The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

The South Carolina Bar has proposed a number of amendments to various court rules to implement limited scope representation in South Carolina. In limited scope representation, a lawyer handles a discrete portion of the matter, and the client handles the remainder of the matter on his or her own. Further resources concerning limited scope representation, generally, may be found on the American Bar Association's Website at: https://www.americanbar.org/groups/delivery_legal_services/resources.html.

The Supreme Court referred the Bar's proposals to the South Carolina Access to Justice Commission for further study. The Commission is now considering submitting proposed amendments to several court rules to the Supreme Court, and the Commission seeks written comment from the public concerning the merits of the various rule change proposals.

Persons desiring to submit written comments should submit their comments to the following email address, limitedscopecomments@sccourts.org, on or before September 19, 2018. Comments should be submitted as an attachment to the email as either a Microsoft Word document or an Adobe PDF document.

SERVICE ISSUES IN LIMITED SCOPE APPEARANCES

The South Carolina Access to Justice Commission is considering recommending to the Supreme Court that Rule 5 of the South Carolina Rules of Civil Procedure be amended by adding the following to paragraph (b) of the rule:[1]

> **(b)(4) Service in Limited Scope Matters.** When an attorney makes a limited scope appearance in a matter pursuant to Rule 11(e), service shall be made upon the attorney until the attorney withdraws by filing and serving a Notice of Completion of Limited Appearance or until the limited scope attorney is otherwise relieved by the court. Where an attorney who makes a limited scope appearance is served with a paper, pleading, or other paper after withdrawing in the limited scope matter, the attorney shall promptly forward the document to the client.

The Commission is also considering amending Rules 4.2 and 4.3 of the Rules of Professional Conduct, which are found in Rule 407 of the South Carolina Appellate Court Rules. Comment 2 to Rule 4.2 would be amended to provide:

> [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates. In cases where a limited scope appearance is made on behalf of a person in a matter where limited scope appearances are permitted under court rules, the person shall be considered represented when the lawyer is provided with written notice of a limited scope appearance in the matter.

New Comment 3 would be added to Rule 4.3, to provide:

> [3] In cases where a limited scope appearance is made on behalf of a person in a matter where limited scope appearances are permitted under court rules, the person shall be considered represented when the lawyer is provided with written notice of a limited scope appearance in the matter.

[1] Additions to existing rules are underlined.

LIMITED SCOPE APPEARANCE AND WITHDRAWAL PROCESS

The Commission is further considering proposing to the Supreme Court that Rule 1.2(c) of the Rules of Professional Conduct, as well as Comment 8 to Rule 1.2, be amended to provide:

> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Where a lawyer wishes to make a limited scope appearance on behalf of a person in a matter where limited scope appearances are permitted under court rules, the agreement shall be in a writing signed by the client.
>
> . . .
>
> [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. For example, a lawyer who is appointed as counsel may not seek to limit the scope of representation in that matter, and any agreement between the lawyer and the client to provide limited scope representation may not result in hybrid representation in the filing of documents or the conduct of hearings or trials.

The Commission is considering recommending Rule 11 of the South Carolina Rules of Civil Procedure be amended to provide for a method of making a limited scope appearance and withdrawing from a matter.

> **(e) Limited Scope Appearance in Court.** In accordance with Rule 1.2(c) of the South Carolina Rules of Professional Conduct, an attorney may make a limited scope appearance for a self-represented party in a specified civil or family court hearing when the attorney has entered into a written agreement with that party to provide limited scope representation.
>
> > **(1) Notice of Limited Scope Appearance.** To make a limited scope appearance, the limited scope attorney must file and serve a court-approved Notice of Limited Scope Appearance form

specifying the hearing for which the attorney is making a limited appearance prior to or simultaneous with the hearing. If the attorney appears at a hearing on behalf of a party pursuant to a limited representation agreement, the attorney shall notify the court of that limitation at the beginning of that hearing. The attorney may make more than one limited appearance in a matter.

(2) Notice of Completion and Withdrawal. Upon conclusion of the hearing in which an attorney has made the limited scope appearance, the attorney may withdraw from the action by filing a Notice of Completion of Limited Scope Appearance form, together with proof of service on the party and all other parties to the action. The attorney's withdrawal is effective upon the filing and service of the Notice of Completion of Limited Scope Appearance without further action by the court. The attorney shall include the current address and telephone number of the party on the Notice of Completion of Limited Scope Appearance form.

(3) Hybrid Representation Prohibited. An attorney making a limited scope appearance pursuant to this rule shall be considered the attorney for that party for all matters and will remain counsel of record until the attorney properly withdraws. The attorney and the party may not divide argument or argue on the same legal issue, and all documents must be filed by the attorney during the period of the limited appearance.

PREPARATION OF PLEADINGS

Finally, the Commission is considering three options with respect to the preparation of pleadings in limited scope matters. The first does not require that the attorney be identified; the second requires the self-represented party indicate that the pleading was prepared with the assistance of a South Carolina attorney; and the third requires that the attorney be specifically identified in the pleading. All three proposed amendments would add new paragraph (f) to Rule 11 of the South Carolina Rules of Civil Procedure.

Option 1:

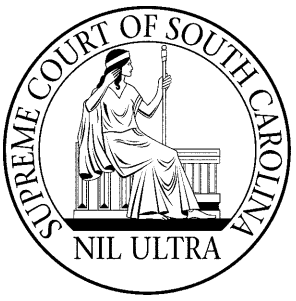
> **(f) Limited Scope Preparation of Documents.** An attorney may draft or help draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney need not be identified or sign the pleading, motion, or other paper. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts. Limited scope assistance provided under this rule does not constitute an appearance in the matter.

Option 2:

> **(f) Limited Scope Preparation of Documents.** An attorney may draft or help draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney need not be identified or sign the pleading, motion, or other paper, but the pleading shall include a statement following the signature of the self-represented person stating "Prepared with the Assistance of a South Carolina Attorney." In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts. Limited scope assistance provided under this rule does not constitute an appearance in the matter.

Option 3:

(f) Limited Scope Preparation of Documents. An attorney may draft or help draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney need not sign the pleading, motion, or other paper, but the pleading shall contain the notation "prepared with the assistance of counsel" and shall state the attorney's name, address, telephone number, and bar number. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts. Limited scope assistance provided under this rule does not constitute an appearance in the matter.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
August 29, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

27774 - The State v. Stepheno J. Alston Pending

Order - Juan C. Vasquez v. State Pending

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

2018-000208 - The State v. Raymond L. Young Granted until 9/16/2018

PETITIONS FOR REHEARING

27826 - The State v. Tyrone King Pending

27827 - SCDOT v. David Franklin Powell Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5587-In the matter of Tynslee Elizabeth Fields	Pending
5588-Brad Walbeck v. The I'On Company	Pending
2018-UP-178-Callawassie Island Members Club v. Gregory Martin	Pending
2018-UP-179-Callawassie Island Members Club v. Michael Frey	Pending
2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-244-Albert Henson v. Julian Henson	Pending
2018-UP-249-Century Capital v. Midtown Development	Pending
2018-UP-274-Corey Ross v. Carolina Adventure World, LLC	Pending
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-318-Theresa Catalano v. Jack Catalano	Pending
2018-UP-323-Cheryl Burch v. Thomas Burch	Pending
2018-UP-327-State v. Joe Ross Worley	Pending
2018-UP-329-John Alden Bauer, III v. Beaufort County Sch. Dist.	Pending
2018-UP-331-Basil Akbar v. SCDPPPS	Pending
2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending
2018-UP-335-State v. Samuel Edward Alexander, Jr.	Pending
2018-UP-338-John Rakowsky v. Law Office of Adrian Falgione	Pending
2018-UP-339-State v. James Crews	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-343-State v. Benjamin C. Hernandez	Pending
2018-UP-348-Frederick Tranfield v. Lily Tranfield	Pending

2018-UP-349-Verma Tedder v. Darlington County	Pending	
2018-UP-351-Rachael Dain v. HCDSS	Pending	
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending	

PETITIONS-SOUTH CAROLINA SUPREME COURT

5511-State v. Lance L. Miles	Pending	
5534-State v. Teresa A. Davis	Pending	
5535-Clair Johnson v. John Roberts (MUSC)	Pending	
5536-Equivest Financial, LLC v. Mary B. Ravenel	Pending	
5537-State v. Denzel M. Heyward	Pending	
5541-Camille Hodge Jr. (Camille Hodge, Sr.) v. UniHealth	Pending	
5542-S. C. Lawyers Weekly v. Scarlett Wilson	Pending	
5546-Paul Boehm v. Town of Sullivan's Island	Pending	
5548-James Dent v. East Richland County	Pending	
5554-State v. Antwan J. Jett	Pending	
5556-BLH by parents v. SCDSS	Pending	
5557-Skywaves v. Branch Banking	Pending	
5559-Commissioners v. City of Fountain Inn	Pending	
5561-Innovative Waster v. Crest Energy	Pending	
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending	
2017-UP-403-Preservation Society of Charleston v. SCDHEC	Granted	08/21/18
2017-UP-425-State v. Esaiveus F. Booker	Pending	
2017-UP-427-State v. Michael A. Williams	Pending	

2017-UP-455-State v. Arthur M. Field	Pending	
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending	
2018-UP-031-State v. Arthur William Macon	Pending	
2018-UP-063-Carolina Chloride, Inc. v. SCDOT	Pending	
2018-UP-074-Edward W. Miller v. SCPEBA	Pending	
2018-UP-078-David Wilson v. John Gandis	Pending	
2018-UP-080-Kay Paschal v. Leon Lott	Pending	
2018-UP-081-State v. Billy Phillips	Pending	
2018-UP-083-Cali Emory v. Thag, LLC	Pending	
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending	
2018-UP-092-State v. Dalonte Green	Pending	
2018-UP-109-State v. Nakia Johnson	Pending	
2018-UP-111-State v. Mark Lorenzo Blake, Jr.	Pending	
2018-UP-121-State v. James W. Miller	Pending	
2018-UP-128-Patricia E. King v. Margie B. King	Granted	08/21/18
2018-UP-130-State v. Frederick S. Pfeiffer	Granted	08/21/18
2018-UP-150-Cedric E. Young v. Valerie Poole	Pending	
2018-UP-176-State v. Terry Williams	Pending	
2018-UP-182-Bank of America v. Carolyn Deaner	Pending	
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending	
2018-UP-187-State v. Rodney R. Green	Pending	

2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-193-Mark Ostendorff v. School Dt .of Pickens Cty.	Pending
2018-UP-201-Knightsbridge Property Owners v. Paul Nadeau	Pending
2018-UP-211-Hamilton Duncan v. Roy Drasites	Pending
2018-UP-216-Nicholas Geer v. SCDPPPS	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Palmetto Mortuary Transport, Inc., Petitioner,

v.

Knight Systems, Inc. and Robert L. Knight, Respondents.

Appellate Case No. 2016-001531

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
James Randall Davis, Special Referee

Opinion No. 27833
Heard March 28, 2018 – Filed August 29, 2018

REVERSED

John Julius Pringle Jr. and Lyndey Ritz Zwingelberg, of Adams and Reese LLP, of Columbia, for Petitioner.

Reginald I. Lloyd, of Lloyd Law Firm, LLC, of Camden, and James Edward Bradley, of Moore Taylor Law Firm, P.A., of West Columbia, for Respondents.

JUSTICE JAMES: Palmetto Mortuary Transport, Inc. (Palmetto) sued Knight Systems, Inc. and Robert Knight (collectively, Knight) for breach of an asset

purchase agreement executed in connection with the sale of Knight's mortuary transport business to Palmetto. A special referee found Knight breached the agreement by violating both a non-compete covenant and an exclusive sales provision contained in the agreement. Knight appealed, and the court of appeals reversed and remanded, holding the 150-mile territorial restriction in the non-compete covenant was unreasonable and unenforceable. *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 416 S.C. 427, 786 S.E.2d 588 (Ct. App. 2016). We reverse the court of appeals and hold that under the facts of this case, the territorial restriction in the non-compete covenant was reasonable and enforceable. We also find Knight's additional sustaining grounds to be without merit and therefore reinstate the special referee's order.

FACTUAL AND PROCEDURAL HISTORY

Founded in the 1980s, Knight began its operations as a mortuary transport business; however, it eventually expanded to include the manufacturing and sale of body bags. In 2006, Knight decided to sell the mortuary transport portion of its business and approached a broker for assistance. In October 2006, Donald and Ellen Lintal (the CEO and CFO of Palmetto) met with a broker to discuss the purchase of Knight's mortuary transport business. From November 2006 to January 5, 2007, the parties and their agents—including brokers, accountants, and attorneys—negotiated the terms of an asset purchase agreement (the Agreement). During negotiations, Mr. Knight expressed to Mr. Lintal his desire to "get out of the business."

