate bond, the PSC erred "on the side of caution" and granted the request, issuing its second decision by December 2017 (the second order).

The second order granted DIUC additional revenue as compared to the first order—around 80% of the total revenue requested—amounting to an approximate 88% increase in rates to ratepayers as compared to the rates charged before the 2015 application was filed. Pursuant to section 58-5-240(D) and the expiration of the appellate bond, the second order also required DIUC to issue refunds to its customers for the "excess" rates collected during the appeal, i.e., the difference between the 109% increased rates DIUC had been charging and the 88% increased rates the PSC

[2] For comparison, in its prior ratemaking application in 2011, DIUC requested a 37% increase in its prior rates.

had approved in the second order. *See* S.C. Code Ann. § 58-5-240(D) ("In all cases in which a refund is due, the [PSC] shall order a total refund of the difference between the amount collected under bond and the amount finally approved.").

DIUC appealed the second order, contesting only the PSC's ruling regarding its denial of a portion of DIUC's rate case expenses (management fees and legal fees incurred in seeking the rate increase). Notably, DIUC did not seek a second appellate bond or propose "other arrangements satisfactory to the [PSC] for the protection of parties interested." *See id.* Moreover, DIUC never raised to either the PSC or this Court any argument about the impropriety of the refunds issued in the second order, its alleged inability to obtain an appellate bond, or the unfairness of forcing the utility to get an appellate bond it could not afford. As a result, DIUC began charging the 88% rate increase rather than the 109% rate increase it had been collecting during the first appeal and remand.

Following oral arguments in April 2019, this Court issued its decision in July 2019, again reversing and remanding to the PSC for a de novo hearing. *See Daufuskie Island Util. Co. v. S.C. Off. of Regul. Staff* (*DIUC II*), 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019). However, in stark contrast to *DIUC I*, the Court explained its decision to reverse and remand a second time was not based on the merits of DIUC's arguments on appeal and should not be read to suggest the Court's views on the merits. *Id.*

C.

Following the second remand, the PSC accepted the parties' settlement agreement allowing DIUC to collect rates equivalent to the 109% rate increase requested in the 2015 application (the third order). However, the breakdown of the rates requested in the 2015 application and those granted in the third order were vastly different from one another.[3] Nonetheless, the PSC agreed with the parties that the rates were

[3] For example, although not an exhaustive list, (1) the rate base approved in the third order was over $1,000,000 lower than that requested in the 2015 application; (2) the rate of return granted was over 1.25% lower than requested; and (3) the rate case expenses approved were over $700,000 higher than the initial request due to the length and complexity of the various appeals. The $700,000 increase in rate case expenses alone was particularly notable given that DIUC had requested a total revenue increase of around $1,200,000; in other words, the increase in rate case expenses amounted to 61% of the total revenue increase requested by DIUC in its

"just and reasonable and [would] allow [DIUC] the opportunity to earn a reasonable rate on the basis of its [2015 application]."

D.

The settlement agreement and third order resolved all of the outstanding issues between the parties except one: the propriety of DIUC's request for a reparations surcharge. The requested surcharge consisted of two parts. The first part centered around the refund issued to DIUC customers after the second order and expiration of the appellate bond. Specifically, DIUC claimed that since it had ultimately been granted the ability to collect rates equivalent to the 109% rate increase sought in the 2015 application, the earlier refund—the difference between the 109% increase collected under bond and the 88% increase approved in the second order—was improperly credited to the ratepayers. The second part of the surcharge involved the period of time between the issuance of the second and third orders. During that time, due to DIUC's failure to secure an appellate bond or make "other arrangements satisfactory to the [PSC]," DIUC charged its customers the 88% rate increase granted in the second order. However, DIUC later contended that, because the third order approved rates equivalent to the 109% increase originally requested, it should have been able to charge the full 109% rate increase all along.[4]

Ultimately, the PSC denied DIUC's request for a reparations surcharge in a thoughtful and detailed order (the fourth order). In relevant part, the PSC found the reparations surcharge amounted to illegal retroactive ratemaking. The PSC explained DIUC's sole statutory remedy was set forth in section 58-5-240(D), and that statute did not authorize the award of a reparations surcharge. The PSC believed section 58-5-240(D) provided DIUC's sole statutory remedy for two reasons: (1) "[w]hen a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy," quoting *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992); and (2) section 58-5-240(D) was the General Assembly's sound policy declaration to balance the

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2015 application (and the total revenue increase ultimately granted in the third order).

[4] Recall DIUC was able to charge the 109% rate increase during the pendency of the first appeal due to securing an appellate bond pursuant to section 58-5-240(D). Therefore, it was only between the issuance of the second and third orders that DIUC did not charge its ratepayers the 109% increase.

interests of utilities and their customers, and should the PSC fail to require compliance with the statute, it "would signal to utilities that they need not follow the bond statute and still may recover additional monies" via a belated reparations surcharge.

The PSC additionally noted that although the revenue increase requested in the 2015 application and the revenue increase approved in the third order were nearly identical *in total*, the *composition* of the figures was "dramatically different," and, therefore, "the similarities between revenue settled upon and revenue originally applied for [did] not indicate that the rates DIUC originally applied for were *de facto* just and reasonable." Thus, the PSC held DIUC did not have lost revenue it was entitled to collect during the second appeal because DIUC did not establish its right to those revenues until the third order was issued.[5]

DIUC directly appealed the fourth order to this Court pursuant to Rule 203(d)(2)(A), SCACR.

II.

In an appeal from the PSC, the Court's review is governed by section 1-23-380 of the South Carolina Code (Supp. 2022). *Duke Energy Carolinas, L.L.C. v. S.C. Off. of Regul. Staff*, 434 S.C. 392, 406, 864 S.E.2d 873, 880 (2021). "Pursuant to that statute, the Court may not substitute its judgment for an agency's judgment as to the weight of the evidence on questions of fact." *Id.* (citing S.C. Code Ann. § 1-23-380(5)). Rather, the Court may only reverse or modify a decision of the PSC

[5] In particular, DIUC specifically agreed in the third order to forgo recovery of certain rate base expenses related to a utility plant in service. However, DIUC nonetheless ensured the revenue increase approved in the third order matched that of the increase sought in the 2015 application by substituting the value of the utility plant in service for rate case expenses incurred during the various appeals. The PSC found that substitution noteworthy because the updated rate case expenses making up the final revenue increase approved were either not incurred by the utility until after *DIUC II* or not shown to be just and reasonable until the parties reached the settlement encompassed by the third order. As a result, the PSC explained DIUC was not entitled to a reparations surcharge for the time period between the issuance of the second and third orders because the calculation of the surcharge was "based either on [the utility plant in service] it agreed not to seek or rate case expenses that were unrecoverable until the third proceeding."

"when the findings or conclusions are affected by an error of law, clearly erroneous, or arbitrary and capricious." *Id.* (citing S.C. Code Ann. § 1-23-380(5)(d)–(f)).

The Court must view the PSC's findings on appeal as "presumptively correct." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Thus, "the party challenging the [PSC's] order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *Id.*

III.

We first address the portion of the reparations surcharge related to DIUC's attempt to recoup the ratepayer refund required by the second order after the expiration of DIUC's appellate bond. The PSC found DIUC did not challenge the propriety of the refund in the second appeal and, therefore, the ruling in the second order finding refunds were necessary and proper had become the law of the case. DIUC does not directly challenge that ruling here, making no attempt in its brief to this Court to argue why the law-of-the-case doctrine does not apply. As a result, we affirm the PSC's finding that the refund portion of the surcharge must be denied. *See Atl. Coast Builders & Contractors, L.L.C. v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Transp. Ins. Co. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

IV.

As to the second portion of the reparations surcharge—involving DIUC's request to charge the 109% rate increase between the issuance of the second and third orders—DIUC argues that without this portion of the surcharge, the third order does not make the utility whole. More specifically, DIUC contends the third order permitted DIUC to collect rates equivalent to the full increase requested in the 2015 application, and the utility therefore should have been able to collect that amount starting on the date of the first order, regardless of any appeals. Additionally, DIUC claims it was fiscally impossible for it to secure an appellate bond between the issuance of the second and third orders, and thus, it would be unfair to require strict compliance with section 58-5-240(D). We disagree for several reasons, finding such compliance is the only avenue under which DIUC could have sought relief here.

Once the PSC issues a ruling disallowing the full rates requested by a utility in a ratemaking application, the only mechanism for the utility to collect the revenue it requested is provided in section 58-5-240(D). *See generally* S.C. Code Ann. § 58-5-240 (providing a utility is not entitled to the revenue requested in a ratemaking application until one of three things occurs: (1) pursuant to subsection A, the PSC specifically approves those rates; (2) pursuant to subsection E, the PSC fails to timely rule on the application; or (3) pursuant to subsection D—which only applies after the PSC disallows the higher rates in whole or in part—the utility takes certain actions that would protect ratepayers from improperly overpaying). Accordingly, DIUC's compliance with subsection D is the only method which could entitle it to the reparations surcharge.

Section 58-5-240(D) provides, in relevant part:

> If . . . the utility shall appeal from the [PSC's] order[] by filing with the [PSC] a petition for rehearing, *the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case*. Such bond must be in a reasonable amount approved by the [PSC], with sureties approved by the [PSC], conditioned upon the refund, in a manner to be prescribed by order of the [PSC], to the persons, corporations, or municipalities, respectively, entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; *or there may be substituted for the bond other arrangements satisfactory to the [PSC] for the protection of parties interested*. During any period in which a utility shall charge increased rates under bond, it shall provide records or other evidence of payments made by its subscribers or patrons under the rate or rates which the utility has put into operation in excess of the rate or rates in effect immediately prior to the filing of the schedule.
>
> All increases in rates put into effect under the provisions of this section which are not approved and for which a refund is required shall bear interest at a rate of twelve percent per annum.
>
> The interest shall commence on the date the disallowed increase is paid and continue until the date the refund is made.
>
> In all cases in which a refund is due, the [PSC] shall order a total refund of the difference between the amount collected under bond and the amount finally approved.

Id. § 58-5-240(D) (emphasis added).

Thus, section 58-5-240(D) contemplates two possible routes for a utility to collect higher rates during an appeal once the PSC has disallowed revenues sought in a ratemaking application: the first is securing an appellate bond, and the second is making "other arrangements satisfactory to the [PSC] for the protection of parties interested." There are no other options or exceptions set forth in that subsection of the statute. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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. . . . [C]ourts are bound to give effect to the expressed intent of the legislature." (cleaned up)).

As the PSC explained, "When a statute creates a substantive right and provides a remedy for infringement of that right, the [injured party] is limited to that statutory remedy." *Dockins*, 306 S.C. at 498, 413 S.E.2d at 19. Various provisions in the South Carolina Code—including section 58-5-240—provide utilities the right to be protected from excessive regulatory lag (the delay in time between when a ratemaking application is filed and when a utility can collect the higher revenues in the application). As a result, should a utility wish to protect itself against the ills of regulatory lag, it is limited to those remedies set forth in the statutes. None of those remedies include a reparations surcharge, and therefore, the PSC has no authority to grant a utility equitable relief via such a surcharge. *See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (explaining section 58-5-240(D) only allowed for the imposition of an appellate bond on a utility who had not fully prevailed before the PSC, and therefore, the PSC lacked the equitable authority to impose an appellate bond on a utility who had fully prevailed).