On January 5, 2007, Knight and Palmetto executed the Agreement. Pursuant to the Agreement, Knight sold various tangible assets, goodwill, and customer accounts—including body removal service contracts with Richland County, Lexington County, and the University of South Carolina—to Palmetto in exchange for $590,000.[1] The Agreement included a provision (Exclusivity Provision) requiring Palmetto to purchase body bags from Knight for ten years and requiring Knight to sell body bags to Palmetto for ten years. The Exclusivity Provision became a central issue in the dispute between the parties.

A ten-year, 150-mile non-compete covenant was also executed and was included as an exhibit to the Agreement. Although the non-compete covenant

[1] The following purchase price allocations were set forth in the Agreement: $37,500 for "Furniture, Fixtures, & Equipment"; $1,000 for a "Non-Competition Covenant"; and $551,500 for "Customer Lists."

restricted Knight from providing mortuary transport services within a 150-mile radius of Lexington County, it placed no restrictions on Knight's ability to continue its body bag manufacturing business. The non-compete covenant also provided that "a breach by [Palmetto] of [the Agreement] or such other documents ancillary thereto, shall constitute a breach of [the non-compete covenant] and shall release [Knight] from any and all restrictions hereunder."

Mr. Lintal testified the 150-mile territorial restriction extending from Lexington County was included to ensure Knight would not compete with Palmetto in South Carolina for ten years. Mr. Lintal acknowledged that at the time Palmetto purchased the transport business, Knight provided services primarily in Richland and Lexington County. Mr. Lintal testified that at the time the Agreement was executed, "We didn't know where the business was actually going to -- what we were going to -- if we were going to try to expand it at different locations. We wanted to keep our options open if it was doable."

In 2011, Palmetto still held the mortuary transport services contract with Richland County pursuant to the Agreement. Since the original five-year term between Palmetto and Richland County was expiring, Richland County issued a Request for Proposal (RFP) seeking mortuary transport service for the succeeding five years. Palmetto timely submitted its response to the RFP.

As noted above, the Exclusivity Provision required Palmetto to purchase body bags exclusively from Knight for ten years. From 2007 through 2011, Palmetto purchased over $45,000 worth of body bags from Knight. Palmetto had also purchased body bags from manufacturers other than Knight in the amount of $884.97. These purchases consisted of thirty-one infant bags ($192.75), four extra-large body bags ($213.72), six heavy duty body bags ($208.50), and six water-retrieval bags ($270.00). Knight became aware of the purchase of infant bags in 2009 or 2010 and immediately considered the purchase to be a breach of the Agreement, but did not confront Palmetto about the supposed breach for almost two years. Mr. Knight testified he did not become aware of the other purchases until discovery was exchanged after litigation began.

Palmetto believed the Exclusivity Provision did not require Palmetto to purchase either infant or extra-large bags from Knight. Palmetto agreed it had breached the Exclusivity Provision in purchasing heavy duty and water-retrieval bags from other manufacturers but argued this breach was not material. It argued the remedy for this breach was not cancellation of the Agreement, but rather money

damages in the amount of $478.50, the sum it paid other manufacturers for heavy duty and water-retrieval bags. Knight argued the Exclusivity Provision required Palmetto to purchase *all* of its body bags from Knight and claimed the breach was material and nullified all terms and conditions of the Agreement, including the non-compete covenant.

On June 16, 2011, one day prior to the deadline for responses to the RFP, Mr. Knight recorded a conversation he had with Mr. Lintal. During the conversation, Mr. Knight accused Palmetto of purchasing infant body bags from other manufacturers. Mr. Lintal replied he did not believe his purchase of these body bags from other manufacturers was "significant," and he noted he did not believe "it was anything to break [the Agreement]." As noted above, Mr. Knight was aware of Palmetto's supposedly illicit purchase of infant body bags for almost two years before he confronted Mr. Lintal.

Following his conversation with Mr. Knight, Mr. Lintal suspected Knight was going to bid against Palmetto on the Richland County contract. Mr. Lintal's suspicion was correct—Mr. Knight submitted his own RFP the very next day. Even though Knight had received $590,000 for the sale of the business and an extra $45,000 in body bag purchases from Palmetto, Mr. Knight testified, "I didn't want to get back in the business. I was forced to. . . . I felt like if I didn't take action at that time, I was going to be left out in the cold." After the RFP deadline passed, Mr. Knight contacted the Richland County Procurement Office and told a Richland County official that Knight should be awarded the contract because it was the sole provider of odor-proof body bags—a requisite of the RFP.[2] Although Palmetto's response to the RFP contained the lowest price for services and received the highest total points from the Richland County Procurement Office, Richland County awarded the contract to Knight the next month.

Palmetto sued Knight for breach of the Agreement, alleging Knight violated: (1) the non-compete covenant prohibiting Knight from providing mortuary transport services for ten years within the 150-mile territorial restriction and (2) the Exclusivity Provision, based upon Knight's refusal to supply Palmetto with body

[2] Palmetto had been purchasing odor-proof bags from Knight pursuant to the Agreement; however, Knight believed the Agreement requiring it to sell bags to Palmetto was no longer in effect because Palmetto had purchased body bags from other manufacturers. After Knight won the Richland County bid, Knight ceased selling body bags to Palmetto.

bags. Knight answered and counterclaimed, alleging the non-compete covenant was unenforceable because it contained an unreasonable territorial restraint, contained an unreasonable time restriction, and was not supported by adequate consideration. Knight also alleged any breach of the non-compete covenant was excused because Palmetto first materially breached the Exclusivity Provision by purchasing body bags from other manufacturers.

The case was tried before a special referee. The special referee found the non-compete covenant was reasonably limited in time and territorial scope and was supported by valuable consideration. The special referee found Knight breached the Agreement by violating the non-compete covenant and by refusing to sell body bags to Palmetto. The special referee determined Palmetto's purchase of heavy duty and water-retrieval body bags from other manufacturers, although a breach, did not constitute a material breach of the Agreement such that Knight was excused from performance of its contractual obligations. The special referee ordered Knight to pay (1) attorneys' fees and (2) damages of $373,264.54 in lost profits resulting from the wrongful competition with Palmetto. The special referee issued a permanent injunction requiring Knight to comply with the terms of the non-compete covenant for a term of five years and seven months following the date of his order, but allowing Knight to complete its performance of the 2011 mortuary transport contract with Richland County. Finally, the special referee awarded Knight $478.50 in damages for Palmetto's breach of the Agreement.

Knight appealed the special referee's order to the court of appeals, arguing the special referee erred in finding (1) the territorial restriction in the non-compete covenant was reasonable and enforceable, (2) the territorial restriction was supported by independent and valuable consideration, (3) the non-compete covenant was not void as against public policy, and (4) the non-compete covenant was not voided by Palmetto's breach of the Exclusivity Provision. *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 416 S.C. 427, 429-30, 786 S.E.2d 588, 589 (Ct. App. 2016). The court of appeals reversed and remanded, holding the non-compete covenant's 150-mile territorial restriction was unreasonable and unenforceable.[3] *Id.* at 437, 786 S.E.2d at 593. Because South Carolina does not follow the "blue pencil rule" and

[3] Citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), the court of appeals declined to address Knight's remaining arguments since its holding regarding the territorial restriction of the non-compete covenant was dispositive of the appeal.

because the non-compete covenant does not include a "step-down provision," the court of appeals found it would be impermissible to redraw the Agreement to include a smaller territorial restriction. *Id.* at 436, 786 S.E.2d at 592. This Court granted Palmetto's petition for a writ of certiorari to review the court of appeals' decision.

STANDARD OF REVIEW

An action for a breach of contract is an action at law. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Id.* (quoting 17B C.J.S. *Contracts* § 1030). We review questions of law de novo. *Id.*

DISCUSSION

I. Territorial Restriction of the Non-Compete Covenant

Palmetto argues the court of appeals erred in holding the territorial restriction in the non-compete covenant was unreasonable. We agree.

A. Applicable Law

"A covenant not to compete is enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by a valuable consideration." *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960). "The reason why such covenants are held to be unenforceable is that unless they meet certain criteria, they constitute a restraint upon trade which is against public policy." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 347 (1958).

In *Reeves v. Sargeant*, 200 S.C. 494, 496, 21 S.E.2d 184, 185 (1942), Sargeant operated a successful photography business in Richland County. For $3,500, Reeves purchased the business, together with all of its assets, goodwill, and the exclusive right to use the name "Sargeant Photo Company." *Id.* The contract required Sargeant to "never again enter into the photograph business . . . in Richland County." *Id.* at 497, 21 S.E.2d at 186. Following the execution of the contract, Sargeant began competing against Reeves, and Reeves sued Sargeant. *Id.* at 498, 21 S.E.2d at 186. "[Sargeant] successfully contended in the lower court that the contract being one in partial restraint of trade is void and against public policy, because the duration of the restraint upon the defendant is unreasonable, in that it is without time limit." *Id.*

We disagreed and stated, "The test which generally is laid down by which it may be determined whether a contract is reasonable is whether it affords a fair protection for the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interest of the public." *Id.* at 498-99, 21 S.E.2d at 186. We continued:

> In determining whether a contract in partial restraint of trade is reasonable, the court will look to the whole subject matter of the contract, the kind and character of business, its location, the purpose to be accomplished by the restriction, and all circumstances which show the intention of the parties and which must have entered into the making of the contract. . . . In the case before us, the restraint is limited as to space and territory, and is to run during the lifetime of the defendant. It is only as to the time feature that the defendant objects. In determining whether a contract is reasonable in respect to the length of time during which the restriction is to run, as applied to a case like the one before us, it would seem that the fair and full protection of the business, good will and trade name which the vendee has purchased and paid for, may well be accepted as the test. *It follows naturally that each case must be governed in the main by its own facts*.

Id. at 501-02, 21 S.E.2d at 188 (emphasis added). We found the limitation did not go beyond what was necessary for the protection of Reeves in the prosecution of the business he purchased and was, therefore, reasonable and enforceable. *Id.* at 504, 21 S.E.2d at 189.

In *Somerset v. Reyner*, 233 S.C. 324, 327, 104 S.E.2d 344, 345 (1958), Somerset owned a profitable shop in the Five Points area of Columbia specializing in the sale of sterling silver. Ninety-five percent of his sales were in the Greater Columbia area. *Id.* at 328, 104 S.E.2d at 345. Somerset decided to sell his business and entered into an agreement for Reyner to buy the business. *Id.* The agreement included a non-compete covenant prohibiting Somerset from engaging in the silver or jewelry business in South Carolina for twenty years. *Id.* at 328, 104 S.E.2d at 346. The contract was prepared by Reyner or his attorney, and Somerset was not represented by counsel during the transaction. *Id.* at 329, 104 S.E.2d at 346. Subsequent to the sale, Somerset was employed as manager of the shop, but Reyner

terminated Somerset several months later. *Id.* Somerset brought a declaratory judgment action, arguing the territorial restriction in the non-compete provision was unreasonable—making the non-compete covenant void. *Id.* at 327, 104 S.E.2d at 345. The trial court agreed. *Id.*

We affirmed the trial court and explained a non-compete covenant entered into in conjunction with the sale of a business and its good will is valid if: (1) supported by valuable consideration, (2) reasonably limited as to time, and (3) reasonably restricted as to the place of territory. *Id.* at 329, 104 S.E.2d at 346. We stated:

> We shall first determine whether the covenant under consideration is necessary in its full extent for the protection of the covenantee's business or good will. If not, the territorial scope of the restraint is unreasonable and no inquiry need be made as to the presence or absence of other necessary requirements.