Were we to agree with DIUC and allow a utility to collect a reparations surcharge following a successful appeal, it would entirely obviate the need for a utility to ever secure an appellate bond or make "other arrangements," thus placing all the risk on ratepayers and none on the utility. Given the clear system of checks and balances set forth in section 58-5-240(D) weighing the competing interests of utilities and their customers, we reject the suggestion that the General Assembly intended a utility to circumvent the protections afforded ratepayers. *See Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 685 P.2d 276, 281, 284–85 (Idaho 1984) (finding that if a utility were entitled to a surcharge or other monetary relief whenever a public utilities commission order was set aside upon appeal, its failure to follow the

statutory process for obtaining a stay of the commission's initial order would be meaningless; noting the relevant statutes provided only prospective relief and did not give the utilities commission the "authority to prescribe surcharges or reductions to otherwise reasonable rates in order to make up past revenue shortfalls due to confiscatory rates"; and noting that allowing a surcharge following reversal would destroy the protections afforded to ratepayers by the state's appellate bond statute); *Pub. Serv. Comm'n v. Diamond State Tel. Co.*, 468 A.2d 1285, 1300 (Del. 1983) ("[W]e find no statutory authority, and hence no legislative intent, that retrospective rate-making may be judicially mandated—even upon a judicial determination of Commission error in rejecting a rate application. . . . [However, Delaware has an appellate bond statute similar to South Carolina's section 58-5-240(D).] The provision of this form of remedial relief from an erroneous commission order thereby serves two purposes: (1) it provides a meaningful form of relief in the event of a successful appeal; and (2) *it suggests, at the very least, that the Legislature did not intend to permit recoupment through rate surcharge as an alternative means of appellate redress for an erroneous commission ruling.*" (emphasis added)).[6]

Thus, we conclude the PSC correctly found that DIUC's sole remedy is that provided in section 58-5-240(D). In doing so, we find it notable that DIUC exclusively relied

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[6] *Cf. Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 563 P.2d 588, 604 (N.M. 1977) ("This is an issue of first impression in New Mexico. However, this court has held that rate-making is legislative in its nature, and it is axiomatic that legislative action operates prospectively, not retroactively. Retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant." (internal citation omitted)); *Bristol Cnty. Water Co. v. Harsch*, 386 A.2d 1103, 1108 (R.I. 1978) (affirming the denial by the state utilities commission of a reimbursement in a utility's next rate order for errors in a previous rate order; and explaining that because rates are prospective in nature, they "may not be designed to recoup past losses": "The rule prohibiting the imposition of retroactive rates holds true despite the fact that the company's loss might be attributable to the inevitable result of a regulatory lag."); Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983, 998 (1991) ("*Even if the court reverses a rate order on appeal*, the court remands the case to the commission to fix rates for the future. Once the commission fixes rates, . . . *any changes can be prospective only*." (emphasis added)).

on the appellate bond option set forth in section 58-5-240(D) and never explored the second option available, that being to seek "other arrangements satisfactory to the [PSC]."[7] This second (and presumably cheaper) option was specifically drawn to DIUC's attention during the proceedings before the PSC, yet DIUC chose not to pursue it despite its alleged inability to pay for an extension of its appellate bond. Given the clear options set out in section 58-5-240(D), it was incumbent upon DIUC to either secure an appellate bond or request "other arrangements." DIUC's failure to do so here is fatal to its request for a reparations surcharge.[8]

V.

As a final matter, the parties hotly contested whether our decision should be guided by *South Carolina Electric & Gas Co. v. Public Service Commission* (hereinafter

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[7] *See, e.g.*, *In re Blue Granite Water Co.*, 434 S.C. 180, 203, 862 S.E.2d 887, 899 (2021) (explaining that under section 58-5-240(D), and with the PSC's approval, the utility created a "deferred account for a regulatory asset that would increase at a rate of . . . the difference between the rates approved in the PSC's order . . . and the rates originally requested in [the utility's] application. Then, assuming [the utility] prevailed on appeal, it would be able to recover the amount in the deferred account in a future ratemaking case."); Krieger, *supra* note 6, at 1015–16 ("The courts that have addressed [whether the creation of a deferred account constitutes retroactive ratemaking] have found no retroactive ratemaking problem. . . . [They] reasoned that retroactive ratemaking only applies to adjustments in past rates; because [utilities commissions do] not take[] into account the expenses of a [deferred account] in past rates, [the commissions are] free to consider the deferred expenses in setting future rates." (footnote omitted)).

[8] We additionally note our disapproval of the timeliness of DIUC's request for a reparations surcharge. Specifically, during the second appeal, DIUC did not argue that its inability to afford an appellate bond rendered section 58-5-240(D) inapplicable on equity grounds. *See Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (determining a particular argument was unpreserved because it was not raised at the petitioner's first opportunity to do so). While we do not base our holding as to this part of the reparations surcharge on issue preservation grounds today, we note for the future that parties should be mindful to raise and pursue issues at their first opportunity so that the relevant facts—here, DIUC's inability to afford an appellate bond or make "other arrangements"—are fresher and more easily vetted.

SCE&G)[9] or *Hamm v. Central States Health & Life Co.* (hereinafter *Central States*).[10] In *SCE&G*, the prior rates set were determined to be lawful and not subject to a refund; in *Central States*, the prior rates set were determined to be unlawful, and refunds were required. *Compare SCE&G*, 275 S.C. at 491, 272 S.E.2d at 795, *with Central States*, 299 S.C. at 505–06, 386 S.E.2d at 253–54.

In this instance, neither *SCE&G* nor *Central States* is persuasive authority, for here, the Court did not reach the merits of the lawfulness of the rates set by the PSC. *See DIUC II*, 427 S.C. at 464, 832 S.E.2d at 575. The parties settled the case before the PSC could determine with finality whether the rates set in the second order were appropriate or confiscatory. Rather than trying to squeeze this case into the precedent of *SCE&G* or *Central States*, we return to the overarching point that the PSC is a governmental agency of limited power and jurisdiction, and it may exercise only those powers expressly or impliedly conferred upon it by the General Assembly. *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). As we explained above, the General Assembly has not authorized the PSC to issue reparations surcharges. Rather, DIUC's remedy here lies exclusively with its compliance with section 58-5-240(D). It is only within the framework set forth in that section that the PSC can offer relief to utilities seeking to collect higher rates during the pendency of an appeal.

VI.

It is undeniable that due to statutory deadlines and the like, most ratemaking cases are resolved quickly, and the resultant regulatory lag is typically very short. Unfortunately, the regulatory lag here was significantly longer than normal, and the resultant delay in DIUC being able to increase its revenues was extensive. Nonetheless, given the unambiguous statutory scheme, we hold that section 58-5-240(D) provides the exclusive remedy for a utility seeking to collect higher revenues during the course of an appeal and thereby avoid excessive regulatory lag. DIUC knowingly chose not to comply with the statute, declining to seek "other arrangements satisfactory to the [PSC]" despite being urged to do so. The PSC therefore properly rejected DIUC's belated request for a reparations surcharge. *See SCE&G*, 275 S.C. at 491, 272 S.E.2d at 795 ("The crux of this issue is the firm principle that rate-making is prospective rather than retroactive. The [PSC] has

[9] 275 S.C. 487, 272 S.E.2d 793 (1980).

[10] 299 S.C. 500, 386 S.E.2d 250 (1989).

no . . . authority . . . to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility."). The decision of the PSC is

AFFIRMED.

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

The Supreme Court of South Carolina

Amendments to Rule 410(j), South Carolina Appellate Court Rules

Appellate Case No. 2023-001144

ORDER

The South Carolina Bar has filed a petition seeking to amend Rule 410(j) of the South Carolina Appellate Court Rules (SCACR) to increase the Annual License Fee by $25. The Bar reports this increase is necessary based on inflation and corresponding increased costs for staff and other services. The proposed increase was voted on and approved by the House of Delegates.

Pursuant to Article V, § 4 of the South Carolina Constitution, we grant the Bar's request to amend Rule 410(j), SCACR. The amendments, which are effective immediately, provide as follows:

> **(j) License Fees.** The membership year shall be the calendar year. By January 1st, each member who is in good standing (other than deceased members) shall pay the South Carolina Bar the fees specified in this section and in section (k) below. All income and assets shall be handled separately by the South Carolina Bar, as prescribed in its Constitution and Bylaws. For the purpose of this rule, the term "license fee" shall include any assessment under Rule 411, SCACR.
>
> > **(1) Regular Member.** The license fee for a regular member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $215. The license fee for all other regular members shall be $300. In addition, the license fee of a regular member shall include the Lawyer's Fund for Client Protection assessment specified by Rule 411,

SCACR. Finally, each regular member shall pay $30 which shall be designated for meeting the civil legal needs of indigents as directed by the Board of Governors of the Bar, but any member may deduct this fee before remitting payment.

(2) Inactive Member. The license fee shall be $230.

(3) Judicial Member. The license fee shall be $230. If, however, the member is or will be age sixty-five or older during the license year, and is either a retired judge meeting the requirements of (h)(1)(C)(ii) above or a judge of a federal court in senior status, no license fee is required.

(4) Judicial Staff Member. The license fee for a judicial staff member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $215. The license fee for all other judicial staff members shall be $230.

(5) Military Member. The license fee for a military member shall be $230. This fee shall be waived during a time of war declared by the Congress of the United States and, upon written request, shall be waived when the member is serving on active duty in an area designated as a combat zone by the President of the United States.

(6) Administrative Law Judge Member. The license fee shall be $230.

(7) Retired Member. No fee is required.

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR, or Rule 427 (Limited Certificate of Admission for Judge Advocates), SCACR. The license fee for all other persons holding a limited certificate shall be $300.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
August 30, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph G. Kelsey, #217218, Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, Respondent.

Appellate Case No. 2020-001473

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Opinion No. 6020
Heard April 4, 2023 – Filed August 30, 2023

REVERSED AND REMANDED

Gerald Malloy, of Malloy Law Firm, of Hartsville; Jonathan Edward Ozmint, of The Ozmint Firm, LLC, of Greenville; and Hannah Lyon Freedman, of Justice 360, John H. Blume, III, of Law Office of John Blume, and Whitney Boykin Harrison, of McGowan Hood Felder & Phillips, of Columbia, all for Appellant.

Matthew C. Buchanan, of South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

Allison Elder, of Root & Rebound, of Greenville, for Amici Curiae Former Correctional Agency Heads, Correctional Administrators, and Prison Wardens.

THOMAS, J.: Joseph G. Kelsey appeals the order of the Administrative Law Court (ALC), which affirmed the denial of parole by the Parole Board of the South Carolina Department of Probation, Parole and Pardon Services (the Board), arguing, *inter alia*, the Board is required to give putative parolees access to their files. We reverse and remand.

FACTS

Kelsey was denied parole in November of 2015 and in November of 2017. He appealed his third denial of parole, dated November 15, 2019, to the ALC. The ALC affirmed. In January and March of 2018, Kelsey requested the Board's reports concerning his "suitability for parole, likelihood of reoffending, etc., and any assessment tools applied to [him] and their results." The Board never responded to Kelsey. At the most recent parole hearing, the Board noted that some, but not all, of its members had received a copy of Kelsey's prehearing packet. Only five of the six members of the Board were at Kelsey's hearing, and the vote was three to two in favor of parole, or sixty percent; however, parole for a violent offense required "yes votes" from at least two-thirds, or sixty-seven percent, of the members of the Board.[1] Because Kelsey received only sixty percent, he did not meet the sixty-seven percent requirement. Thus, the Board denied parole. Kelsey filed two letters requesting reconsideration and a revote before the full Board. Kelsey also argued the Board acknowledged that some members had not received his prehearing packet, and he should be permitted an opportunity to provide additional information.