Id. at 330, 104 S.E.2d at 346. Because the store's business came almost entirely from the Greater Columbia area, we found no rational basis for the statewide territorial restraint and voided the covenant. *Id.* at 330, 104 S.E.2d at 347. We found that to protect Reyner's interest in the business, it was not necessary to prohibit Somerset from engaging in similar business in "Charleston, Spartanburg, Greenville[,] or numerous other cities in South Carolina." *Id.* at 330, 104 S.E.2d at 346. Reyner argued Somerset was estopped from attacking the validity of the covenant because Somerset informed Reyner that the entire state could be included in the territorial restriction because he—Somerset—had no intention of returning to this type of business. *Id.* at 330, 104 S.E.2d at 347. We rejected that argument, noting "[t]he general rule is that an agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel." *Id.* Additionally, we declined to apply the "blue pencil test" to redraw a reasonable territory for the restriction because the covenant was "clearly indivisible" and "furnishe[d] no basis for dividing this territory." *Id.* at 332, 104 S.E.2d at 348. We explained, "We cannot make a new agreement for the parties into which they did not voluntarily enter." *Id.*

B. Analysis

The court of appeals analogized the instant case to *Somerset* and found the territorial restriction was unreasonable. The court of appeals found that at the time

the Agreement was executed, Knight's mortuary transport business only conducted business in Richland and Lexington counties and found Palmetto's tentative desire to expand its business throughout the state—without more evidence of definitive planning, acquisitions, or other overt acts—did not support a finding that the restriction was reasonable. Additionally, the court of appeals found Knight's intention of not returning to the mortuary transport business was an irrelevant factor in determining whether the territorial restriction was reasonable.

We disagree with the court of appeals. While *Somerset* and the instant case have some factual similarities, the court of appeals too narrowly focused on these similarities and failed to consider the facts of the instant case as a whole. *See Reeves*, 200 S.C. at 502, 21 S.E.2d at 188 ("It follows naturally that each case must be governed in the main by its own facts."). Under *Reeves*, an analysis of the reasonableness of a territorial restriction in a non-compete covenant must take into account relevant facts surrounding the making of the agreement. *See id.* at 501, 21 S.E.2d at 188 (noting that in determining whether a non-compete covenant is reasonable, a court will consider: (1) the whole subject matter of the contract; (2) the kind and character of the business; (3) location; (4) the purpose to be accomplished by the restriction; and (5) all circumstances which show the intention of the parties and which must have entered into the making of the contract). We will now apply these considerations to the territorial restriction in the non-compete covenant agreed upon by Palmetto and Knight. We must note that consideration (4), the purpose to be accomplished by the restriction, is intertwined with all other considerations we address.

As for the subject matter of the contract, we stress the non-compete covenant between Knight and Palmetto arose out of the sale of a business between two sophisticated parties. Non-compete covenants executed in conjunction with the sale of a business should be scrutinized at a more relaxed level than non-compete covenants executed in conjunction with employment contracts. *See Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 284 (4th Cir. 1974) (citing Virginia law and stating, "greater latitude is allowed in determining the reasonableness of a restrictive covenant when the covenant relates to the sale of a business than in those ancillary to an employment contract"); *American Hot Rod Ass'n, Inc. v. Carrier*, 500 F.2d 1269, 1277 (4th Cir. 1974) (citing North Carolina law and noting non-compete covenants in employment contracts are scrutinized more rigorously than similar covenants incident to the sale of a business). Non-compete covenants executed in the context of an employment contract are generally disfavored and are strictly

construed against an employer. *Milliken*, 399 S.C. at 31, 731 S.E.2d at 292. The probability of unequal bargaining power that may exist between an employer and employee is significantly reduced when the restriction arises in the context of a sale of a business between two sophisticated parties. Also, a non-compete covenant executed pursuant to the sale of a business allows the opportunity for a seller to capitalize on the disposition of the business's goodwill and bargain for a higher price. *See Day Companies v. Patat*, 403 F.2d 792, 795 (5th Cir. 1968).

The Agreement involved the somewhat complex sale of Knight's mortuary transport business to Palmetto for $590,000. Both Palmetto and Knight are sophisticated parties and were represented by legal counsel throughout the negotiation and execution of the Agreement. Knight necessarily considered the restrictions in the non-compete covenant in making his decision to enter into the Agreement. The non-compete covenant was integral to Palmetto's decision to enter into the Agreement. Mr. Lintal testified about Mr. Knight's "strong reputation" in the business and stated, "[The non-compete covenant] was very important to us because without the non-compete, we wouldn't have bought the business." Further, the non-compete covenant specifically provided, "[Knight] has agreed to provide such covenants as set forth herein as *a material inducement to [Palmetto]* to enter into and close the Purchase Agreement." (emphasis added). It is clear the non-compete covenant was a centerpiece of the Agreement and that both Palmetto and Knight bargained for and intended to benefit from its terms.

While the non-compete covenant effected a partial restraint of trade by limiting Knight's ability to provide mortuary transport services, this restraint was offset by Knight's continuation of its body bag manufacturing business and the Exclusivity Provision requiring Palmetto to purchase body bags from Knight throughout the term of the non-compete covenant. Indeed, Palmetto purchased approximately $45,000 worth of body bags from Knight before the current controversy arose. The Agreement did not prohibit Knight from continuing to sell bags to other customers. It is clear that both Knight and Palmetto carefully considered and calibrated their options and best interests in striking their bargain.

Under *Reeves*, we must consider the kind and character of the business and the location of the business. The territorial restriction in this case consisted of a 150-mile radius surrounding Lexington County. At the time Palmetto purchased Knight's business, the business predominantly serviced Richland and Lexington counties. However, focusing only upon the existing territory of Knight's business and Palmetto's lack of concrete plans for geographical expansion ignores the kind and

character of the business. A mortuary transport business necessarily involves mobility of services, and expansion into other areas of South Carolina is certainly foreseeable. This is not a brick and mortar 1950s local retail business as was the case in *Somerset*. Palmetto, a sophisticated buyer, saw the opportunity for expansion outside Knight's existing business area and thus negotiated the Agreement with Knight, a sophisticated seller, to protect its interests by implementing the 150-mile territorial restriction. At his deposition, Mr. Lintal testified that since the execution of the Agreement, Palmetto has added new customers and "on occasion" provides services for customers outside of the Columbia and Lexington area.

After considering the Agreement as a whole, and after giving the non-compete covenant the more relaxed scrutiny it requires, we find the territorial restriction was not greater than what was essential for a reasonable protection of the rights purchased by Palmetto. *See Metts v. Wenberg*, 158 S.C. 411, 415, 155 S.E. 734, 735 (1930) (noting it is generally held that a non-compete is reasonably restricted as to the place or territory "where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party").

II. Knight's Additional Arguments

Knight presents two additional sustaining grounds for this Court's consideration if this Court were to find error with the court of appeals' conclusion that the non-compete covenant's territorial restriction was unreasonable.[4] Because

[4] Although not raised to this Court as an additional sustaining ground, at the court of appeals, Knight also argued the non-compete covenant's territorial restriction was not supported by independent and valuable consideration. The Agreement set forth the purchase price allocation of $1,000 for the non-compete covenant. Additionally, the non-compete covenant provided:

> NOW, THEREFORE, in consideration of the foregoing premises, the promises set forth herein, the consideration of $1,000.00 specifically allocated to this Agreement in the Purchase Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, [Knight] and [Palmetto], intending to be legally bound, hereby agree and covenant as follows[.]

we find the court of appeals erred in concluding this non-compete covenant was unenforceable, we will address Knight's additional arguments.

A. Public Policy

Knight argues the non-compete covenant—restricting competition between potential competitors for public contracts—is invalid and void as against public policy. Although there may be situations in which this Court may find a restriction of competition between potential competitors for public contracts to be void as against public policy, this case does not rise to such a level.

Determining whether a contract is void as against public policy is generally a question of law for the Court. *See Milliken*, 399 S.C. at 30, 731 S.E.2d at 291. Here, there is no evidence Knight and Palmetto colluded or purposefully undertook an act to affect the public procurement process. The non-compete covenant neither restricted the public's ability to bid on public contracts nor guaranteed Palmetto would obtain any public contract for mortuary transport services within the defined territory. We also note Mr. Knight professed his desire to "get out of the [transport] business." The protection of Palmetto's interest in not having Knight compete for public contracts following its purchase of Knight's business is grounded in sound business practices and does not violate public policy. We decline to create a blanket rule that a non-compete covenant that restricts competition between potential competitors for public contracts is invalid and void as against public policy.

B. Palmetto's Breach of the Agreement

Knight argues Palmetto first breached the Agreement by purchasing body bags from other manufacturers, thereby nullifying all terms and conditions—

We affirm the special referee's conclusion that the non-compete covenant was supported by independent and valuable consideration. *See Metts*, 158 S.C. at 415, 155 S.E. at 735 (providing non-compete agreements must be supported by valuable consideration); *Lowery v. Callahan*, 210 S.C. 300, 304, 42 S.E.2d 457, 458 (1947) ("When the consideration agreed upon [in a contract] is something of value, the courts will generally, in the absence of fraud, coercion, and undue influence, and if the parties are competent, not avoid the [contract] on the ground of the inadequacy of the consideration . . . for the contracting parties, and not the courts, must determine the quid pro quo.").

including the non-compete covenant—contained in the Agreement. Although it is clear Palmetto breached the Agreement, we agree with the special referee's conclusion that Palmetto's breach was not material; consequently, the special referee properly concluded Palmetto's breach did not nullify all terms and conditions contained in the Agreement.

1. Interpretation of the Exclusivity Provision

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Id.*

The Exclusivity Provision stated:

> 3.4.8 [Knight]'s Related Business. Knight, through his related body bag business (the "Related Business"), shall provide to [Palmetto] body bags at a discounted rate and [Palmetto] shall for the term of the non-compete agreement buy all their body bags from [Knight]. Below are current charges for different types of body bags. The prices noted below shall not be increased by more than ten percent (10%) in any calendar year.
>
> Heavy Duty body bags: $20.00
> Lightweight body bags: $8.00
> Odor-Proof body bags: $50.00
> Water-Retrieval body bags: $30.00

Knight claims Palmetto breached the Exclusivity Provision by purchasing $884.97 worth of body bags from other manufacturers. Palmetto claims it was required to buy from Knight only those types of bags listed in the above provision and argued its breach of the Exclusivity Provision was only in the amount of $478.50. The special referee agreed with Palmetto and awarded damages to Knight in the latter amount. We agree with the special referee.

2. Materiality of Palmetto's Breach

"A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract." *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009). "Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989).

The special referee found Palmetto breached the Exclusivity Provision by purchasing $478.50 worth of body bags from manufacturers other than Knight. However, the special referee found this breach was not material and did not nullify Knight's obligation to honor the non-compete covenant. The special referee concluded Knight was entitled to $478.50 in damages as a result of Palmetto's breach.

We hold Palmetto's conduct did not constitute a material breach of the Agreement.[5] Palmetto breached the Agreement by purchasing $478.50 worth of body bags from outside manufacturers. In comparison, Palmetto purchased $45,000 worth of body bags from Knight prior to the current controversy and paid Knight

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[5] The special referee conducted an analysis under section 241 of the Restatement (Second) of Contracts, which this Court previously adopted when determining whether the breach of a commercial lease was material. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994) (adopting section 241 to determine whether a breach of a commercial lease was material, which sets forth the following circumstances as significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated by damages for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all of the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing). We see no reason not to apply these factors to the Agreement in this case.

$590,000 to purchase Knight's mortuary transport business. As additional support for the special referee's finding that Palmetto's breach was not material, we again note Knight knew of Palmetto's supposedly illicit purchase of infant body bags but sat on the information for approximately two years and did not confront Palmetto about the breach until the deadline for bidding on the Richland County contract was imminent.

Knight argues the special referee erred in focusing on the dollar amount of the breach because the appropriate focus is on "the essential nature of the term breached." Knight relies on *Brazell*, where we held a trial court erred in refusing a seller's demand for rescission after a buyer withheld $2,000 of the $550,000 purchase price of a home. 384 S.C. at 517, 682 S.E.2d at 827. The trial court found the buyer's withholding of such a small amount of the contract price was a nonmaterial breach as a matter of law. *Id.* We reversed and stated the trial court's error "stems from focusing on the dollar amount withheld in determining whether [buyer's] actions defeated the purpose of the contract and the objective of the contracting parties." *Id.* at 518, 682 S.E.2d at 827. Knight's reliance on *Brazell* is misplaced, as *Brazell* involved a contract for the sale of real estate, and this Court has noted "real estate contracts are unique and courts should evaluate the purpose of the real estate contract and the materiality of a breach in light of these differences." *Id.*

Evidence in the record supports the special referee's conclusion that Palmetto's breach was not material. Even if Palmetto's breach extended to the entire sum of $884.97 paid by Palmetto to other body bag manufacturers, our analysis would be the same.