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[1] *See* S.C. Code Ann. § 16-1-60 (Supp. 2022) (defining murder as a violent crime); S.C. Bd. of Paroles and Pardons, *Policy & Procedure Manual* 28 (2019), https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf ("In the case of violent offenders whose offenses occurred after January 1, 1986, the vote to grant parole must be by at least two-thirds of the members of the Board members present; however, only a quorum must be present to conduct business.").

Kelsey submitted the packet to the ALC. Among other things, the packet included (1) a list of Kelsey's jobs while incarcerated, including chaplain assistant and teaching assistant; (2) a letter from a prison minister indicating Kelsey was continuing his education in pursuit of a Bachelor's degree and he had housing at Jump Start, if paroled; (3) numerous letters of support and awards indicating academic achievement and participation in the Greenwood Crisis Stabilization Unit; (4) a psychological evaluation indicating extensive family support, a low risk of reoffending, a proposal to move in with his fiancée, if paroled, and good physical, mental, and emotional health; and (5) the letters exchanged between Kelsey's attorneys and the Board in advance of and after his parole hearing. Kelsey also filed prior denials of parole, a transcript of his parole hearing, a transcript of his co-defendant's parole hearing, and transcript portions of Kelsey's trial hearing. The Board filed a response, arguing in part that Kelsey had no right to view his parole files.

By order filed October 7, 2020, the ALC found the Board erred in "mistakenly believ[ing] that a parole applicant has no right to review his parole file." The ALC found that the requirement that an inmate notify the Board of an error in a file he had no right to see was "logically and legally absurd." The ALC further noted that documents could be redacted and/or submitted under seal. However, the ALC found the Supplemental Record on Appeal that was submitted provided it ample material for review and affirmed the Board. This appeal follows.

STANDARD OF REVIEW

S.C. Code Ann. § l-23-610(B) (Supp. 2022) provides the applicable standard:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;

> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp.*, *v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

LAW/ANALYSIS

Kelsey argues he is entitled to access his parole files. We agree.

In arguing inmates have no right to review their parole files, the Board relies on its own Form 1212, which lists the criteria for parole consideration and includes the following language:

> In deciding whether or not to grant parole, the Parole Board considers, among other things, the inmate's record before incarceration as well as during incarceration. The record itself is prepared through investigations conducted for the Parole Board, and it becomes a part of the inmate's parole file. The files are maintained by the Department of Probation, Parole and Pardon Services and are, by the statute, privileged and confidential. The confidentiality of the parole file is far reaching; inmates themselves have no right to inspect the contents of their files. *If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or*

> *inaccuracy.* The Board will investigate the inquiry and notify the inmate of the action taken.

South Carolina Department of Probation, Parole and Pardon Services, *Criteria for Parole Consideration*, https://www.dppps.sc.gov/content/download/200476/4681336/file/Criteria+for+Parole+Consideration.pdf (emphasis added).

The Board also relies on numerous statutes. "The Board shall keep a complete record of all its proceedings and hold it subject to the order of the Governor or the General Assembly." S.C. Code Ann. § 24-21-40 (2007). "No inmate has a right of confrontation at the hearing." S.C. Code Ann. § 24-21-50 (2007). "All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director." S.C. Code Ann. § 24-21-290 (2007).

We find the Board's reliance on section 24-21-40 is misplaced because it is merely a document retention rule and does not apply. In addition, there is no right to confrontation pursuant to section 24-21-50 because, as the ALC found, "[t]he Board rightfully segregates the inmate from victim witnesses." Section 24-21-50, however, does not govern an inmate's right to review his or her file. As to section 24-21-290, we note it specifically states a court can order review of a probation agent's information and data. In addition, as the ALC also noted, Form 1212 *requires* the inmate to notify the Board if there is an error in his or her file and to require an inmate to do so when he/she has no right to see the file "is logically and legally absurd."

The ALC rules provide for redaction and submission under seal where necessary. Rule 6(B)(1)&(2), SCALC. The evidence underlying the basis of the Board's decision could be provided to the ALC.

> States have taken varied statutory approaches to this issue. Some view the contents of an inmate's file as privileged and refuse access to the file altogether, at least in the absence of a court order. Others have adopted a standard practice of permitting prisoners to review their files, sometimes because state constitution due process is

> read as requiring that inmates be afforded timely disclosure of the contents of their files, or reasonable summaries thereof, prior to their parole hearing. A third group of states gives the parole board the discretion to allow a prisoner to inspect the file in an appropriate case. Falling into this latter category in all probability are the vast majority of states whose statutes do not address the question.

Neil P. Cohen, *Procedures typically used in parole granting—Access to inmate's file and disclosure of other information*, Law of Probation & Parole § 6:20 (2d ed. 2023); *see id.* ("In the federal system, a prisoner is allowed reasonable access to a report or other document which will be used by the Parole Commission in making its determination.").

Like the ALC, we find the language of Form 1212 requiring an inmate to notify the Board if his or her file is incorrect necessarily implies the right to review the file. Although the ALC found, in this case, the Supplemental Record on Appeal "provide[d] ample material for review[,]" we find Kelsey has still not been permitted to review his parole file and thus has not been provided the referenced opportunity to notify the Board of any errors or inaccuracies he identifies. The Supplemental Record on Appeal was provided to the ALC by Kelsey, and Kelsey alleges the ALC still did not have access to his complete file. With the protections for victims in place by reasonable redaction and sealing, we find an inmate is entitled to review his or her file. Thus, we reverse and remand for Kelsey to review his file, report any inaccuracies, and be given a new parole hearing.[2]

[2] Based on our disposition of this issue, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating appellate courts need not address remaining issues when disposition of prior issue is dispositive).

CONCLUSION

Based on the foregoing, we reverse and remand to the ALC for proceedings consistent with this opinion.[3]

REVERSED AND REMANDED.

MCDONALD and HEWITT, JJ., concur.

[3] In his reply brief, Kelsey states he is not "asking the courts to grant him parole, but rather to act within their lawful authority and grant him a parole hearing at which . . . the Board compl[ies] with the law."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stewart Buchanan, #69848, Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, Respondent.

Appellate Case No. 2019-001554

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 6021
Heard May 3, 2023 – Filed August 30, 2023

AFFIRMED

Hannah Lyon Freedman, of Justice 360, and John H. Blume, III, of Law Office of John Blume, both of Columbia, for Appellant.

Matthew C. Buchanan, of South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

THOMAS, J.: Stewart Buchanan appeals the order of the Administrative Law Court (ALC), which affirmed the denial of parole by the Parole Board of the South Carolina Department of Probation, Parole and Pardon Services (the Board), arguing (1) the Board's procedures violated his right to due process and (2) his forty-seven years of incarceration for a crime he committed as a juvenile constitutes cruel and unusual punishment. We are constrained to affirm.

FACTS

On May 18, 1973, Buchanan broke into the victim's home in the early morning hours. The victim, Buchanan's neighbor, awoke and fled the house. Buchanan stabbed her to death in the front yard. Buchanan, who was seventeen years old at the time, was under the influence of a mix of drugs and alcohol and a lack of sleep. In September of 1973, Buchanan pled guilty to murder and was sentenced to life imprisonment. At the time, an individual sentenced to life in South Carolina was eligible for parole upon the service of ten years. The trial court made a confidential report from Buchanan's psychiatrist available to the jury, which returned a verdict of guilty with a recommendation of mercy.[1]

Buchanan first appeared before the Board on January 12, 1983, and was denied parole. He has now appeared before the Board at least eighteen times and been denied parole each time. Regarding the most recent denial in November 2018, parole was denied due to: (1) the nature and seriousness of the offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.

Prior to the most recent parole hearing, Buchanan submitted a Memorandum in Support of Favorable Parole Recommendation. The memo reported Buchanan had "more than demonstrated his rehabilitation and reformation through his positive institutional record and participation in numerous counseling, rehabilitative[,] and religious programs." The memo argued the Board should consider the factors enumerated in *Aiken v. Byars*.[2]

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[1] At the time of the hearing, the death penalty had been abolished, yet a jury still determined whether to recommend mercy.

[2] 410 S.C. 534, 765 S.E.2d 572 (2014). The *Aiken* court held that a sentencing court considering a sentence of life without parole (LWOP) for a juvenile offender must consider:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence";
> (2) the "family and home environment" that surrounded the offender;

As to the first factor, the hallmark features of youth, the memo explained Buchanan was a juvenile at the time of the crime, with a juvenile's lack of maturity, underdeveloped sense of responsibility, and incomplete neurological development. The memo notes Buchanan's childhood was tumultuous with an unstable family life, difficulties at school, and a peer group that was involved with drugs and alcohol. His parents were absent most of the time, his older sister had just run away from home, he spent time in a boys' home, and he "began engaging in attention seeking behavior at home and at school . . . ."

Regarding the second factor, family and home environment, the memo reported that Buchanan's father was "an alcoholic who drifted from job to job" and when he was home, enforced corporal punishments, including backhanding, punching in the face, and hitting with a belt. Buchanan's mother was "cold and aloof" and highly critical of her children. In addition, she once allegedly attempted to run over one of Buchanan's father's mistresses and threatened to leave her husband many times "and did a few times for short periods of time." The family moved to Fort Mill, a town of less than 3,000 at the time, when Buchanan was seven years old. Buchanan did not fit in well in the small community. He was overweight, weighing over 200 pounds by the time he was sixteen years old. He was teased at school and became the class clown, often getting in trouble. After his older sister, who acted somewhat as a surrogate mother to him, ran away, and Buchanan returned from a short stay at a boys' home, he "turned to drinking and drugs."

> (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him;
> (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and
> (5) the "possibility of rehabilitation."

Id. at 544, 765 S.E.2d at 577 (alterations in original) (quoting *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012)). These factors are generally referred to as the *Miller* factors. The parties here also refer to them as the *Aiken* factors.

The memo describes Buchanan's situation at the time of the offense when considering the third factor from *Miller*, the circumstances of the offense. During the summer of 1973, Buchanan began using methamphetamines and LSD, had stopped attending his auto mechanics classes at York Technical College, was working night shifts, and was not sleeping. The night of the offense, he took several hits of LSD and drank excessively. His recollection of the night in question was "a blur." Buchanan admitted to the police that he committed the offense and told them "he did not have complete control of his actions that night." However, "[t]hen and now[, he] takes full responsibility for his actions and the consequences thereof."

In its discussion of the fourth factor, the incompetency of youth when dealing with the criminal justice system, the memo notes that at the time he pled guilty, Buchanan accepted the advice of his attorney, who "virtually guaranteed him that he would be paroled in less than twenty years" because many persons convicted of murder were granted parole after ten years of service, and it was rare not to be granted parole after twenty years.

Finally, as to the fifth factor, the possibility of rehabilitation, the memo notes Buchanan has spent the last forty-five years incarcerated and has taken advantage of the opportunities available to him. While he was still seventeen years old, he became part of Manning's Comprehensive Drug Abuse Program by visiting schools and churches to dissuade other teenagers from using drugs. Within the prison, he has been certified as a literacy tutor for more than forty years. He tutors, teaches English at night school, and started his own course to teach inmates basic legal research and writing. He has also worked as a volunteer Inmate Grievance Clerk and a hospice volunteer, and is a member of the Character Based Unit (a society of inmates focused on rehabilitation), which is demanding and requires a good disciplinary history, ability to contribute, demonstrated interest in rehabilitation, mental stability, and credibility. Buchanan volunteers as a chaplain in the prison and, when on work release, he is actively involved with Trinity Baptist Church and Kairos, a Christian ministry program.