Knight also argues the non-compete covenant contains a termination clause[6] providing that "a breach by [Palmetto]" of the Agreement would relieve Knight from

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[6] The termination clause reads:

> Breach of the Purchase Agreement. Notwithstanding anything contained herein to the contrary, a breach by Buyer of the Purchase Agreement or such other documents ancillary thereto, shall constitute a breach of this Agreement and shall release Seller from any and all restrictions hereunder.

further contractual obligations. Knight claims that *any breach* of the Agreement by Palmetto released it from the terms of the non-compete covenant. Therefore, Knight asserts, the termination clause does not require a material breach of the Agreement to permit Knight to terminate the non-compete covenant. We disagree. Only a material breach would relieve Knight from further contractual obligations. *See Kiriakides*, 312 S.C. at 275-76, 440 S.E.2d at 366-67 (holding a forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced even though a lease between the parties specifically agreed "any breach" would give rise to the right of termination).

CONCLUSION

We hold the territorial restriction of the non-compete covenant is reasonable and enforceable, and we hold Knight's additional sustaining grounds are without merit. We therefore **REVERSE** the court of appeals and reinstate the special referee's order.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

We note the termination clause does not provide that "any" breach by Palmetto relieved Knight from further contractual obligations.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner-Respondent,

v.

Shannon Scott, Respondent-Petitioner.

Appellate Case No. 2017-001607

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Maité Murphy, Circuit Court Judge

Opinion No. 27834
Heard April 18, 2018 – Filed August 29, 2018

AFFIRMED AS MODIFIED

Attorney General Alan M. Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown, Assistant Attorney General Alphonso Simon Jr., Solicitor Daniel E. Johnson and Assistant Solicitor April Woodard Sampson, all of Columbia, for Petitioner-Respondent.

Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent-Petitioner.

JUSTICE FEW: The circuit court granted Shannon Scott immunity pursuant to the Protection of Persons and Property Act, and the court of appeals affirmed. We affirm the court of appeals as modified.

I. Facts and Procedural History

On the night of April 10, 2010, Shannon Scott and his fiancé Rosalyn were asleep at Scott's home. Scott's daughter Shade and three of Rosalyn's daughters were at a party at a teen nightclub with friends. Shade had a history of problems with a girl named Teesha and her friends. Shade testified Teesha "started with me" by "flipping my hair, like back flipping my hair trying to hit me." Shade and her friends left the party but Teesha followed them into the parking lot where Shade described her as, "Being like ready to fight." Shade and her group left in one vehicle and Teesha and her group followed in an SUV. A third vehicle, a Honda, driven by the deceased—Darrell Niles—followed behind Teesha. It is unclear why Niles was following the two vehicles.

As Shade's group was driving away from the club, they stopped at a red traffic light. Shade and two other passengers in the vehicle testified that when Teesha's group stopped at the light, someone got out of Teesha's vehicle and approached their vehicle with a gun. Shade's group ran the red light and Teesha's group pursued them. Shade's group attempted to pull into a police station but the station was closed. One of the girls called her mother Rosalyn and explained they were being chased by Teesha. Rosalyn woke up Scott and informed him their daughters were being chased by "those girls." Rosalyn instructed her daughter to drive to Scott's home. It is unclear whether Scott or Rosalyn were informed of the presence of the gun.

When Shade's group arrived, they pulled around to the back of the house. Scott testified, "While they're going into the backyard, I see the truck coming down and some more headlights behind it." Scott and Rosalyn helped the girls inside through the back door. Two of Rosalyn's daughters testified they heard a gunshot as they were entering the house. Scott and Rosalyn also testified they heard a gunshot while they were getting the children inside. Rosalyn specifically testified Scott was in the house when she heard the first gunshot. After the gunshot, Rosalyn called 911.

After Scott heard the gunshot, he retrieved his roommate's gun and "ran" toward his front door. Both vehicles had driven past Scott's house and turned around, and both were positioned so the driver's side of the vehicle was facing the front of Scott's house. Scott testified,

> The SUV . . . turned around . . . . There was another car behind it. I seen the headlights. The SUV came back up. As it came back up, it cut the headlights off and it was proceeding to come my way, maybe three miles per hour.

The circuit court found Scott did not fire first. "The credible testimony established that they turned the SUV around, turned off the lights, rolled down the windows and drove by [Scott's] home and began to fire." The court found that "in response to these events, [Scott] exited the front of his home onto a very small stoop." As the two vehicles approached, Scott fired a warning shot "straight in the air" and yelled not to come any closer. Scott testified,

> After I fired the warning shot, the car proceeded to come closer and I heard another shot. I ducked down over the front hood of my vehicle that was parked up front all the way to the porch. And as I was ducking down and going back into the house at the same time, I shot back again. I shot and went back into the house.

He remembered he shot "twice, possibly three" times. The police arrived a few minutes later and discovered Niles was dead from a gunshot.

The State indicted Scott for murder. The circuit court granted Scott's motion for immunity under the Act. The court of appeals affirmed. *State v. Scott*, 420 S.C. 108, 800 S.E.2d 793 (Ct. App. 2017). The State and Scott filed petitions for a writ of certiorari, and we granted both petitions.

II. Analysis

In *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), we stated, "Section 16-11-450 provides immunity from prosecution *if* a person is found to be justified in using deadly force under the Act." 406 S.C. at 371, 752 S.E.2d at 266. Subsection 16-11-450(A) of the South Carolina Code (2015) provides,

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was

> used is a law enforcement officer acting in the performance of his official duties . . . .

Scott argues his right to self-defense and to defend his family are both a "provision of law" that permitted him to use deadly force. According to Scott, "the legislature must have anticipated a circumstance such as the one in this case, where a person's children were in imminent peril, and shots were being fired at him, his house, or towards his house, and where that person would be entitled to defend himself and his family."

We focus our analysis on self-defense. As we stated in *Curry*, "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." 406 S.C. at 371, 752 S.E.2d at 266.

There are four elements that must be established to justify the use of deadly force as self-defense. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). Scott bears the burden of proving these elements by the preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The elements are,

> (1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Dickey, 394 S.C. at 499, 716 S.E.2d at 101 (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)).

The circuit court's order did not follow this structure with precision, but we can glean from its order the necessary findings of fact to support the conclusion that Scott established the four elements of self-defense.

First, as to the requirement that the defendant was without fault in bringing on the difficulty, the State did not argue Scott was at fault, nor is there any evidence in the record Scott was at fault. Scott was asleep in his home when Rosalyn woke him up and told him their daughters were being chased by Teesha. Scott was ushering his daughter and her friends into his house when he heard a gunshot. The circuit court found the girls in Teesha's vehicle "instigated the deadly circumstances." The court of appeals stated, "The parties agree Scott was not engaged in an unlawful activity at the time of the shooting." 420 S.C. at 114, 800 S.E.2d at 796.

Second, as to the requirement that the defendant believed he was in imminent danger of losing his life or sustaining serious injury, the circuit court found Scott had "a reasonable fear of imminent peril of death" and "it is abundantly clear to the Court . . . the environment inside [Scott's] home was one of terrified, panicked young people, but also terribly frightened adults." There is evidence to support these findings.

Third, as to the requirement that the defendant's belief was reasonable, the circuit court found, "When [Scott] fired the shot, he reasonably believed he was being attacked with deadly force directed at his home." This finding is supported by the same evidence that supports Scott's actual belief. As to this element, however, the State and the dissent differentiate between the reasonableness of Scott's fear of attack by the occupants of Teesha's vehicle and his fear of attack by Niles. We will address this point separately below.

Finally, as to the requirement that the defendant had no other probable means of avoiding the danger, the circuit court found, "shots were fired by [one of the girls in Teesha's group] and then by [Scott] as [Scott] stood on the curtilage of his home." Based on this finding, the circuit court correctly concluded Scott was excused from proving this element because he was within the curtilage of his own home when he fired the shots. The circuit court stated, "At no point is it required that [Scott] retreat into his home to be fired upon without him being able to defend . . . himself." *See State v. Jones*, 416 S.C. 283, 291, 786 S.E.2d 132, 136 (2016) ("Under the Castle Doctrine, '[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.'" (quoting *State v. Gordon*, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924))); *State v. Grantham*, 224 S.C. 41, 45, 77 S.E.2d 291, 293 (1953) (holding that a person "in his home lawfully occupied by him and . . . without fault in bringing on the difficulty was not bound to retreat in order to invoke the benefit of the doctrine of self-defense, but could stand his ground and repel the attack with as much force as was reasonably necessary");

see also Wiggins, 330 S.C. at 548 n.15, 500 S.E.2d at 494 n.15 ("We have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home."); 40 Am. Jur. 2d *Homicide* § 165 (2008) ("[T]here is general agreement that no duty to retreat rests upon one who, without fault, is attacked by another when in his or her own curtilage."); *Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. ("It is the fourth element—the duty to retreat—that is excused under the Act and the Castle Doctrine."). The circuit court correctly found Scott satisfied the fourth element.

Therefore, the circuit court made the necessary factual findings to support the existence of self-defense. Because those findings are supported by the evidence, our standard of review requires that we uphold them. *See State v. Manning*, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) (explaining we review immunity determinations for an abuse of discretion, which "occurs when the trial court's ruling . . . is without evidentiary support." (quoting *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014))).

The State argues, however, that even if Scott was entitled to use deadly force against the occupants of Teesha's vehicle under the law of self-defense, he was not entitled to use deadly force against Niles. As support for this argument, the State points out the two vehicles were some distance apart, so Scott had to shoot in a different direction to hit Niles. The State poses this alleged error as an error of law, arguing Scott had no legal right to shoot an "innocent bystander." We frame the issue as one of fact. We believe the appropriate question is whether Scott was justified in using deadly force against the occupants of Niles' vehicle, which in turn depends on whether he established the elements of self-defense as to those occupants.

As we discussed, the first and fourth elements are not in dispute. So, we focus our analysis of the State's argument as to elements two and three. Obviously, if Scott reasonably feared an occupant of Teesha's vehicle was going to shoot him, that fear would not justify Scott to shoot in a different direction at an innocent bystander. However, if Scott reasonably believed he was being attacked by gunfire by occupants of both vehicles, then he would be entitled to use deadly force against both vehicles.

The circuit court addressed the State's "innocent bystander" argument directly. First, the court made general findings regarding the existence and reasonableness of Scott's fear of attack by gunfire,

> The court finds credible [Scott's] testimony that both the Honda and SUV drove past his home and turned around and stopped in front of his residence. . . . His testimony was very credible that he heard a gunshot. Hearing a gunshot, along with the threats, the chase, and being confronted at his home as the target of a drive by shooting, with his children inside, created a reasonable fear of imminent peril of death for him and his family.

Then, the court related that reasonable fear directly to Niles,

> [Niles] had followed [Scott's] daughters home while they were being chased by another vehicle. [Niles] never identified himself to [Scott] and in doing so left [Scott] to reasonably believe that [Niles] too was an imminent threat. If in fact [Niles] was present merely to observe these events or even assist those being chased in some way, the credible evidence presented simply fails to support such a finding.

The court also found Scott "reasonably believed [Niles] was engaged in an unlawful and forcible act against his home."

The dissent disagrees the evidence supports the circuit court's findings regarding Niles. Respectfully, however, the dissent confuses what we know from reading the record of the immunity hearing with what Scott knew in the heat of the moment on his porch that night. The dissent states, "Scott may have been apprised about the danger posed to his family *by Teesha Davis and the passengers in her vehicle,* not by Darrell Niles," and "a close examination of the record demonstrates the threats, the chase, and the drive-by shooting all are attributed to the SUV." From our hindsight review of the record, we know Teesha's vehicle was the SUV, but there is no evidence Scott knew that. Scott knew only that his daughter had been chased home, and when they arrived he saw two vehicles behind her. While he was securing his daughter in the house he heard a gunshot. He then armed himself, exited the front of his house, and saw two vehicles driving in the opposite direction "maybe three miles per hour."

At oral argument, Justice James asked the State, "Does [Scott] have to interview, I'm not being facetious, does he have to interview the perpetrators and ask 'which one of you fired that shot so I can fire my shot accordingly?'" The answer is, "No," because,

"A person has the right to act on appearances, even if the person's belief is ultimately mistaken." *Dickey*, 394 S.C. at 501, 716 S.E.2d at 102 (citing *State v. Fuller*, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989)). The circuit court understood this, and found based on the evidence of what Scott knew and observed in the heat of that moment, "[Scott] reasonably believed [Niles] was engaged in an unlawful and forcible act against his home."

Subsection 16-11-450(A) provides that "[a] person who uses deadly force as permitted by . . . an[] applicable provision of law is justified in using deadly force and is immune from criminal prosecution." Self-defense is the classic provision of law that justifies the use of deadly force. It was clearly the Legislature's intent that if a person seeking immunity under subsection 16-11-450(A) could prove the elements of self-defense in an immunity proceeding, immunity must be granted. In *Curry*, we stated "a valid case of self-defense must exist," and found that the circuit court's finding in that case that the defendant had not proven self-defense was supported by the evidence. 406 S.C. at 371, 752 S.E.2d at 266. Explaining our ruling to affirm the denial of immunity, we stated, "Appellant's claim of self-defense presents a quintessential jury question." 406 S.C. at 372, 752 S.E.2d at 267. In this case, we have the opposite situation. The circuit court's finding that Scott did prove self-defense is supported by the evidence. In this case, therefore, we must affirm the circuit court's order granting immunity.

III. Section 16-11-440

The State, Scott, the court of appeals, and the circuit court spent considerable time addressing the applicability of subsections (A) and (C) of section 16-11-440 of the South Carolina Code (2015). We address those subsections in turn.

A. Subsection 16-11-440(A)

Subsection 16-11-440(A) provides in relation to this case,

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury . . . if the person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering . . . a dwelling[or] residence . . . ; and (2) [the person] who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

The circuit court found the subsection 16-11-440(A) presumption of reasonable fear applies to Scott. However, there is no evidence whatsoever in this record that Niles or anyone else was "in the process of unlawfully and forcefully entering a dwelling or residence," a prerequisite that clearly must be met before the presumption applies. Therefore, the circuit court erred in finding that subsection 16-11-440(A) applied.

In this case, however, Scott did not need a presumption of reasonable fear because he proved to the circuit court's satisfaction as a matter of fact that his fear was reasonable. As we have already discussed, the circuit court found Scott "reasonably believe[d] that [Niles] was an imminent threat," and Scott "reasonably believed [Niles] was engaged in an unlawful and forcible act against his home." These findings—which are supported by the evidence—made it unnecessary for the circuit court to address whether the reasonableness of Scott's fear should be presumed pursuant to subsection 16-11-440(A).

B. Subsection 16-11-440(C)

Subsection 16-11-440(C) provides,

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . . .

The circuit court found subsection 16-11-440(C) applied to Scott, and the court of appeals agreed. *Scott*, 420 S.C. at 114, 800 S.E.2d at 796. We agree. Scott (1) was "not engaged in an unlawful activity," (2) was "attacked," (3) was "in another place where he ha[d] a right to be," and (4) "reasonably believe[d] [the use of deadly force] [wa]s necessary to prevent death or great bodily injury to himself or another person." Therefore, subsection 16-11-440(C) clearly provides he "ha[d] no duty to retreat and ha[d] the right to stand his ground and meet force with force."

However, the applicability of subsection 16-11-440(C) was not essential to the circuit court's finding of immunity in this case. Because Scott was in the curtilage of his home when he used deadly force against Niles, he already had no duty to retreat, and was free to stand his ground and meet force with force, pursuant to the

Castle Doctrine as we explained in *Grantham*, 224 S.C. at 45, 77 S.E.2d at 293. The purpose of subsection 16-11-440(C) was merely to extend this common law right to "[]other place[s] where he has a right to be." S.C. Code Ann. § 16-11-440(C)*; see* S.C. Code Ann. § 16-11-420(A) (2015) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business."); *Jones*, 416 S.C. at 291, 786 S.E.2d at 136 (noting subsection 16-11-420(A) "extended [the Castle Doctrine's] protection, when applicable, to include an occupied vehicle and a person's place of business"). In this case, that extension is unnecessary.

IV. Conclusion

There is evidence in the record to support Scott's use of deadly force against Niles under the doctrine of self-defense. Therefore, he was entitled to immunity pursuant to Subsection 16-11-450(A) of the Protection of Persons and Property Act. We **AFFIRM AS MODIFIED**.

BEATTY, C.J., and JAMES, J., concur. KITTREDGE, J., concurring in a separate opinion. HEARN, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I concur with Justice Few's majority opinion. While I am of the view that our deferential standard of review constrains us to uphold the trial court's grant of immunity to Shannon Scott, I write separately because I believe Justice Hearn's dissent raises significant and legitimate concerns regarding the reach of the Protection of Persons and Property Act. I, too, question whether the General Assembly intended to empower the judicial branch with authority to grant immunity in this circumstance. The Act, which purports to codify the Castle Doctrine and assign the power to grant immunity from the executive branch to the judicial branch, is far from a model of clarity. As a result, this Court has wrestled in a number of cases to discern legislative intent in particular situations. I believe today's majority opinion is a faithful effort to honor legislative intent in terms of the substantive application of the Act, as well as the judicially engrafted procedures this Court has been required to establish. *See State v. Curry*, 406 S.C. 364, 370 n.3, 752 S.E.2d 263, 266 n.3 (2013) (noting that "the Act is silent on the procedure to follow when an accused seeks immunity"). Over time, without legislative action, this Court will continue to do its best to fill in the many unanswered gaps of the Act. Ideally, the General Assembly will respond at some point and provide clarity in terms of the reach and applicability of the Act. With clearer legislative guidance, this Court could more assuredly honor its proper and limited role of interpreting the law. Perhaps the result in this case, for the reasons advanced by Justice Hearn, will prompt legislative action. Pending clarification of the Act, given our current abuse of discretion standard of review, I join the majority opinion because there is some evidence to uphold the trial court.

JUSTICE HEARN: As I disagree with the majority's view that there is evidence in the record to support Scott's use of deadly force against Niles, I respectfully dissent.

I acknowledge this Court's limited lens when reviewing a circuit court's factual findings from an immunity hearing under the Protection of Persons and Property Act (the Act). Most certainly, it is within the circuit court's province to determine the credibility of the witnesses. Nevertheless, while numerous factual inconsistencies permeate this record, all relate to the extent Scott may have been apprised about the danger posed to his family *by Teesha Davis and the passengers in her vehicle,* not by Darrell Niles, the apparent bystander who was killed by Scott's gunfire.

While there was a factual issue concerning whether Scott knew someone in Teesha Davis's vehicle (the SUV) had a gun, the record is devoid of any evidence demonstrating Niles or Eric Washington, the two occupants in the third vehicle (the Honda), presented any threat. The evidence presented at the hearing all concerned Scott's belief that Teesha and her accomplices followed Shade's vehicle. Numerous witnesses in Shade's car, including Asia Mills, Ave Fuller, Denzel Davis, and Antonio Bennet, testified that Teesha or someone else in the SUV had a gun. Many of these witnesses also testified to hearing gunfire upon pulling into Scott's driveway, and Scott testified he only armed himself with his roommate's gun after hearing a gunshot. In their statements to police, none of these witnesses mentioned the existence of a gun or hearing gunshots while in the driveway; however, it was up to the circuit court to determine what and whom to believe. Indeed, Sergeant Thomas testified that at no time during the investigation did any of the witnesses mention that Teesha displayed a gun; the first time he learned of this fact was during the immunity hearing. Regardless, the testimony of Scott's daughter—that she told her father they were being followed by a car with a gun in it—and of Scott and the other witnesses—that they heard gunfire shortly after the daughter pulled into Scott's driveway—unquestionably provided a sufficient basis for the circuit court to conclude that the occupants in the SUV placed Scott in "reasonable fear of imminent peril of death" for him and his family. While this finding justifies the use of deadly force *as to those in the SUV*, it does not relieve Scott's burden of proving Niles posed a similar threat.

Accordingly, in order for Scott to successfully gain immunity under the Act, it was incumbent upon him to present evidence that Niles presented an imminent threat to the safety of Scott and his family. There is absolutely no evidence in the record to support the circuit court's conclusory finding that Scott reasonably believed Niles "was engaged in an unlawful and forcible act against his home." Moreover,

unlike the majority, I believe the circuit court's general findings regarding the reasonableness of Scott's fear are irrelevant *as to Niles*. The majority relies in part on the following finding by the circuit court: "Hearing a gunshot, along with the threats, the chase, and being confronted at his home as the target of a drive by shooting, with his children inside, created a reasonable fear of imminent peril for him and his family." However, a close examination of the record demonstrates the threats, the chase, and the drive-by shooting all are attributed to the SUV. Teesha Davis and Shade's prior history, the hair flipping at the club, and the frantic call to Scott or Rosalyn[1] do not demonstrate that Niles posed a threat. Further, while Niles followed the SUV, the "chase" cannot reasonably be viewed as involving Niles because Scott was not even aware of a third vehicle until after his daughter's group arrived home. Scott testified his daughter's car and the SUV were driving "like a race…just two cars top speed, bumper to bumper almost," without mentioning a third vehicle. Finally, the record contains no evidence Niles was involved in the drive-by shooting. Washington testified the Honda had its lights on and windows up—the same condition as when police found it. In contrast, the SUV had its headlights off, drove at a creeping pace in front of Scott's house, and had an occupant hanging her arms out the window.

Even viewing the facts in the light most favorable to Scott, at most, Niles' vehicle was simply following behind the SUV on a public roadway. His vehicle was not the source of any gunfire or other threats. No witnesses testified to any fear from Niles or Washington. Indeed, most of the witnesses never even saw that vehicle, including Shade, her stepsister Ave Fuller, and Denzel Davis. Likewise, a fourth occupant, Antonio Bennet, did not testify that he saw a second car following them. Only Asia Mills, Rosalyn, and Scott testified seeing Niles' vehicle that night and they said nothing that would indicate they felt the Honda was a threat. For example, Mills stated: "the only time I saw the second car was when they turned around at the Allstate and that was it." Rosalyn also testified to seeing the Honda turn around at Allstate, and Scott noted he saw the SUV stop in front of his house, followed by the Honda.

Additionally, Sergeant Reese, one of the two investigating officers, testified that none of the witnesses reported a third vehicle being involved in this incident. In fact, when police arrived at Scott's house, they left to search only for the SUV and were unaware that a third car was involved until after returning to the house and discovering it in a ditch, where they found Niles deceased from a gunshot to the head. The other investigator, Sergeant Thomas, stated unequivocally that throughout

[1] Witness testimony differed as to who was called.

the investigation, no witness reported anyone other than the occupants in the SUV posed a threat to Shade's group.

Nevertheless, Scott fired not in the direction of the SUV, but toward an unarmed, innocent bystander whose only act of aggression was to drive by Scott's house on a public road. I do not believe our General Assembly intended to grant absolute immunity to an individual like Scott under such circumstances. Accordingly, I dissent and would reverse and remand for a trial, where Scott's claim of self-defense would be determined by a jury.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Callawassie Island Members Club, Inc., Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis, Respondents.

Appellate Case No. 2016-002187

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27835
Heard May 1, 2018 – Filed August 29, 2018

REVERSED

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia; M. Dawes Cooke, Jr., and John W. Fletcher, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston; and Stephen P. Hughes, of Howell, Gibson & Hughes, PA, of Beaufort, for Petitioner.

Ian S. Ford and Neil D. Thomson, both of Ford Wallace Thomson LLC, of Charleston, for Respondent.

JUSTICE FEW: The circuit court granted summary judgment to The Callawassie Island Members Club on the basis that its membership documents clearly and unambiguously require members to continue paying their dues until their membership is reissued, even after their resignation. The court of appeals

reversed. We reverse the court of appeals and reinstate the summary judgment for all unpaid dues, fees, and other charges.

I. Facts and Procedural History

In 1999, Ronnie and Jeanette Dennis purchased property on Callawassie Island. At that time, the Dennises joined a private club known as the Callawassie Island Club, and paid $31,000 to become "equity members." In their application, the Dennises agreed their membership would be governed by the "Plan for the Offering of Memberships in The Callawassie Island Club," which the developer of Callawassie Island created in 1994. The 1994 Plan included exhibits labeled as Bylaws and Rules. The 1994 Plan stated, "An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club." Similarly, the 1994 Bylaws stated, "Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees, and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club."

The 1994 Plan contemplated that the members would eventually take over the assets and operation of the Island Club. In 2001, the members of the Island Club formed The Callawassie Island Members Club, Inc. for this purpose. The Members Club assumed ownership and operations of all Island Club amenities, including a golf course and driving range, tennis courts, a swimming pool, and a clubhouse. The members of the Island Club—including the Dennises—received a membership certificate to the Members Club and continued to enjoy the benefits of membership. The Members Club established its own Bylaws, Plan, and Rules in 2001, each of which was amended several times over the years.