In addition, Buchanan has been enrolled in the release plan, Jump Start. He was to graduate on November 14, 2018, "at the Blue Level — the highest possible level of completion." Jump Start is a Christian-based organization that focuses on transitioning men back into the workforce and society after prison. As a parolee and graduate of Jump Start, Buchanan would be provided transitional housing for two years, be mentored, and receive assistance getting a job and eventually buying

a home. He completed extensive business and vocational courses, completed more than 500 hours of carpentry training, and worked as a manager for Astro Glass during a work release program. Buchanan submitted numerous certificates of training, volunteerism, and education, and letters in support of his parole from educators, potential and past employers, and prison employees.

Dr. Susan Knight, a forensic psychologist, examined Buchanan in preparation for the parole hearing. She noted Buchanan had some disciplinary charges during his incarceration; however, she concluded he did not represent a significant risk for future violent acts. Dr. Knight interviewed numerous employers, prison employees, a chaplain, and others, who positively described Buchanan as follows: a model inmate; a hard worker; a "really good, really respectful guy"; of "good character"; respected and well-liked by other inmates; helpful to other inmates; smart; deeply involved in religion; "If he got out tomorrow, I would be happy to know he bought a home on my street"; sincere, articulate, and honest; and remorseful. Dr. Knight concluded Buchanan suffered from no psychological disorders and found, "[H]is prison record indicates an exceptionally-responsible worker, with very few physical altercations, and a positive demeanor and attitude. Collateral and interview data indicate [he] expressed remorsefulness[] and [the] ability for empathy."

Dr. Knight reviewed the criteria used by the Board and concluded that, as to the nature and seriousness of the offense, Buchanan took full responsibility, demonstrated remorse, and recognized with good insight the factors that facilitated his substance abuse. As to his adjustment while in confinement, Dr. Knight reiterated Buchanan's many accomplishments and honors. Regarding her assessment of Buchanan's risk to the community, Dr. Knight found he was at low risk for future violent recidivism, and she identified substance abuse treatment as his primary risk management strategy. Finally, as to the Board's criterion of the adequacy of an offender's parole plan, Buchanan has been approved for two years of housing at Jump Start and has the opportunity of employment in a ministry and involvement through Jump Start in woodworking, a furniture company, and other construction.

Buchanan's attorney also submitted a letter to the Board, arguing that after *Aiken*, it needed to consider Buchanan's "youth and its attendant circumstances and provide a meaningful opportunity for release." The letter requested the Board (1) hire an expert in adolescent brain development and consider the expert's written evaluation; (2) schedule the parole hearing at a different time from hearings for adult offenders and allow testimony from mental health professionals and other

witnesses; and (3) consider the factors of youth, including the incompetency of youth regarding the legal system, immaturity, home and community environment at the time of the offense, evidence of remorse, and efforts made toward rehabilitation.

The Board responded to the letter, arguing Buchanan was not being denied any constitutional rights. The Board noted, "Though [its] reasons for denial . . . will never change, these reasons for denial are legal . . . ." The Board also stated, "As long as it is revealed that the Board applied the mandatory criteria, the use of the events of the offense as a reason for denial is lawful."

At the hearing before the Board, Buchanan was represented by his attorney and accompanied by three pastors and Dave Johnson from Jump Start. Buchanan explained the events of the offense and his subsequent involvement in a comprehensive drug abuse therapy program, Narcotics Anonymous, and Alcoholics Anonymous. Buchanan's attorney spoke on his behalf. Pastor Tammy Blom also spoke on his behalf, concluding she envisioned Buchanan "moving into Jump [S]tart after leaving prison." Pastor Frank Ledvinka also spoke, indicating he believed in Buchanan, saw Buchanan's great love of God and others, and asked the Board to give him a chance. The hearing indicates the Board had "71 signatures in opposition." According to Buchanan, the Board deliberated for less than a minute before verbally denying his request for parole. In a subsequent letter, the Board stated it considered the following in denying parole:

> (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record . . . ;
> (2) the factors published in Department Form 1212 (Criteria for Parole Consideration);
> (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws[;] and
> (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws.

Buchanan appealed to the ALC.

In its order affirming the Board, the ALC noted its review was confined to a determination of whether the Board's denial of parole afforded Buchanan due process and was consistent with *Cooper v. South Carolina Department of*

Probation, Parole & Pardon Services.[3] The ALC rejected Buchanan's argument that recent case law had created a new substantive constitutional right to a "meaningful" parole review for inmates who were sentenced as juveniles, which required the Board to expressly consider an inmate's youth in determining parole. In addition, the ALC found it did not have the authority to "establish a new substantive constitutional right." The ALC denied Buchanan's request that it order the Board to grant parole. This appeal followed.

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2022) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency. The court of appeals may reverse or modify the decision only if substantive rights of the appellant have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law. *Id.*

LAW/ANALYSIS

A. Due Process

Buchanan argues the "legal sea change" applicable to juvenile *sentencing* during the past decade or so requires the Board to adopt procedures that will allow juvenile offenders to have their youth and immaturity considered in *parole decisions*. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Miller*, 567 U.S. at 489 (finding juveniles convicted of homicide could not be subjected to mandatory LWOP sentences, "regardless of their age and age-related characteristics and the nature of their crimes" because to do so would "violate [the] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding "that for a juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of life without parole"); *Montgomery v. Louisiana*, 577 U.S. 190, 212–13 (2016) (giving *Miller* retroactive effect and stating, "In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are

[3] 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), *abrogated on other grounds by Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023).

constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.").

South Carolina recognized these principles in *Aiken* as to sentencing, holding the sentences of "fifteen inmates who were sentenced to life without parole as juveniles" violated the Eighth Amendment under *Miller*. 410 S.C. at 536–37, 765 S.E.2d at 573. Our supreme court acknowledged the "affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577. *Aiken* held that a sentencing court considering an LWOP sentence for a juvenile offender must consider the *Miller* factors. *Id.* at 544, 765 S.E.2d at 577.

Buchanan argues the Board's current parole review process violates his due process rights by not also requiring the Board to consider these factors in reviewing his parole applications. Buchanan notes that fifteen of his eighteen parole denials cite, virtually verbatim, the same three reasons for denial:

> (1) the nature and seriousness of the current offense;
> (2) an indication of violence in this or a previous offense; and
> (3) the use of a deadly weapon in this or a previous offense.

According to Buchanan, the Board's process is insufficient because it does not require the Board to consider his youth and rehabilitation. Buchanan argues many jurisdictions have judicially or legislatively required parole boards to specifically consider the "hallmark features of youth" in considering parole of juvenile offenders.

The Board argues the change in the law as it relates to juvenile sentencing has not been extended beyond sentencing in South Carolina, maintaining *Miller* and *Aiken* require the factors of youth be considered only by the sentencing court, not the Board. *Id.* at 544, 765 S.E.2d at 577 (explaining that *Miller* mandates consideration of the factors of youth by "the sentencing authority"). In addition, the Board maintains that because Buchanan's sentence provides for parole *eligibility*, *Miller* and *Aiken* do not apply. *See Montgomery*, 577 U.S. at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.").

The statutory factors that must be considered by the Board are as follows:

> The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. § 24-21-640 (Supp. 2022). In addition, the Board must consider the factors enumerated in its parole form.[4]

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[4] The current list of the factors on Form 1212 are as follows:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of [C]orrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes [an] inmate[']s living arrangements, where he/she will live and who he[/she] will live with; the character of those with whom the inmate plans to associate in both

In *Cooper*, our supreme court explained the Board's procedure is proper "if [the Board] clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the . . . factors published in its parole form." 377 S.C. at 500, 661 S.E.2d at 112; *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) (relying on the holding in *Cooper* to affirm a denial of parole because the parole board "clearly stated in its [order] that it considered the [section 24-21-60] criteria and the criteria set forth in Form 1212").

As found by the ALC, the Board's denial of parole met the requirements of *Cooper* and the ALC had authority to review the decision.[5] Based on what *Cooper* says

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his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;

11. The willingness of the Community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow his/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate[;]
15. The actuarial risk and needs assessment outlined in section 24-21-10 (F)(1) of the S.C. Code of [L]aws; which evaluates based on Criminal Involvement, Relationships/Lifestyle, Personality/Attitudes, Family, Social Exclusion and Mental Health[; and]
16. Other factors considered relevant in a particular case by the Board.

South Carolina Department of Probation, Parole and Pardon Services, *Criteria for Parole Consideration*, https://www.dppps.sc.gov/content/download/200476/4681336/file/Criteria+for+Parole+Consideration.pdf

[5] Following the South Carolina Supreme Court's decision in *Cooper*, the General Assembly amended section 1-23-600(D) of the South Carolina Code to provide that "[a]n administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits . . . or an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." 2008 S.C. Acts No. 334, § 7 (effective June 16, 2008). The ALC and our supreme court have continued to review these appeals where they implicate an alleged deprivation of due process. *See Rose v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 429 S.C. 136, 144, 838 S.E.2d 505, 510 (2020) (reviewing a claim

about a routine denial of parole, this is a routine denial and the ALC correctly affirmed the Board. We recognize there is tension between the principle that inmates are entitled to a meaningful parole review and what appears to be serial denials of parole based solely on factors that do not change and that have no relation to an inmate's rehabilitation. Even so, we read the authorities to instruct that the court system's role does not include looking behind the Board's statement that it has considered all of the factors and made its decision. As noted by the Board, despite Buchanan's claim that "the Board has denied his request for parole based on the facts and circumstances of the offense[,] which [are] fixed in the past and cannot be changed[,]" Buchanan has not been permanently denied parole and "[j]ust because [he] hasn't received parole yet doesn't mean he never will." *See Furtick*, 352 S.C. at 598, 576 S.E.2d at 149 (stating "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process") (emphasis in original); S.C. Code Ann. § 24-21-645(D) (Supp. 2022) ("[U]pon a negative determination of parole, prisoners in confinement for a violent crime . . . must have their cases reviewed every two years for the purpose of a determination of parole . . . ."); S.C. Code Ann. § 16-1-60 (Supp. 2022) ("For purposes of definition under South Carolina law, a violent crime includes the offense[] of[] murder . . . .").

The Board asserts as long as its notice of rejection states it followed the statutory and Form 1212 criteria, its order of denial is valid. Based on the law currently

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that Rose had been granted parole in 2001 but remained incarcerated in 2020); *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 419, 745 S.E.2d 110, 123 (2013) (reviewing a parole denial for an alleged *ex post facto* violation); *see generally Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003) (reviewing an appeal from the Board's decision finding Furtick ineligible for parole because an inmate has a liberty interest in gaining access to the Board and a permanent denial of eligibility implicates a liberty interest requiring due process); *Al-Shabazz v. State*, 338 S.C. 354, 376–77, 527 S.E.2d 742, 754 (2000) (finding the ALC has the authority to review non-collateral and administrative agency decisions); *cf. Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 171, 886 S.E.2d 671, 674 (2023) (explaining "[an inmate's grievance] claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over the appeal. However, the ALC is not required to hold a hearing in every matter and may summarily dismiss an inmate's grievance if it does not implicate a state-created liberty or property interest sufficient to trigger procedural due process guarantees").

existing in South Carolina, we must agree. However, we are concerned regarding the perfunctory manner in which Buchanan's request for parole was denied. Although Buchanan and other juveniles similarly situated are technically eligible for parole, the continuing denial of parole based on the same factors, all unchangeable and related to their offenses, gives no guidance to these inmates about what can be done to improve their chances of parole and is, in essence, equivalent to being ineligible for parole. Under the current system, it appears no passage of time served (here, forty-seven years) or showing of rehabilitation (here, eighteen parole reviews now indicating Buchanan "has more than demonstrated his rehabilitation") can change his fate before this Board. The public policy behind *Roper*, *Graham*, and *Miller*, to restore hope to juvenile offenders for some life outside of prison, is thwarted by the Board's continued reliance on factors existing at the time of the conviction with little or no apparent consideration of subsequent rehabilitation efforts. The prospect of parole, including meaningful parole hearings, incentivizes good conduct while imprisoned and encourages participation in rehabilitative programs, which reduces recidivism rates. *See* Amanda Dick, *The Immature State of Our Union: Lack of Legal Entitlement to Prison Programming in the United States as Compared to European Countries*, 35 Ariz. J. Int'l & Compar. L. 287, 291 (2018). Additionally, parole reduces prison populations by releasing rehabilitated inmates, lessening the fiscal burden of incarceration by eliminating spending on the detention of individuals who no longer pose a threat to society.