In 2010, the Dennises decided they no longer wanted to be in the Members Club, so they submitted a "letter of resignation" and stopped making all payments. Those payments included $634 per month for the membership, "special assessments" that totaled $100 per month, and yearly food and beverage minimums of $1,000. In 2011, the Members Club filed a breach of contract action against the Dennises, alleging the unambiguous terms of the membership documents required the Dennises to continue to pay their membership dues, fees, and other charges until their membership is reissued. The Dennises denied any liability, alleging they were told by a Members Club manager that their maximum liability would be only four months of dues, because after four months of not paying, they would be expelled.

The Dennises also alleged the membership arrangement violates the South Carolina Nonprofit Corporation Act. *See* S.C. Code Ann. §§ 33-31-101 to -1708 (2006 & Supp. 2017).

The Members Club filed a motion for summary judgment. The circuit court held a hearing and issued an order granting summary judgment. The court found the membership documents unambiguously require a resigned member to continue to pay dues, fees, and other charges until the membership is reissued. The court rejected the Dennises' arguments relating to the Nonprofit Corporation Act.

The Dennises appealed, and the court of appeals reversed on both issues. *The Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016). The court of appeals found there was "some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." 417 S.C. at 616, 790 S.E.2d at 438. In addition, the court of appeals found the provisions of the documents that require the Dennises to continue to pay their membership dues after resignation violate section 33-31-620 of the Nonprofit Corporation Act. 417 S.C. at 618-19, 790 S.E.2d at 439. The court of appeals remanded to the circuit court for trial. 417 S.C. at 619, 790 S.E.2d at 440. The Members Club filed a petition for a writ of certiorari, which we granted.

II. Discussion

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The questions before us in this appeal are questions of law. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law . . . ."). We review questions of law de novo. 378 S.C. at 110, 662 S.E.2d at 41. Because the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous. *See Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

A. The Membership Arrangement

We begin our analysis of this case with a general discussion of the membership arrangement and the membership documents that govern that arrangement. Three documents governed the Dennises' membership in the Island Club and the Members Club—the Bylaws, the Plan, and the Rules. The three documents reference each other and are intended to operate together. When the Dennises first joined the Island Club, the 1994 versions of those documents applied. However, these documents were amended several times over the years, as permitted by the Bylaws, the Plan, and the Rules.[1] The first amendments occurred when the club assets were transferred from the Island Club to the Members Club in 2001, at which point the Members Club enacted its own Plan, Bylaws, and Rules.[2] All three documents were further amended several times during the 2000s. There is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments. When the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.[3]

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[1] The 1994 Bylaws provide the "Bylaws may be altered, amended, or repealed." The 1994 Plan provides the "Plan may be amended in accordance with the Bylaws." Similarly, the 1994 Bylaws provide the board of the Island Club have the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club."

[2] There is no question the Dennises are contractually bound to the Members Club. The Dennises argued to the court of appeals there was no evidence their Island Club membership transferred to the Members Club. The court of appeals rejected this argument, stating, "We hold a question of fact does not exist as to whether Appellants were members of [the Members Club]." 417 S.C. at 615, 790 S.E.2d at 438. We agree.

[3] The dissent incorrectly states the Club's position as to which version of the governing documents control the relationship. Rather than taking a position as to which documents control, the Club has argued from the beginning it is entitled to summary judgment under any version of the documents. At the summary judgment hearing, the Club stated, "The documents have been clear since 1994 that you are obligated to continue to pay until it's reissued." The Club made the same point in the hearing on the Dennises' motion to reconsider the summary judgment. In its brief to the court of appeals, the Club stated, "At all times during the Dennises'

B. Ambiguity of the Membership Documents

The Dennises argue these documents are ambiguous as to whether they are obligated to continue to pay membership dues, fees, and other charges after resignation, and therefore the circuit court erred in granting summary judgment. We disagree.

Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," states,

> An Equity Member who is on the waiting list to sell his/her membership *will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club*. Any unpaid dues, fees and other charges plus interest accrued under the then prevailing terms of the Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.

This language unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued. There are no provisions in the 2009 Bylaws or 2009 Rules that contradict this. Also, although not dispositive of the issue, this language is nearly identical to the provisions in the 1994 Plan and Bylaws that relate to continued payment after resignation.

In finding there was ambiguity in the membership documents, the court of appeals focused on the fact the language in the 1994 Rules governing "termination" was different than the language in the 1994 Bylaws and 1994 Plan governing

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membership, the applicable governing documents mandated that members remain obligated for dues, fees and assessments until such time as their membership was reissued." Finally, in its brief to this Court, the Club stated, "From 1994 through the present date, all of the governing documents . . . have plainly stated that members remain obligated to fulfill the commitments of membership in the Club until the reissuance of their membership."

"resignation." 417 S.C. at 616, 790 S.E.2d at 438. In particular, the court of appeals referenced the 1994 Rules that state, "Any member may *terminate* membership in the Club . . . . Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including food and beverage minimums)." *Id.* In other words, the 1994 Rules do not contain any "until reissued" provision regarding termination, while the 1994 Bylaws and Plan do contain that language regarding resignation. The court of appeals found further ambiguity based on the fact the 2009 Rules "termination" provision did not define the term "unpaid." 417 S.C. at 617, 790 S.E.2d at 438.

The court of appeals was incorrect for several reasons. First, any difference between the language of a "termination" provision and a "resignation" provision is not sufficient to create an ambiguity. The documents provide that termination and resignation are two separate events. Ronnie Dennis unequivocally testified he resigned by submitting a "letter of resignation." Thus, the language in the "termination" provisions of the 1994 and 2009 Rules is irrelevant.

Second, even if we were to treat the "termination" provision and the "resignation" provision as governing the same event, there is no ambiguity. The 1994 Rules state, "All rules and regulations contained herein shall be subject to and controlled by the applicable provisions of the By-Laws." The 1994 Rules, therefore, are subject to the 1994 Bylaws, which unambiguously state that "dues, fees, and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." In addition, the 2009 Rules, which were in place when the Dennises resigned, state, "Any member may terminate membership in the Club . . . . Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold."

Finally, the term "unpaid" in the 2009 Rules is not ambiguous, despite the fact it is not defined. The court of appeals explained its interpretation of this provision by stating, "It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation." 417 S.C. at 617, 790 S.E.2d at 438. We find there is nothing unclear. "Unpaid" means any payment the Dennises are obligated to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include obligations to pay before and after the date of resignation. The Dennises admit they have not made the payments.

According to the plain language of the membership documents, the Dennises' unpaid dues, fees, and other charges are "unpaid."

The plain language of the applicable provisions of the membership documents expresses the intent with which these provisions were written. *See* 11 *Williston on Contracts* § 32:7 (4th ed. 2012) ("In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution."). The provisions of the membership documents that require members to continue to pay their membership dues until their membership is reissued are necessary to ensure the Club will remain viable in the future. When the Dennises entered into this membership agreement, they accepted the obligation to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also received the benefit of knowing that if other members experienced those circumstances, the other members would likewise be obligated to continue to make their payments. Without these provisions, members could default on their payments whenever it became convenient to do so, and the non-defaulting members would be forced to absorb the costs. Therefore, these provisions are not "unfair" or "unreasonable," but rather are the very feature of the membership documents that enables the Dennises and other members to sustain a viable Members' Club on Callawassie Island, which in turn increases the value of their membership and their property.

The dissent argues that "taking the majority's view to its logical end, this is an obligation that could extend beyond a member's lifetime," and we have rendered a "harsh result." In response to the "logical end" argument, we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. The "logical end" of our analysis goes no further than required by the four corners of the governing documents in this case when applied to the facts of this case. The Dennises resigned on November 1, 2010, and the summary judgment order was filed on June 10, 2014. Therefore, the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.

In suggesting we have rendered a "harsh result"—a factual analysis we should not conduct in this case because the governing documents are unambiguous—the dissent ignores several important facts. First, the Dennises' membership in the Club—and thus their obligation to pay membership dues, fees, and other charges—is tied to

their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership dues, they may sell their house. In addition, Callawassie Island is a private resort community developed around the property owners' use of the amenities paid for by these dues. The Dennises purchased their exclusive home there in 1999 for $590,000. They have chosen not to sell, but are instead attempting to keep their home on this resort island without having to pay a property owner's share of the amenities.

When reading unambiguous contracts, we should not normally concern ourselves with the fairness of the result required by the terms of the contract. The Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues. Because the dissent has made it an issue, however, we note our decision by no means renders a harsh result. Rather, this is precisely the result to which these sophisticated purchasers of a resort home agreed when they decided to purchase the property and abide by the terms of the governing documents.

C. Parol Evidence

The Dennises urge us to consider information they allege was conveyed to them orally at the time they joined the Island Club. In particular, the Dennises claim Ellen Padgett—who served as the membership coordinator for the club when the Dennises joined—told them that if they chose to stop making their membership payments, they would be liable only for four months of payments before they would be expelled from the club. At oral argument, the Dennises also noted the testimony of Lindsey Cooler, a subsequent membership coordinator, who testified at a deposition that the Members Club does not allow members to resign.

First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning. *See Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."); *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument."); *see also* 11 *Williston on Contracts* § 33:1 (4th ed.

2012) (stating the parol evidence rule "prohibits the admission of evidence of prior or contemporaneous oral agreements, or prior written agreements, whose effect is to add to, vary, modify, or contradict the terms of a writing which the parties intend to be a final, complete, and exclusive statement of their agreement."). Thus, under the circumstances of this case, Padgett's statement about expulsion and Cooler's statement about resignation are irrelevant.

The discussion about expulsion does, however, draw us to the terms of the membership documents that deal with expulsion, and the court of appeals' interpretation of those terms. Relying on the 2001 Rules, the court of appeals found there was "an ambiguity as to whether Appellants were entitled to expulsion and thus exposed to a maximum liability of four months' of unpaid dues (plus any accrued expenses)." 417 S.C. at 617-18, 790 S.E.2d at 439.

We believe the court of appeals erred in finding this provision created an ambiguity. First, the 2001 Rules were not in effect when the Dennises resigned in 2010. Even if those Rules did apply, however, the Rules state, "Any member whose account is delinquent for sixty (60) days from the statement date *may* be suspended by the Board of Directors. . . . Any member whose account is not settled within the four (4) months' period following suspension *shall* be expelled from the Club." This provision makes it clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.

Second, the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition. The 2009 Rules state, "The Board of Directors may suspend a member . . . from some or all club privileges for a period up to one year." The 2009 Rules further provide, "The Board of Directors *may* . . . request the resignation of any member of the club for cause deemed sufficient to the Board. If the member does not resign at the request of the Board, the member *may* be expelled by the Board." We find there is no ambiguity as to expulsion from the Members Club.

D. Nonprofit Corporation Act

The Dennises argue the provisions in the membership documents that require them to continue to pay dues, fees, and other charges after resignation violate the

Nonprofit Corporation Act. They rely specifically on subsection 33-31-620(a) of the Nonprofit Corporation Act, which provides, "A member may resign at any time." S.C. Code Ann. § 33-31-620(a) (2006). The Dennises contend the membership documents prevent them from actually "resigning" because they require them to continue to pay dues, fees, and other charges even after they are no longer in the Members Club. The court of appeals agreed, and found "[s]ection 33-31-620 obligates resigned members to pay any dues incurred *before* resignation," but "does not require resigned members to continue to pay any dues that accrue *after* resignation." 417 S.C. at 618, 790 S.E.2d at 439. The court of appeals explained that requiring a member to continue to pay dues that accrue after resignation "would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations."[4] *Id.*

The court of appeals' reasoning ignores subsection 33-31-620(b), which provides, "The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation." S.C. Code Ann. § 33-31-620(b) (2006). Subsection 33-31-620(b) contemplates two categories of debt for which a resigned member continues to be responsible after resignation: (1) "obligations incurred . . . before resignation" and (2) "commitments made before resignation." S.C. Code Ann. § 33-31-620(b). The dues, fees, and other charges the Dennises owe fall into the "commitments made" category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges "until his or her equity membership is reissued by the Club." When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620.

[4] Although we disagree with the court of appeals' legal reasoning here, we do applaud the reference to the Eagles' hit *Hotel California*. *See* 417 S.C. at 618, 790 S.E.2d at 439.

III. Conclusion

The court of appeals' opinion is **REVERSED** and the circuit court's order granting summary judgment is reinstated.

KITTREDGE and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I respectfully dissent, as I believe the court of appeals was correct that the governing documents are ambiguous and the Club's interpretation violates the South Carolina Nonprofit Corporation Act (the Act).

The majority ostensibly permits the Dennises to resign from the Club, yet holds them responsible for the same obligations as an active member, including ever-accumulating dues and fees, only allowing them to escape that obligation in the unlikely event their membership is reissued. This harsh result is one I do not believe the governing documents require, and certainly not as a matter of law.