In this case, Buchanan argues he confessed, he accepted the advice of his attorney to plead guilty, "his attorney virtually guaranteed him that he would be paroled in less than twenty years[,]" and the jury recommended mercy. He has been imprisoned for fifty years for a crime he committed at age seventeen. And there appears to be no dispute—none—that he has been an exemplary inmate and demonstrated remorse, rehabilitation, and a low risk for recidivism.

We reluctantly affirm the ALC's finding that the Board followed the proper procedure when it denied Buchanan parole because the Board's order of denial stated the Board had considered "the factors outlined in [s]ection 24-21-640" and "the factors published in Department Form 1212." *See Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) ("A decision of the ALC should be upheld . . . if it is supported by substantial evidence in the record."); *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (providing the procedure for denying parole is proper "if [the parole board] clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in [Form 1212]"); *Compton*, 385 S.C. at 479, 685

S.E.2d at 177 (affirming a denial of parole because the parole board's order complied with the *Cooper* requirements). Although the Board has complied with the minimal requirements necessary for this to satisfy the standard our supreme court articulated in *Cooper*, we are sympathetic to Buchanan's argument that it appears inmates who offended while juveniles are not given meaningful review regarding parole. Our role is one that is limited to operating within the framework set by statutory law and by our supreme court's precedents. It may well be good policy for the Legislature to review and/or revise the parole system to assure the factors of youth are a part of considering parole in these cases rather than permitting the seemingly perfunctory review now standardly given, but that is the Legislature's decision, not ours.

B. Cruel and Unusual Punishment

Buchanan argues the Board's multiple denials of parole over so many years violates the cruel and unusual punishment prohibitions in the United States and South Carolina Constitutions. We disagree.

The United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII. The South Carolina Constitution provides, "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. Const. art. I, § 15. Under either Constitution, we find no violation.

"[P]arole is a privilege, not a matter of right . . . . Parole is a creature of statute and is exclusively in the province of the legislative branch of government. The General Assembly empowers the Department to administer the parole program." *Major v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 384 S.C. 457, 465, 682 S.E.2d 795, 799 (2009). "[T]he *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149.

> A State is not required to guarantee eventual freedom to a juvenile offender . . . . What the State must do, however, is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth

> Amendment prohibits a State from imposing a life without parole sentence on a juvenile non[-]homicide offender, it does not require the State to release that offender during his natural life.

Graham, 560 U.S. at 75. We agree with the ALC that neither the United States Supreme Court nor our supreme court requires specific parole criteria to be considered in determining whether to grant parole, and the Board's denial of parole did not constitute cruel and/or unusual punishment under either Constitution.

CONCLUSION

Based on the foregoing, the order of the ALC is

AFFIRMED.

MCDONALD and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J&H Grading & Paving, Inc., Respondent,

v.

Clayton Construction Company, Inc., Appellant.

Appellate Case No. 2019-001950

Appeal From Lexington County
Walton J. McLeod, IV, Circuit Court Judge

Opinion No. 6022
Submitted December 1, 2022 – Filed August 30, 2023

AFFIRMED

Townes Boyd Johnson, III, of Townes B. Johnson III, LLC, of Greenville, for Appellant.

Wesley Dickinson Peel and Chelsea Jaqueline Clark, of Bruner Powell Wall & Mullins, LLC, of Columbia, for Respondent.

VINSON, J.: Clayton Construction Company, Inc. (Clayton) appeals the circuit court's ruling that Clayton was liable to J&H Grading & Paving, Inc. (J&H) for attorney's fees pursuant to section 27-1-15 of the South Carolina Code (2007). Clayton argues the circuit court erred by finding (1) Clayton failed to make a reasonable and fair investigation into the merits of J&H's claim under section 27-1-15, (2) the "pay when paid" provision in the parties' subcontract created a

condition precedent to payment, (3) the "pay when paid" provision was unenforceable under the South Carolina Subcontractors' and Suppliers' Payment Protection Act (the Act)[1], and (4) any delay in payment beyond ninety days was unreasonable. We affirm.[2]

FACTS

Clayton, the general contractor for the construction of a new car dealership owned by Herlong Chevrolet-Buick, Inc. and Herlong Family Properties, LLC, (collectively, Herlong) entered into a subcontract (the Subcontract) with J&H on September 24, 2015. Pursuant to the Subcontract, J&H agreed to complete site work for the project. Clayton agreed to pay J&H $688,075.00 for its work and to make progress payments less retainage of ten percent. Over the course of the project, an additional $28,855.70 was added to the contract price, bringing the total to $716,930.70. The Subcontract provided, "Final payment of the balance due shall be made to [J&H] no later than seven (7) days after receipt by [Clayton] of final payment from Owner [for J&H's] work." (hereinafter, "pay when paid" provision). Clayton made progress payments as agreed.

J&H completed its work under the Subcontract and a certificate of occupancy was issued to the dealership on March 20, 2017. J&H submitted its final pay application via email to Clayton on April 26, 2017, seeking payment of $75,298.00, consisting of the retainage and a small outstanding balance. On July 25, 2017, J&H resubmitted its pay application to Clayton. On August 1, 2017, Clayton responded that it had not been paid retainage by Herlong and therefore could not issue the remaining retainage until it was paid. J&H's final day of work on the project, completing punch list items, was in December of 2017. On January 19, 2018, J&H again emailed Clayton seeking its final payment and retainage. Clayton responded on the same day and stated Herlong had not yet paid Clayton as required by the terms of Clayton's contract with Herlong. Clayton did not dispute the amount due or that J&H had satisfactorily completed the work. J&H sent a letter on January 25, 2018, again seeking payment from Clayton. J&H filed a notice and certificate of mechanics' lien[3] on the property on February 27, 2018.

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[1] S.C. Code Ann. §§ 29-6-10 to -250 (2007 & Supp. 2022).

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

[3] *See* S.C. Code Ann. § 29-5-10(a) (2007) ("A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the

Thereafter, on March 2, 2018, J&H mailed Clayton a demand pursuant to section 27-1-15 requesting payment. In its March 9, 2018 response, Clayton pointed to the Subcontract's "pay when paid" provision. Clayton stated it had not received payment from Herlong for the work, was in litigation seeking payment,[4] and would "remit any undisputed contract balances to J&H" as soon as it received such payment or the litigation was fully adjudicated. Clayton therefore stated that in accordance with the provisions of the Subcontract, "there [we]re no amounts due and owing to J&H" at the time.

J&H brought this action against Clayton and Herlong on May 21, 2018, for foreclosure of its mechanics' lien and alleging causes of action for breach of contract and quantum meruit. In its answer, Clayton claimed that no amounts were currently due to J&H pursuant to the Subcontract. In February 2019, Herlong, Clayton, and J&H entered into a settlement agreement pursuant to which Herlong "agree[d] to release $75,298.00 under its contract with Clayton directly to J&H as payment for J&H's subcontract with Clayton on the [p]roject" and J&H agreed to dismiss its claims against Herlong. The settlement agreement provided, however, that J&H reserved its claims and rights against Clayton for attorney's fees and interest on the allegedly wrongfully withheld contract balance. Thereafter, both parties filed motions for summary judgment, which the circuit court denied.

The circuit court held a bench trial on the matter in August 2019. The only issue at trial was whether J&H was entitled to attorney's fees under section 27-1-15 based on Clayton's reliance on the "pay when paid" provision in the Subcontract. The circuit court found in favor of J&H and concluded it was entitled to attorney's fees under section 27-1-15. The circuit court rejected Clayton's argument that pursuant to *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976), "pay when paid" clauses were not conditions precedent to payment such that they violated the Act. The circuit court concluded the "pay when paid"

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erection, alteration, or repair of a building or structure upon real estate . . . by virtue of an agreement with . . . the owner of the building or structure . . . shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him.").

[4] In August 2017, Clayton filed a mechanics' lien on the property and sued Herlong for the balance owed on the project.

provision in the Subcontract was unenforceable because the plain language of the Act expressly prohibited such terms. It therefore determined "Clayton's refusal to pay [wa]s unreasonable on its face." The circuit court ruled the Act—which was passed decades after *Elk*—was controlling as to the issue and, at most, *Elk* stood only for the proposition that a contractor had a reasonable time to attempt to obtain payment from the owner before paying a subcontractor. The circuit court determined that a reasonable delay was "such that would not force [J&H] to resort to legal action" to comply with the provisions of the mechanics' lien statute. The circuit court found delaying payment to J&H longer than ninety days after it requested payment was per se unreasonable because J&H was required to file a mechanics' lien within ninety days of completing its work to preserve its right to payment. The circuit court reasoned that by suspending payment past the statutory deadline for filing the mechanics' lien, Clayton required J&H to initiate legal proceedings that dragged on for two years before J&H was finally paid, even though Clayton did not dispute the amount or that J&H had satisfactorily completed its work. The circuit court "additionally f[ound] Clayton failed to conduct a reasonable and fair investigation" pursuant to section 27-1-15 when it knew the amount owed was undisputed yet still refused to pay J&H. Clayton filed a motion to reconsider, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by finding Clayton failed to make a reasonable and fair investigation into the merits of J&H's claim under section 27-1-15?

2. Did the circuit court err by finding the "pay when paid" provision created a condition precedent to payment?

3. Did the circuit court err by finding the "pay when paid" provision was unenforceable under the Act?

4. Did the circuit court err by finding any delay in payment beyond ninety days was unreasonable?

STANDARD OF REVIEW

"When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706

S.E.2d 495, 497 (2011). "The circuit [court]'s findings of fact will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law." *Id.* Statutory interpretation is a question of law, which this court reviews de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ANALYSIS

I. Enforceability of "Pay When Paid" Provision

Clayton argues the circuit court erred by finding the "pay when paid" provision in the Subcontract created a condition precedent to payment and was unenforceable under section 29-6-230. Clayton contends that pursuant to the holding in *Elk*, such provision did not create a condition precedent to payment but instead allowed a general contractor to withhold payment for a reasonable time to allow it an opportunity to obtain payment from the owner. We disagree.

Section 29-6-230 provides,

> Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. *Any agreement to the contrary is not enforceable*.