I. Controlling Documents

The majority contends the Club's 2008 Plan, 2009 Bylaws, and 2009 Rules unambiguously require a resigning member to continue to pay—potentially for that member's lifetime and beyond—dues, fees, and food and beverage minimums unless their membership is reissued. The majority's categorical reliance on these documents is stunning because neither the trial judge nor the Club has identified them as the controlling documents. In fact, the Club alleges in its complaint that only the contracts signed by the Dennises, which reference the 1994 plan, and provisions pertaining to the property owners' association—a separate entity—form the basis of the parties' contract. Importantly, in its motion for summary judgment, the Club specifically pointed to the 2001 plan, general club rules, and bylaws, making only a vague reference to "all amendments thereto." Certainly, as the moving party, the Club is required to identify with particularity which documents comprise the alleged contract. In my view, if the Club cannot do this—and heretofore in this litigation it has not—it is not entitled to summary judgment.

Even throughout this appeal, the Club has been inconsistent in identifying which documents form the contract between the parties, and has instead relied on different versions of the plan, bylaws, and rules at various stages. For example, in its brief to the court of appeals, the Club suggested *all* of the numerous documents together form the contract, and argued they must be read as a whole. However, in its petition for rehearing to the court of appeals, the Club argued the 1994 plan, bylaws, and club rules unambiguously entitle it to judgment as a matter of law. Thereafter, in its brief to this Court, the Club never stated with specificity which documents entitle it to judgment as a matter of law, instead merely asserting, "Several controlling documents, which have been amended and revised over the years, govern membership in the Club." While the Club does delineate the order of primacy as "the CIPOA covenants, CIMC's By-Laws, its Membership Plan, and its General Club

Rules," it never set forth which version of each subset controls. Thus, I disagree with the majority's pronouncement that the 2008 Plan, 2009 Bylaws, and 2009 Rules control when the Club itself has never argued that.[5]

II. Ambiguities

In addition to believing that the Club has not carried its burden to demonstrate what documents form the contract between these parties, I agree with the court of appeals that the documents are ambiguous on their face. To begin, under Rule 14.2.1 of the 2001 Rules, the rules upon which the Club premised its motion for summary judgment,

> Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. Notwithstanding termination, the members shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums).

According to the Club, this provision is subordinate to the bylaws and membership plan, so even if the term "unpaid" only referred to unpaid dues at the time of resignation, the Dennises are still required to pay future dues. However, conspicuously absent from this provision is any language indicating the dues and charges continue to accrue after resignation "until the membership is reissued." The 2009 Rules contained a similar termination provision, and added language that the member remains liable "until the membership is sold." As the court of appeals noted,

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[5] Needless to say, I disagree with the majority that I have incorrectly stated the Club's position as to the controlling documents, but this disagreement merely underscores our differing views as to what a party must show to justify a grant of summary judgment. The Club never specifically argued the 2008 Plan, 2009 Bylaws, and 2009 Rules control, as the majority has found. Even if I were to accept the premise that the Club argued *all* of the various documents support its position, I would still disagree with deciding this case as a matter of law because I discern at least one substantial difference in the documents, i.e., whether a resigned member is responsible for all unpaid dues and charges or whether that responsibility extends to future dues. Although I have pointed out other ambiguities in the documents, this is a substantial one which I believe should preclude summary judgment.

the governing documents do not define the term "unpaid," and viewing the evidence in the light most favorable to the Dennises as we are required to do, the clause is ambiguous because it is unclear whether a resigned member is liable for unpaid dues outstanding at the time of resignation or for dues accruing before and after resignation. Moreover, Rule 14.2.1 states that upon termination, the member "shall *remain* liable" for unpaid club accounts and dues. The use of the words "remain" and "unpaid" support the Dennises' interpretation that the provision refers to charges and dues which have already been accrued—not future charges—for a member cannot *remain* liable for dues and charges which have not yet come into existence. In my view, the better interpretation is to impose liability on the member for previously-incurred dues and charges, rather than *future* dues and charges in perpetuity; however, at the least, the two contrary constructions illustrate the ambiguity in this agreement between the parties. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."); *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the Court; but where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

Moreover, the Dennises point to the understanding conveyed to them by Ellen Padgett, the membership director when they joined, who assured them the maximum liability for unpaid dues would be four months. Even though Ms. Padgett confirmed that understanding in her deposition testimony, the majority completely discounts this testimony, reasoning that parol evidence to vary this purportedly unambiguous contract is inadmissible. Because I disagree that the documents are unambiguous, I believe this evidence is relevant and further supports the denial of summary judgment. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) ("[W]here a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.").

Finally, I believe it is worth noting that according to the 1994 Plan, in place when the Dennises purchased their membership, members possessed the right to resign and upon reissuance of their membership, were entitled to receive the greater of their membership contribution or eighty percent of the contribution paid by the new purchaser. While the 1994 Plan provided that an equity member remained obligated to pay dues to the Club until his equity membership was reissued, the Plan

then explained the dues "will accrue against and be deducted from the amount to be paid to the resigned member upon the reissuance" of his membership. In line with this, the 1994 Bylaws state, "Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees and charges shall accrue against a resigned equity *membership* until the resigned equity membership is reissued by the Club." These provisions unequivocally state that any liability for unpaid dues and fees accrues against membership equity only, rather than on an ongoing basis against the member personally. Thus at the time the Dennises joined the Club, the extent of their continuing financial obligation upon resignation was their $31,000 initial contribution. Accordingly, even if I were to agree with the majority's assertion that the 1994 documents were supplanted by later amendments, a subsequent change in the bylaws and rules cannot strip the Dennises of this substantive right contained in the documents at the time of purchase, and create unlimited personal liability where none previously existed. Indeed, taking the majority's view to its logical end, this is an obligation that could extend beyond a member's lifetime.[6] Even if I were to accept the majority's view that the documents justify rendering judgment as a matter of law, at some point courts are called upon to step in to alleviate a provision contrary to public policy. *See Ward v. W. Oil Co.*, 387 S.C. 268, 275 n.5, 692 S.E.2d 516, 520 n.5 (2010) (refusing to enforce an illegal contract because to do so "would violate statutory law and, in turn, public policy"); *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 170 (1961) ("Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal.").

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[6] The 2008 Plan provides upon a member's death, the equity membership automatically transfers to the decedent's heirs, who then have 120 days to accept it. If the heirs decline to accept the membership, it is deemed resigned and will be reissued in the same manner as any other resigned membership, thereby exposing the estate to liability for future dues. Specifically,

> [T]he estate of the deceased member shall be responsible for payment of all dues, fees and other Charges associated with the deceased member's Equity Membership from the date of the member's death until such time as the deceased member's residential unit or lot on Callawassie Island is transferred to another owner and such owner acquires an Equity Membership.

III. Nonprofit Corporation Act

I also disagree with the majority's interpretation of the Nonprofit Corporation Act. In my opinion, the majority's holding effectively eliminates any meaningful right of resignation, which the Act guarantees. Specifically, the Act provides,

> (a) A member may resign at any time.
>
> (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.

S.C. Code Ann. § 33-31-620 (2006). Black's Law Dictionary defines "resign" as:

> 1. To formally announce one's decision to leave a job or an organization <to resign from the army>.
>
> 2. To give up or give back (an office, trust, appointment, etc.) to those by whom it was given; to surrender <the officer resigned his commission>.
>
> 3. *To abandon the use or enjoyment of; to give up any claim to* <the monk resigned his inheritance>.

Resign, *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

While the Club strenuously asserts the Dennises were permitted to resign, I find this purported resignation meaningless because the Club continued to assess monthly membership dues, fees, and other charges, potentially throughout the Dennises' lifetimes.[7] Moreover, the Club's argument that it is justified in continuing

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[7] The majority blithely suggests the Dennises should sell their house in order to put an end to their monthly payments to the Club. However, even if the Dennises wanted to sell their home, that may be easier said than done. A news article that is included in the record reveals the Club's membership scheme has significantly chilled potential buyers. *See* Kelly Meyerhofer, *Callawassie Club ruling: Court sides with members, cited Eagles song*, THE BEAUFORT GAZETTE (August 5, 2016), https://www.islandpacket.com/news/local/community/beaufort-news/article93992207.html. Indeed, according to the article, one member could not sell her property for over two years, despite listing it for $1. As of July 2016, eight

to impose dues because the Dennises are still entitled to use all of the Club's amenities runs completely counter to the very concept of resigning. An individual who resigns relinquishes a claim, or "abandon[s] the use or enjoyment" thereof. *Id.* By continuing to assess membership dues, fees, and other charges, the Club prevents the Dennises from "giving up…[or] surrend[erring]" their responsibilities, something I believe is contrary to the Act. *Id.* By accepting the interpretation of the ambiguous terms offered by the Club, the majority conflates the meaning of an active and a resigned member because there is essentially no difference: both remain responsible for all conditions of membership.

I further disagree with the majority that requiring the Dennises to pay for dues accruing after resignation is consistent with the Act. I acknowledge the Official Comments to section 33-31-620 explain that a resigning member cannot shed complete liability for "obligations incurred or commitments made" prior to resignation. However, I believe the majority errs in classifying future dues and charges as "commitments made" before resignation because at the time the Dennises joined the Club, the 1994 Plan and Rules allowed members to resign without holding them personally liable for future dues and charges in perpetuity. The result reached by the majority not only deprives them of a remedy which they possessed at the time they joined the Club, but also one clearly granted to them by the Act, which is arguably contrary to public policy and akin to enforcing an illegal contract. *Ward*, 387 S.C. at 279, 692 S.E.2d at 522 (holding a contract involving gambling devices was illegal and therefore unenforceable); *White v. J.M. Brown Amusement Co.,* 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."). Moreover, at least one court has interpreted this provision in the Act to mean something different than a monetary obligation because the section also uses the phrase "obligations

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lots were listed at less than $10,000 each, belying the use of the majority's description of Callawassie Island property as "exclusive." The majority also takes issue with my description of the result in this case being harsh, and opines that we should look no farther than the result in *this* case. However, it is not uncommon for appellate courts to consider what a decision may mean to other litigants in the future, and in view of the numerous lawsuits filed by the Club against its members resulting in a "Callawassie-specific body of case law," as noted by Dennises' counsel, I stand by my description of the majority's result being harsh.

incurred." *See Kidd Island Bay Water Users Co-op. Ass'n, Inc. v. Miller*, 38 P.3d 609, 611 (Idaho 2001) (noting under the Idaho Nonprofit Corporation Act, "commitments made" prior to resignation clearly means something other than a monetary obligation and applies to specific commitments by a member to the corporation).

Lastly, the majority's holding which forecloses the ability to resign has the potential to lead to an absurd result. Instead of attempting to resign, members have more incentive to simply become "bad neighbors" and behave in such a way as to encourage the Club to suspend them, because suspension places them in a better financial situation than resignation. Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," ending their liability for future dues. Surely a member who peaceably resigns should not be placed in a worse pecuniary situation than a member who is suspended for violating Club rules and policies.

Therefore, in viewing the evidence in the light most favorable to the Dennises, I believe material issues of fact remain, rendering summary judgment improper. Accordingly, I would affirm the court of appeals and would remand to the trial court for further proceedings.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donte Samar Brown, Petitioner.

Appellate Case No. 2017-000094

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 27836
Heard June 12, 2018 – Filed August 29, 2018

AFFIRMED IN RESULT

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan Wilson and Senior Assistant Attorney General David Spencer, both of Columbia; and Solicitor Scarlett A. Wilson, of Charleston, all for Respondent.

JUSTICE KITTREDGE: The central issue before the Court concerns authentication of Global Positioning System (GPS) monitoring evidence. Specifically, is the requirement for authentication satisfied by testimony that GPS data is accurate because "[w]e use it in court all the time"? The answer is an unqualified "no."

A Zaxby's restaurant in Goose Creek, South Carolina, was robbed by two males wearing ski masks and gloves while carrying a gun and knife, around midnight on Christmas Eve. During the robbery, a Zaxby's employee was shot by one of the robbers. As a result of law enforcement's investigation—including a traced scent trail, DNA evidence found on a ski mask and gun, an executed search warrant, and a tip that Petitioner confessed to committing the crime with Christopher Wilson—Petitioner and Wilson were arrested and charged with robbery, as well as other crimes stemming from the incident. In addition, during the course of their investigation, law enforcement discovered that Wilson was wearing a GPS ankle monitor at the time of the robbery. Wilson's GPS records reflected that he was at Zaxby's during the robbery. Wilson pled guilty prior to Petitioner's trial.