(emphasis added). By its plain language, section 29-6-230 expressly prohibits parties from conditioning payment to the subcontractor upon the owner's payment to the general contractor and further provides that any agreement to the contrary is unenforceable. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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."). Here, the Subcontract provided, "Final payment of the balance due shall be made to [J&H] no later than seven (7) days after receipt by [Clayton] of final payment from Owner [for J&H's] work." The record shows Clayton used this "pay when paid" provision to condition its payment

to J&H upon its first receiving payment from Herlong. When J&H invoiced Clayton for final payment, Clayton relied upon the "pay when paid" provision and refused to pay because it had not yet received payment from Herlong. The clause therefore created a condition precedent for payment to J&H in violation of section 29-6-230. Thus, we find the circuit court did not err in concluding section 29-6-230 expressly prohibits parties from agreeing to condition payment to a subcontractor upon payment to the general contractor and therefore the "pay when paid" provision of the Subcontract was unenforceable.

We reject Clayton's argument that, based upon the holding in *Elk*, the "pay when paid" provision did not create a condition precedent and we find section 29-6-230 is controlling as to this issue. This statute was passed almost twenty-five years after *Elk* and specifically addresses the issue. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) ("T[his c]ourt must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). Its plain language demonstrates a legislative intent that parties cannot condition payment to a subcontractor upon the general contractor receiving payment from the owner. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("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."). Here, Clayton relied on the language of the "pay when paid" provision to refuse to pay J&H for its work and therefore applied the provision as a condition precedent to payment. Thus, regardless of the holding in *Elk*, we hold section 29-6-230 rendered the "pay when paid" provision unenforceable because Clayton used it to condition payment to J&H upon Clayton's receiving payment from Herlong.

Further, *Elk* supports the circuit court's conclusion that Clayton could not rely on the "pay when paid" provision to refuse to pay J&H. In *Elk*, our supreme court held the circuit court erred in directing a verdict in favor of the general contractor "solely on the basis it had not received full payment from the owner and, consequently, was not yet liable on its contract with [the subcontractor]." 267 S.C. at 418, 229 S.E.2d at 262. Stated differently, the court disagreed that the general contractor could refuse to pay the subcontractor under these circumstances. *Id.* The facts of *Elk* are similar to this case. In *Elk*, the parties disputed whether the retainage was due to the subcontractor under the terms of their contract because the general contractor had not yet received payment from the owner. *Id.* at 414-16, 229 S.E.2d at 260-61. The parties' subcontract included a clause that stated the

general contractor would pay the retainage sixty days after it received "[f]ull and final payment . . . of all the funds due him for th[e] project." *Id.* at 415, 229 S.E.2d at 261. The general contractor raised no question as to the subcontractor's performance under the contract. *Id.* at 415, 229 S.E.2d at 261. Our supreme court noted the circuit court "construed [the provision] as creating a condition precedent to [the general contractor's] liability for the retainage." *Id.* at 416, 229 S.E.2d at 261. Our supreme court rejected this interpretation and held the clause did not "create[] a condition precedent but rather only postponed payment by [the general contractor] for a reasonable time so as to afford [it] an opportunity to obtain funds from the owner." *Id.* at 418, 229 S.E.2d at 262. Had our supreme court upheld the circuit court's ruling, it would have allowed the general contractor to avoid paying the subcontractor indefinitely, depending on when—and if—it received payment from the owner. *See id.* at 417, 229 S.E.2d at 262 ("To construe [such provision] as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, *which may never occur*, is to give to it an unreasonable construction . . . ." (emphasis added) (quoting *Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 661 (6th Cir. 1962))). This is precisely the scenario section 29-6-230 prohibits.

Here, as in *Elk*, Clayton employed the Subcontract language to delay payment to J&H indefinitely. Although the court in *Elk* determined a similar contract provision was not a condition precedent to payment, the result of this interpretation was only to allow the general contractor to delay payment for a reasonable time—not to allow it to withhold payment indefinitely. Because Clayton used the clause to delay payment indefinitely, *Elk* supports the circuit court's conclusion that the "pay when paid" provision could not be used as a condition precedent to payment but, at most, could only be interpreted to delay payment for a reasonable time. As we discuss further below, we hold the circuit court did not err in finding a delay of more than ninety days from the date the request was first made was per se unreasonable. *See Elk*, 267 S.C. at 418, 229 S.E.2d at 262 (holding the question of what constituted a reasonable time was a question of fact). However, because J&H also made a demand for payment under section 27-1-15, which imposes its own deadline for payment, section 27-1-15 determines what constitutes a "reasonable time" from the date of the demand.

II. Compliance with Section 27-1-15

Clayton argues the circuit court erred in finding it failed to conduct a reasonable and fair investigation as to J&H's demand for payment. Clayton contends it replied to J&H's March 2, 2018 demand letter promptly and within the forty-five-day requirement. Clayton asserts its refusal to pay was based upon the "pay when paid" provision in the contract, the fact Herlong had not paid Clayton for J&H's work, and the holding in *Elk*. We disagree.

"The party seeking an award of attorney's fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. Whether a party's steps taken were 'reasonable and fair' is a question of fact." *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007) (citation omitted) (quoting *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct. App. 1994)).

> Whenever a contractor . . . has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make *a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand*. If the person fails to make a fair investigation *or otherwise unreasonably refuses to pay the claim* or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

§ 27-1-15 (emphases added).

We hold the circuit court did not err in concluding Clayton failed to comply with the requirements of section 27-1-15 and is therefore liable to J&H for attorney's fees. Section 27-1-15 requires a person upon whom a claim is made to pay a valid claim within forty-five days of the demand and if that person "fails to make a fair

investigation *or otherwise unreasonably refuses to pay* the claim or proper portion, he is liable for reasonable attorney's fees." (emphasis added). It is undisputed Clayton did not pay any portion of J&H's claim within forty-five days of the demand. Further, Clayton did not dispute the amount of J&H's demand or that J&H satisfactorily completed its work. In addition to finding Clayton failed to make a reasonable and fair investigation, the circuit court found Clayton's "refusal to pay [wa]s unreasonable on its face" because its refusal was premised on the "pay when paid" provision. Although Clayton challenges the circuit court's conclusion that it failed to make a reasonable and fair investigation, it does not specifically challenge the circuit court's conclusion that it unreasonably refused to pay. *See Lindsay v. Lindsay*, 328 S.C. 329, 339, 491 S.E.2d 583, 588 (Ct. App. 1997) (noting unchallenged rulings "are the law of the case"). As we stated, the "pay when paid" provision was unenforceable pursuant to section 29-6-230. Therefore, the record supports the circuit court's conclusion that Clayton's refusal to pay was unreasonable, which triggered Clayton's liability under section 27-1-15. Accordingly, we hold the circuit court did not err in concluding Clayton is liable to J&H for attorney's fees.

Further, the circuit court did not err in finding Clayton failed to conduct a reasonable and fair investigation under section 27-1-15. Although Clayton responded to the March 2, 2018 demand within the forty-five-day period, it refused to pay solely because it had not yet received payment from Herlong and was therefore not required to pay J&H based on the "pay when paid" provision. Clayton never disputed the amount of the demand or that J&H completed its work as required under the Subcontract at the time it made its final pay application. In other words, Clayton did not challenge the merits of the claim yet it refused to pay. We hold the foregoing supports the circuit court's conclusion that Clayton failed to conduct a reasonable and fair investigation into the merits of the claim under section 27-1-15. Based on the foregoing, we affirm the circuit court's finding that J&H was entitled to attorney's fees pursuant to section 27-1-15.

III. Reasonableness of Delay in Payment

Finally, Clayton argues the circuit court abused its discretion in concluding a delay of more than ninety days was per se unreasonable. Clayton contends the holding in *Elk* provides a general contractor must be given a reasonable time to allow it to obtain payment from the owner before it is required to pay its subcontractor when the parties' agreement contains a "pay when paid" provision. Clayton contends that

pursuant to section 29-5-20(B) of the South Carolina Code (2007),[5] if a general contractor has already filed a mechanics' lien that includes the amount owed to its subcontractors, a subcontractor has no additional rights to protect by filing its own mechanics' lien. Clayton argues J&H's pursuit of a mechanics' lien was therefore unnecessary and a voluntary undertaking of incurring legal expenses. Clayton further contends the circuit court erred by considering events that took place after March 9, 2018, in determining whether Clayton made a fair and reasonable investigation under section 27-1-15. Clayton contends that in determining the reasonableness of its investigation pursuant to section 27-1-15, the circuit court should have considered only whether the "pay when paid" provision was enforceable and if so whether it was reasonable for Clayton to rely on that provision when it replied on March 9, 2018, to J&H's demand. Clayton contends it fulfilled its obligation under the "pay when paid" provision in February of 2019 when Herlong paid J&H through the parties' mediated settlement agreement. We disagree.

A person seeking to avail himself of a mechanics' lien must file and serve such lien "within ninety days after he ceases to labor on or furnish labor or materials for [a] building or structure." S.C. Code Ann. § 29-5-90 (2007). Further, he must commence suit to enforce the lien within six months after he ceases to furnish labor or materials for the building or structure. S.C. Code Ann. § 29-5-120(A) (Supp. 2022).

First, because J&H made a demand under section 27-1-15, which gives the responding party forty-five days to pay a meritorious claim, a "reasonable time" to pay such demand is forty-five days. However, prior to making its demand under section 27-1-15, J&H submitted its final pay application in April 2017 and resubmitted it several times thereafter. We find the circuit court's determination as to the reasonableness of the delay concerned the requests that were made *prior* to J&H's formal demand and the circuit court did not err in concluding a delay in payment of more than ninety days was per se unreasonable. The circuit court concluded a reasonable time under the circumstances could not exceed ninety days because Clayton did not dispute the amount or that J&H had satisfactorily completed its work and J&H had ninety days to file a mechanics' lien to protect its right to obtain payment. Clayton refused to pay J&H after several requests. J&H's

[5] *See* § 29-5-20(B) (providing "in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner").

recourse was to file a mechanics' lien to protect its right to payment. Thus, it had ninety days to file the lien and six months to commence suit to enforce the lien. The certificate of occupancy for the dealership was issued in March 2017. J&H submitted its final pay application on April 26, 2017. Had Clayton paid J&H within ninety days of J&H submitting its final pay application, J&H would not have been forced to file the lien and could have avoided the associated fees and costs of doing so. Based on the foregoing, we find the record supports the circuit court's conclusion that a delay beyond ninety days was unreasonable.

CONCLUSION

For the foregoing reasons, the circuit court's order finding Clayton was liable to J&H for attorney's fees pursuant to section 27-1-15 is

AFFIRMED.

KONDUROS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ingrid G. Brantley, Respondent,

v.

Dennis E. Brantley, Sr., Appellant.

Appellate Case No. 2020-000260

Appeal From Richland County
Monét S. Pincus, Family Court Judge

Opinion No. 6023
Heard March 9, 2023 – Filed August 30, 2023

AFFIRMED AS MODIFIED IN PART AND REVERSED IN PART

Gregory S. Forman, of Charleston, for Appellant.

Peter George Currence, of McDougall, Self, Currence & McLeod, LLP, of Columbia, and Jordan Christopher Calloway, of McGowan Hood Felder & Phillips, of Rock Hill, both for Respondent.

WILLIAMS, C.J.: In this domestic matter, Dennis E. Brantley, Sr. (Father) argues the family court erred by (1) overstating Father's income when calculating child support, retroactive child support, and unreimbursed medical expenses; (2) holding Father responsible for 85% of the two younger children's extracurricular

activity expenses; (3) finding Father in contempt for failing to inform Ingrid G. Brantley (Mother) of his new address before moving and enrolling their eldest son at a new high school; and (4) requiring Father to pay $75,000 in attorney's fees and costs. We affirm as modified in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Father and Mother were married on May 16, 1999, and divorced on September 26, 2016. During their marriage, the parties had three children: D.B. (Oldest Son) as well as G.B. and H.B. (the Twins). Mother and Father's divorce decree incorporated as a court order a "Partial Marital Settlement Agreement" establishing custody, visitation, and other arrangements for the children's care.

Mother and Father stipulated their individual gross monthly incomes as $3,000 and $10,000, respectively. Accordingly, Father agreed to pay $750 per month in child support to Mother along with accepting responsibility for the children's health insurance premiums (valued at $397 per month) and 77% of the children's unreimbursed medical expenses and extracurricular activity expenses. The agreement also imposed behavioral requirements and restrictions on both Mother and Father, including keeping each other informed of their permanent address and to provide ninety days' notice of "any intention to move his or her residence."

Mother initiated this action on April 12, 2018. Mother alleged Father's new relationship with his then-girlfriend, Paula Cobb, and potential relocation plans were straining his relationship with the Twins. Mother sought a change in custody, a recalculation of child support, and attorney's fees and costs. Father answered and counterclaimed on May 30, 2018, seeking sole custody, child support from Mother, reimbursement from Mother for previously incurred expenses, and fees.

During a May 30, 2018 hearing, the family court determined Father's move and its effect on the children's school enrollment warranted an investigation to determine whether the parties' previous custody arrangement should be changed. The temporary order further required the children stay in their current schools for the remainder of the 2017-18 academic year. Additionally, on June 7, 2018, the family court appointed Richard G. Whiting (Guardian) as the children's guardian ad litem. Following a hearing on August 9, 2018, the family court modified the temporary order (Temporary Order) by granting Father primary physical custody of Oldest Son and Mother primary physical custody of the Twins.

Father filed a contempt action against Mother on July 2, 2018, alleging Mother refused to comply with the Temporary Order by failing to provide ninety days' notice of her intention to move, failing to reimburse out-of-pocket healthcare expenses, and failing to reimburse extracurricular expenses. Mother also filed a contempt petition alleging Father failed to comply with the Temporary Order by refusing to provide Mother with his new address upon relocation and enrolling Oldest Son in Chapin High School prior to receiving a determination from the court as to where the children would attend school for the 2018-2019 school year.

The family court held a trial on March 5-7, May 6-7, and July 29-30, 2019, before Judge Monét S. Pincus. During trial, conflicting testimony arose regarding Father's gross annual income. Father is a self-employed businessman deriving income from three separate businesses. As a result, Father's tax returns and supporting financial documents were necessary in determining his gross annual income. However, this determination became difficult due to Father's financial documents containing numerous errors and omissions such as miscategorization of rent payments, income, business versus personal expenditures, and certain real property.

Mother then presented expert testimony from accountant and certified fraud examiner Christopher Leventis,[1] who attempted to calculate Father's annual gross income. Leventis reviewed Father's personal accounts as well as other relevant financial documents, including his bank statements, credit card statements, and personal tax returns. In his report, Leventis determined Father's gross income to be $202,233 for 2017 and $124,743 for 2018. However, Leventis noted that without Father's 2018 tax return and other supporting documentation, his 2018 income determination was incomplete and opined Father's 2018 income was likely higher.

In its November 8, 2019 final order, the family court found Father was a non-credible witness and his pretrial conduct and trial testimony failed to offer the cooperation necessary to aid the court in resolving the parties' dispute. Specifically, the family court stated:

[1] Leventis was qualified as an expert in certified public accounting and as a certified management accountant and a certified fraud examiner.

> Father's lack of credibility, the lack of supporting documentation from Father regarding his income, the errors and inconsistencies on Father's Financial Declarations and tax returns, Father's personal expenditures, and the fact that multiple tax returns for multiple years were admittedly inaccurate, weighed heavily in the Court's decision to adopt the income Mr. Leventis attributed to Father.

The family court found Father's annual gross income for 2017 was $203,067 and that his 2018 income was consistent with this figure. Accordingly, Father was ordered to pay $1,530 per month in child support as well as a total of $12,760 in retroactive child support. Using these gross income determinations, the family court also ordered the parties to split the children's unreimbursed healthcare costs, with Father paying 85% and Mother paying 15%.

Further, the family court found Father in contempt for willfully violating the Partial Marital Settlement Agreement by failing to provide Mother proper notice of his move to Chapin or his permanent address there, exposing the Twins to overnight visits with his girlfriend on multiple occasions, and by enrolling Oldest Son in Chapin High School for the 2018-19 school year. The family court also found Mother in contempt for failing to provide Father ninety days' notice of her intention to move her residence; failing to reimburse out-of-pocket healthcare expenses; and partially in contempt for failing to reimburse costs of extracurricular expenses.

The family court determined an award of attorney's fees to Mother was warranted based upon Father's substantially greater ability to pay his fees; Mother's beneficial results on most issues; Father's substantially higher income; and the potential negative impact to Mother's standard of living. In determining the reasonableness of the award, the family court found this case was complicated due to the issues associated with Father's financial declarations and the fractured relationships of the parents and children. Specifically, the family court found (1) Father's actions increased the extent and difficulty of the services rendered in this case by denying certain events occurred and (2) Father's lack of credibility regarding his Financial Declarations, tax returns, and bookkeeping increased the nature, extent, and difficulty of the attorney's work in this case and required Mother to hire a forensic accountant to determine his income. Further, Mother obtained beneficial results in

proving Father understated his income and on the issues of child support and custody. As a result, the family court found Father responsible for $75,000 in attorney's fees and costs but permitted Father to deduct $988.18, which Mother owed him for medical costs and extracurricular costs.

Father filed a motion to reconsider on November 18, 2019. On January 7, 2020, the family court entered an amended final order making some minor changes to its earlier order. This appeal follows.

ISSUES ON APPEAL

I. Did the family court err in determining Father's income and child support determination?

II. Did the family court err in ordering Mother and Father to split extracurricular activity expenses?

III. Did the family court err in finding Father in contempt?

IV. Did the family court err in awarding attorney's fees and costs to Mother?

STANDARD OF REVIEW

"The appellate court reviews decisions of the family court de novo." *Clark v. Clark*, 423 S.C. 596, 603, 815 S.E.2d 772, 776 (Ct. App. 2018). "The appellate court generally defers to the findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor." *Id.* "The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence." *Id.*

LAW/ANALYSIS

I. Child Support

A. Income Determination

Father argues the family court erred in determining his income because it improperly found he lacked credibility regarding his financial declarations and improperly qualified and relied on Leventis. As a result, Father contends the family court's calculations of child support, retroactive child support, unreimbursed medical expenses, and Mother's medical reimbursement are all rooted in error. We disagree.

Father defends attacks on his credibility by arguing that contrary to the family court's findings, he did not present consistently inaccurate information about his income. Rather, Father contends any errors in his financial disclosures were either inadvertent or immaterial. Regarding Leventis, Father argues the family court's reliance on his testimony was misplaced for two reasons. First, the court erred in qualifying Leventis as an expert in certified fraud examination because he did not have his certification for financial forensics for accountants. Second, Leventis's income calculations contained numerous factual errors and were based on assumptions and speculation.

"Ordinarily, the family court determines income based upon the financial declarations submitted by the parties." *Spreeuw v. Barker*, 385 S.C. 45, 65, 682 S.E.2d 843, 853 (Ct. App. 2009). "However, whe[n] the amounts reflected on the financial declaration are at issue, the court may rely on suitable documentation to verify income, such as pay stubs, receipts, or expenses covering at least one month." *Id.*; *see also* S.C. Code Ann. Regs. 114-4720(A)(4) (Supp. 2022) (providing that when a parent is self-employed, "gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation, including employer's share of FICA" and the court should carefully review income and expenses from self-employment or operation of a business to determine actual levels of gross income available to the parent to satisfy a child support obligation). Thus, the family court was required to determine whether the financial declarations submitted by the parties were reliable, and if not, what available information and documentation was credible in an attempt to verify income.

In *Spreeuw*, this court found that the evidence presented at trial and the father's own testimony revealed his financial declaration did not accurately reflect his gross income for that year, and therefore, this court was justified in questioning the veracity of his financial declaration in determining his gross income. 385 S.C. at 66, 682 S.E.2d at 853. As a result, this court found the family court did err in

making its income determination based upon the only reliable evidence presented. *Id.* at 67, 682 S.E.2d at 854. This court further stated:

> Father's refusal to provide the family court with a meaningful representation of his current income precludes him from complaining of the family court's ruling on appeal. Lastly, even if the family court erred in determining Father's gross income, such error was caused by Father's failure to provide the court with accurate financial information.

Id. (citation omitted).

Here, Father argues the family court's income determination is based predominantly on inaccurate assumptions about Father's financial records and business practices. The family court found Father's financial declarations were not credible or reliable due to Father's admitted inaccurate information and omissions on multiple financial documents.[2] As a result, the family court was required to look for any other potentially accurate information. This information came through the only expert testimony in the record—Leventis. Father then argues the family court erred in relying on Leventis's testimony because Leventis lacked a certification for financial forensics for accountants. However, Leventis was qualified as an expert in certified public accounting, certified management accounting, and certified fraud examination. Father attempts to discredit Leventis's testimony by arguing he lacked one certification for one of the categories he was qualified. The record demonstrates that Leventis reviewed the financials Father provided, including his bank statements, credit card statements, and tax returns.

The bulk of Father's arguments regarding inaccurate assumptions made by the family court and Leventis seem to quibble with the categorization of certain expenses and Leventis's lack of communication with Father, his bookkeeper, and his CPAs. However, Father at no time substantiates his arguments with sufficient documentation demonstrating obvious error on part of either the family court or Leventis. Therefore, Father's arguments fail due to his inability to supply the court

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[2] Father admits (1) he produced inaccurate information on his claimed child expenses, (2) he made accounting mistakes on his tax returns, and (3) he failed to list property on his financial declarations.

with any meaningful representation of his income. *See Patrick v. Britt*, 364 S.C. 508, 513, 613 S.E.2d 541, 544 (Ct. App. 2005) (affirming the family court's determination of father's income when he refused to provide the court with any meaningful representation of his current income); *Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct. App. 1986) ("A party cannot complain of an error which his own conduct has induced."); *Rish v. Rish by and Through Barry*, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring) (stating that the court of appeals "does not sit to relieve self-inflicted wounds"); *Gore v. Gore*, 288 S.C. 438, 440–41, 343 S.E.2d 51, 52 (Ct. App. 1986) (denying relief when husband's conduct was to blame for the predicament in which he found himself). Moreover, the record shows the family court found Leventis's proposed figure was a proper determination of Father's income only *after* finding (1) Father failed to provide credible evidence supporting a lower income and (2) Leventis's figure was consistent with the expenses it reviewed in Father's 2017 bank records. Therefore, we find the family court did not err in relying upon Leventis's testimony when determining Father's income for purposes of child support.

However, in its order, the family court found Father's gross income for 2017 to be $203,067 and that his income for 2018 and 2019 "should remain on track as it was in 2017," as he still owned and operated the same business he did in 2017 along with new income streams from his father's business and other real estate holdings he inherited. This finding is not in alignment with Leventis's conclusion that Father's income for 2017 was $202,234.46 and for 2018 was $124,743.[3] Thus, we modify the family court's income determination for 2017-2019 to match Leventis's 2017 determination of $202,234.46.[4,5]

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[3] Leventis acknowledged he was unable to provide a complete analysis of Father's income for 2018 as he was unable to review Father's tax return.

[4] Because this finding is dispositive, we need not address Father's arguments as to his income calculation for retroactive child support and unreimbursed medical expenses. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding this court need not address issues when its determination of a prior issue is dispositive).

[5] Father additionally argues the family court erred in failing to impute full-time employment income to Mother because she was deliberately underemployed, working a 26-hour week because she claimed she could not work full time while caring for the parties' fourteen-year-old twins. Father did not raise this issue in his motion for reconsideration, and thus, it is unpreserved for appellate review. *See*

B. Extracurricular Expenses

Father argues that although the family court's final order did not address extracurricular expenses for the children and Mother did not file a motion for reconsideration, in considering Father's motion for reconsideration, the family court, *sua sponte*, required Father to contribute 85% of the twins' extracurricular expenses. Father argues the family court's final orders supersede the parties' prior agreement and the parties' prior agreement on extracurricular activities was no longer operable. Father contends there was no testimony that he agreed to pay child support plus a portion of the twins' extracurricular activities. Thus, Father argues the family court could not modify its original final order pursuant to Rule 60(a), SCRCP. We disagree. In its final order, the family court stated "the parties agreed to divide extracurricular expenses." Father then asked the court to "make it clear whether and how any extracurricular expenses are to be divided." In response, the family court clarified its final order and stated the "parties shall continue to divide the cost of such expenses pro-rata per the Guidelines (now 85% Defendant/15% Plaintiff)." Therefore, the family court's ruling on extracurricular activity expenses was procedurally proper.

Father next argues South Carolina's child support guidelines already address recreational expenses as being one of the expenses considered in determining the appropriate support obligation. Thus, Father argues that to require him to pay additional child support to cover an expense the guidelines already anticipate is a deviation from the child support guidelines and obligates Father to pay twice for these expenses. As such, Father contends the family court did not follow proper procedure because the family court failed to make "written findings that clearly state the nature and extent of the variation from the guidelines."

"When determining the appropriate child support amount, the family court considers the Guidelines." *Jackson v. Jackson*, 432 S.C. 415, 426–27, 853 S.E.2d 344, 350 (Ct. App. 2020); *see also* S.C. Code Ann. §§ 43-5-580(b) (2015), 63-17-470 (2010); S.C. Code Ann. Regs. 114-4710 (Supp. 2022). "Regulation 114-4710 and subsection 63-17-470(C) list factors unaccounted for by the Guidelines that the

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Doe v. Roe, 369 S.C. 351, 375–76, 631 S.E.2d 317, 330 (Ct. App. 2006) (providing that an issue must be raised to and ruled upon by the family court to be preserved for appellate review).

family court is required to consider when determining whether to deviate from the Guidelines." *Id.* at 427, 853 S.E.2d at 350. S.C. Code Ann. Regs. 114-4710(B)(12) states:

> The court may deviate from the guidelines based on an agreement between the parties if both parties are represented by counsel . . . . The court still has the discretion and the independent duty to determine if the amount is reasonable and in the best interest of the child(ren).

Here, the record demonstrates the parties agreed to divide extracurricular expenses in their divorce decree, and Father agreed to be solely responsible for the cost of travel ball. Therefore, the family court did not err in deviating from the Guidelines.

II. Contempt

Father argues the family court erred in finding him in contempt for failing to notify Mother of his proposed move to Chapin and for enrolling Oldest Son at Chapin High School for summer school and the 2018-2019 school year. We reverse only as to the contempt finding for enrolling Oldest Son at Chapin High School.

A. Intent to Move and Permanent Addresses

The partial marital settlement agreement contained two mandates on parental relocation: "Each parent shall keep the other advised as to their permanent address, e-mail address, home, cell, and work phone numbers" and "Each parent shall give the other ninety (90) days' notice of any intention to move his or her residence."

Father argues that on March 7, 2018, Father notified Mother that he was planning on moving on or after May 15 and that he did not move until July 2018. Father argues he did not know when he would be moving and no court order required him to notify Mother of his new address until he permanently moved.

The family court found Father in contempt because the evidence presented demonstrated that, unbeknownst to Mother, Father and his then-girlfriend entered into a lease for a residence in Chapin on March 13, 2018. Father failed to give

Mother the address when they exchanged emails on the issue. The family court found that the only specific information Father provided Mother regarding an impending move was in an email from March 7, 2018.

A party is guilty of contempt when he willfully disobeys a court order. *Burns v. Burns*, 323 S.C. 45, 48, 448 S.E.2d 571, 572–73 (Ct. App. 1994). "A finding of contempt is within the discretion of the trial court and will not be disturbed on appeal unless it is without evidentiary support." *Id.* Once the party seeking a contempt finding makes a prima facie showing by pleading the order and demonstrating noncompliance, "the burden shifts to the respondent to establish his defense and inability to comply." *Noojin v. Noojin*, 417 S.C. 300, 307, 789 S.E.2d 769, 772 (Ct. App. 2016) (quoting *Eaddy v. Oliver*, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001)).

The family court did not err in finding Father in contempt for failing to provide the required notice to Mother of his intent to move. The partial marital settlement agreement specifically required, "Each parent shall keep the other advised as to their permanent address," and "Each parent shall give the other ninety (90) days' notice of any intention to move his or her residence." It is apparent that Father had the premeditated intention of moving. Although he gave Mother notice of this intention on March 7, he specifically stated "it is my intention to move, on or after May 15." However, the record demonstrates Father signed a lease agreement on March 13, 2017, for a one-year lease in Chapin. The record further demonstrates that Father was aware of the requirements of the partial marital settlement agreement and willfully disobeyed it by failing to provide 90 days notice of his intent to move. *See Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973) (to support a contempt finding, language of a court order "must be clear and certain rather than implied"); *Campione v. Best*, 435 S.C. 451, 460, 868 S.E.2d 378, 382 (Ct. App. 2021) (holding that "failure to obey [a court order] is not excused just because a party dons blinders and convinces himself a court order does not mean what it plainly says").

B. School

The family court's June 13, 2018 temporary order required the children to finish the school year in Richland School District Two. Further, the family court "f[ound] it is in the best interests of the children for this case to be 'fast[-]tracked' in order for a determination to be made as to the children's school enrollment prior

to school resuming in August." Mother argued Father was in contempt of this provision for enrolling Oldest Son at Chapin High School in a "credit recovery" summer school program for 2018. Father argues Oldest Son finished his school year at Blythewood and Father did not remove him from Richland School District Two until after the school year ended. Further, Father argues there is nothing in the court's temporary order that prevented him from enrolling Oldest Son in summer school. Father argues that although Oldest Son attended summer school in Chapin, it did not mean he would necessarily attend there in the fall.

We find the family court erred in holding Father in contempt for enrolling Oldest Son in summer school at Chapin High School. As noted earlier, "[c]ivil contempt occurs when a party willfully disobeys a clear and definite court order." *Campione*, 435 S.C. at 457, 868 S.E.2d at 381. The language of the temporary order needed to be "clear and certain rather than implied." *Welchel*, 260 S.C. at 421, 196 S.E.2d at 498. The family court's temporary order specifically required the children to finish the remainder of the school year in Richland School District Two and noted that the case was to be "fast-tracked" to determine future school enrollment. While it can be implied that this order restricted the parties from enrolling the children elsewhere, it does not specifically say so. As such, the evidence fails to demonstrate that Father willfully disobeyed the court's order. *See Campione*, 435 S.C. at 459, 868 S.E.2d at 382 ("We acknowledge a party who attempts in good faith to comply with a court order should not be held in contempt."). Therefore, we reverse the family court's finding that Father was in contempt for enrolling Oldest Son at Chapin High School for summer school and the following school year.

III. ATTORNEY'S FEES & COSTS

Father argues the family court made numerous errors and omissions in its attorney's fee award along with greatly overstating his income. Thus, Father argues these errors, at minimum, provide the basis to reduce the attorney's fee award. In the alternative, Father argues that although the family court found he "has substantially greater ability to pay his fees than Mother," Mother has only incurred $90,591 in fees and costs while Father has incurred $248,761.25. Father argues that because Mother did not claim to owe any outstanding fees and was able to pay her ongoing fees, the family court's findings that "Mother's standard of living would be affected substantially" and "[t]he effect on Father's standard of living is much less than that of Mother" are not justified. Even with their income

disparity, Father contends he does not have a greater ability than Mother to pay his fees and there was no justification for a finding that a financial expert was required to determine his income. Furthermore, Father argues the family court erred in requiring him to pay fees equivalent to 37% of his imputed annual income.

In determining whether to award attorney's fees and costs, a family court must consider: "(1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living." *Srivastava v. Srivastava*, 411 S.C. 481, 489, 769 S.E.2d 442, 447 (Ct. App. 2015) (quoting *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010)). If fees are warranted, the court then considers the following factors set forth in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991) when determining the amount: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Srivastava*, 411 S.C. at 489, 769 S.E.2d at 447 (quoting *Farmer*, 388 S.C. at 57, 694 S.E.2d at 51).

"A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living." *Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001). An attorney's fee award is excessive when it represents a substantial portion of the paying spouse's gross annual income. *See Srivastava*, at 490, 769 S.E.2d at 447 (finding an attorney's fee award representing 90% of the paying spouse's gross annual income was excessive); *Rogers*, 343 S.C. at 334, 540 S.E.2d at 842 (finding an attorney's fee award representing 16% of the paying spouse's annual income was excessive). Although the ability to pay is an essential factor, "if the case [] presents an added dimension of an uncooperative spouse who hampers a final resolution of the issues in dispute, we will not reward an adversary spouse for such conduct." *Blackwell v. Fulgum*, 375 S.C. 337, 346, 652 S.E.2d 427, 431 (Ct. App. 2007).

When presented with similar facts, this court found an attorney's fees award representing approximately 40% of the father's annual income was not excessive in large part due to the father's uncooperative conduct. *See Spreeuw*, 385 S.C. at 72–73, 682 S.E.2d at 857 (finding an award of attorney's fees was appropriate when the father's "uncooperative conduct in discovery and his evasiveness in answering

questions with respect to his financial situation . . . greatly contributed to the litigation costs"). Based upon our review of the record and the parties' briefs, the family court did not err in awarding attorney's fees. The family court's order went through a detailed analysis of both the *E.D.M.* and *Glasscock* factors in determining whether to award attorney's fees and the total amount to award.

Highlighted in this analysis is the family court's determination that this case was complicated due to split custody, ongoing parent-child relationship issues, and allegations of parental alienation. Further, the family court found that Father's evasive behavior, inaccurate disclosures, and a general lack of credibility increased the extent and difficulty of this case. The lynchpin of the award stems from Father's credibility problems and failure to be forthright during trial. The family court noted "[r]ather than providing a direct answer when it became clear that he had the information, it took several questions to elicit the information" and even then Father's answers were evasive and vague. Father admitted there were multiple mistakes and inaccuracies across his tax returns accompanied by "sloppy bookkeeping." The family court stated that it relies heavily on financial declarations, especially in cases in which a party's income is in dispute, and any inaccuracies are taken seriously and can cast doubt on the veracity of the documents. Throughout the trial, the record demonstrates that Father failed to update discovery responses or provide supporting documentation for many of his arguments and claims. Based on the foregoing, we find the family court's award of attorney's fees and costs to Mother was appropriate when considering the relevant factors. Thus, we affirm the family court's award.

CONCLUSION

Based on the foregoing, we **MODIFY** the family court's income determination to match Leventis's 2017 determination, **REVERSE** the family court's finding Father in contempt for enrolling Oldest Son at Chapin High School for summer school and the following school year, and **AFFIRM** the remainder of the family court's order.

GEATHERS and VERDIN, JJ., concur.