At Petitioner's trial, the State connected Wilson to Petitioner, through Wilson's GPS records and otherwise. As noted, this appeal is centered on Petitioner's challenge that the State failed to authenticate Wilson's GPS records. We hold that the State failed to properly authenticate the GPS records, and it was error to admit this evidence. Nevertheless, due to the overwhelming evidence of guilt, we affirm the court of appeals in result because this error was harmless beyond a reasonable doubt.

I.

A Zaxby's restaurant in Goose Creek was robbed around midnight on December 24, 2011, and an assistant manager was shot during the robbery. There were several employees present at Zaxby's during the time of the robbery who testified at trial. They testified that, while Zaxby's was in the process of being closed for the evening, two men wearing dark clothing, ski masks, and gloves robbed them with a gun and knife. One of the robbers shot the assistant manager as she lay on the ground. In addition, one victim testified that the assailants used a knife to rip his pants and take his wallet from his back pocket.

Within minutes of the robbery, a car narrowly avoided hitting two men dressed in dark clothing who were exiting the woods near Zaxby's, crossing the road, and running along a wooded area. The citizen relayed this information to the law enforcement officers who were gathered at the nearby Zaxby's. Based on this information, law enforcement utilized a dog from a K-9 unit to track the scent at the entrance of a subdivision across the street and, along the trail, found money dropped at various places before the scent was lost. Law enforcement also discovered a ski mask, which was submitted for DNA testing. The scent trail ended at Wilson's residence. By the time law enforcement arrived in the vicinity of Wilson's residence, the suspects had left the area. The assailants were not apprehended that night.

Marteeka Hamilton—one of Petitioner's on-again, off-again girlfriends—testified that she received a call from Petitioner on Wilson's cell phone around midnight on the night of the robbery, asking her to pick them up near Wilson's residence because they needed a ride.[1] Hamilton testified that she picked up Petitioner and Wilson near the entrance of the subdivision around 1:00 a.m. that Christmas Eve. She testified that she overheard Wilson talking on the phone and stating that he had accidentally shot someone. She also testified that Petitioner chimed in and chastised Wilson for shooting the victim. Hamilton dropped them off at the Northwoods Mall a few miles away. Days later, Hamilton visited Petitioner and Wilson at a Motel Six near the mall and saw several shopping bags in the room.

Cynthia Garrett was Petitioner's other on-again, off-again girlfriend. Garrett testified that Petitioner confessed to her that he had robbed Zaxby's with Wilson and she relayed this information to the police. Garrett testified that, prior to the robbery, she offered to provide transportation so Petitioner could accept a job offer, but Petitioner told her that he would "rather rob than work," informed her that he was planning to do a "lick"[2] with Wilson, and asked to borrow Garrett's car. Garrett refused to let Petitioner borrow her car. In addition, Garrett knew

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[1] During trial, cell phone records from Wilson's phone were admitted to corroborate this testimony.

[2] Garrett explained that the word "lick" is a term used to describe a robbery.

Petitioner had a gun prior to the robbery and instructed him to remove it from her house. Approximately one week before the robbery, Garrett kicked Petitioner out of her home due to an argument.

On the night of the robbery, Petitioner called Garrett from Wilson's cell phone around midnight asking her to give them a ride.[3] Although Garrett was unaware at the time why Petitioner and Wilson needed a ride and Petitioner offered a couple hundred dollars for it, she refused. Garrett testified that Petitioner became angry and hung up the phone. Petitioner then called Hamilton, as discussed above, and she gave Petitioner and Wilson a ride.

Regarding Garrett's tip to law enforcement, the assigned investigator sent officers to the Motel Six where Garrett said Petitioner had stayed after the robbery and they confirmed that Petitioner had checked in there. In addition, the dollar amount that Garrett provided as being stolen during the robbery closely matched the one that law enforcement obtained from management at Zaxby's.

At that time, the assigned investigator submitted the DNA on the ski mask found at the scene for comparison with Wilson's DNA. The forensic test results revealed it was a match. Based upon their advancing investigation—including Garrett's statement and Wilson's DNA on the ski mask—law enforcement obtained a search warrant for Wilson's residence.

While executing the search warrant, law enforcement discovered Petitioner alone in Wilson's house. During their search, officers located the gun used during the robbery.[4] In addition, they found a knife matching the description of the one used during the crime and a social security card for one of the victims whose wallet had been stolen during the robbery.

Thereafter, law enforcement requested a DNA analysis on various items, including the gun recovered at the residence. The State's DNA expert testified that the test

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[3] Again, during trial, cell phone records from Wilson's phone were admitted to corroborate this testimony.

[4] Ballistic results were admitted at trial, which revealed the gun matched a casing found at Zaxby's.

results revealed Petitioner's DNA could not be excluded from the handle of the gun although approximately 97.8% of the population could be excluded. As the expert explained,

> We can conclude that all of the peaks in [Petitioner's] DNA profile could be found in the mixture profile from the handle of the gun, so we have to report that he is a possible contributor. . . . If all of his data peaks are there, he is one of those people -- he's either one of those unlucky people that, you know, came to the attention of the police and just by coincidence all of his data peaks are there, or he handled the gun. Those are the two possibilities.

The expert concluded, "The most likely explanation for this mixture profile is that Christopher Wilson and [Petitioner] . . . both handled the gun. We could not exclude Christopher Wilson or [Petitioner]."

While Petitioner was incarcerated and awaiting trial, Lanier Daniels was his cellmate. During this time, Petitioner confessed to Daniels that he planned and committed the robbery with Wilson. In particular, Daniels testified that Petitioner said he was "the one who set up the whole thing" and Petitioner explained to him "what had happened at Zaxby's that night" and "how they got away." Daniels testified that Petitioner said he was upset with Wilson because Wilson shot his uncle's girlfriend—the assistant manager—during the robbery. Daniels testified that Petitioner disclosed "his baby mother"—Hamilton—picked Wilson and Petitioner up after the robbery. Petitioner told Daniels that he was arrested while "he was at a friend's house" and "getting rid of the gun."

In addition, the State entered Wilson's cell phone records at trial, without objection, which reflected that Wilson's phone was used to call Hamilton and Garrett during the time periods that they testified Petitioner had called them and stated that he needed a ride for himself and Wilson on the night of the robbery.

Law enforcement also discovered that Wilson was wearing a GPS ankle monitor and requested the GPS records from the South Carolina Department of Probation, Pardon, and Parole Services (the "Department"). The GPS records, which are the focus of this appeal, purportedly placed Wilson at Zaxby's just prior to and during the time of the robbery. During trial, the State submitted Wilson's GPS records, to which Petitioner objected on the basis that the State was unable to authenticate the

records or comply with the business records exception. *See* Rules 803(6) and 901, SCRE. The trial court overruled the objections and admitted the GPS records.

II.

The State presented Agent Steward Powell's testimony to authenticate the GPS records. Agent Powell testified that he is a probation agent with the Department and explained that his job duties include supervising offenders after they are sentenced. Part of the supervision involves the use of GPS monitoring systems. In particular, concerning the matter of authentication, the following colloquy occurred on direct examination:

> **Q.** And what does [your job duty involving GPS monitoring] entail?
>
> **A.** There is a GPS monitor affixed to the ankle of the offender, and their movements are tracked wherever they go.
>
> **Q.** How do they work?
>
> . . . .
>
> **A.** The State has a GOC, general operations center, in Columbia. These offenders are tracked, 24 hours a day, seven days a week so they're always monitored. Us field agents -- and what I mean is someone like me at a local office, we can log on to our computers and see in realtime where these offenders are.
>
> **Q.** Is that information recorded?
>
> **A.** It's recorded and it's archived.
>
> **Q.** How is it recorded?
>
> **A.** It's recorded by a third party vendor [Omni Link] that supplied the software and the hardware, the actual ankle monitor, for the system.
>
> **Q.** *Is that information accurate?*

A. *It is very accurate. We use it in court all the time.*

(emphasis added). The GPS records were admitted into evidence.

The jury found Petitioner guilty of criminal conspiracy, burglary second degree, three counts of armed robbery, and five counts of kidnapping; however, the jury found Petitioner not guilty of possession of a weapon during the commission of a violent crime and attempted murder (or the lesser charge of assault and battery of a high and aggravated nature). Petitioner was sentenced to prison and he appealed to the court of appeals.

The court of appeals affirmed Petitioner's convictions and sentences in an unpublished opinion pursuant to Rule 220, SCACR, finding no abuse of discretion in the admission of the GPS evidence and, in any event, any error was harmless beyond a reasonable doubt. *State v. Brown*, Op. No. 2016-UP-447 (S.C. Ct. App. filed Nov. 2, 2016). Petitioner filed a petition for a writ of certiorari, which we granted.

III.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848 (citations omitted).

IV.

The main issue before this Court is whether Agent Powell's testimony was sufficient to authenticate the GPS records. We hold that the GPS records were not properly authenticated.[5] We do not doubt that Agent Powell was a proper witness

[5] Because we agree with Petitioner that the trial court erred in admitting the GPS records, it is not necessary to address Petitioner's other challenges to this evidence. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d

and likely able to lay the necessary foundation. But in terms of establishing the accuracy of the GPS records, Agent Powell simply observed the GPS records are accurate because "[w]e use it in court all the time." Such a response provides no assistance in assessing the accuracy of the GPS records. Without this component of authentication satisfied, it was error to admit this evidence.

It is black letter law that evidence must be authenticated or identified in order to be admissible. *See State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987) (noting prior to the adoption of the rules of evidence that an exception to the hearsay rule does not "absolve the offering party from the usual requirements of authentication"). Upon adoption of the South Carolina Rules of Evidence, this common law rule was codified at Rule 901, SCRE.[6] *See State v. Anderson*, 386 S.C. 120, 128–132, 687 S.E.2d 35, 39–41 (2009). This rule specifically provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. In addition, the rule contains examples[7] of "authentication or identification conforming with the requirements of this rule." Rule 901(b), SCRE. The method at issue here is:

> (9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Rule 901(b)(9), SCRE.

591, 598 (1999) (stating an "appellate court need not address remaining issues when disposition of prior issue is dispositive" (internal citation omitted)).

[6] "With the exception of subsection (b)(10) . . . this rule is identical to the federal rule." Note, Rule 901, SCRE. This remains true even after the Federal Rules of Evidence were restyled in 2011 as there was "no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 901 advisory committee's note to 2011 amendment.

[7] Rule 901 provides examples of authentication "[b]y way of illustration only, and not by way of limitation." Rule 901, SCRE.

The State acknowledges that it is required to authenticate the GPS records, but argues that this burden is not high. We agree, and moreover, we acknowledge that the reliability or operation of GPS technology in general is not genuinely disputed. *See, e.g.*, *Commonwealth v. Thissell*, 928 N.E.2d 932, 938 n.15 (Mass. 2010) (reviewing the origins of GPS technology as a "U.S.-owned utility that provides users with positioning, navigation, and timing [PNT] services" and consists of three segments maintained by the United States Air Force). This general acceptance of GPS technology does not, however, translate to the State getting a pass from making a minimum showing that the GPS records it seeks to introduce into evidence are accurate.

Here, the testimony of Agent Powell failed to authenticate because it shed no light on the accuracy of the GPS records. The State's argument that authentication was fulfilled through other means fails to appreciate the nature of GPS records and that these records are generated and result from, at least in part, the process or system used by a machine.[8]

As recognized by the Fourth Circuit Court of Appeals, "Any concerns about the reliability of such machine-generated information is addressed through the process of authentication . . . ." *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007). "When information provided by machines is mainly a product of 'mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques,'" then "a foundation must be established for the information through authentication, which Federal Rule of Evidence 901(b)(9) allows such proof to be authenticated by evidence 'describing [the] process or

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[8] Moreover, the State failed to meet the authentication requirements for the other subitems it proposes—through testimony of a witness with knowledge, a showing of distinctive characteristics, or as a public record—because Agent Powell did not pull the GPS records, the GPS records did not reflect Wilson's name on every page, the pages were not in sequential or even chronological order, the records contained inconsistent serial numbers as well as various unexplained time and date gaps, and the records did not reflect compliance with the statute requiring that the Department use a "web-based computer system that actively monitors and *records a person's location at least once every minute twenty-four hours a day*." S.C. Code Ann. § 23-3-540 (Supp. 2017); *see also* Rule 901(b)(1), (4), (7), SCRE.

system used to produce [the] result' and showing it 'produces an accurate result.'" *Id.* (citation omitted).[9]

Other persuasive authority supports this approach. *See, e.g.*, Subdivision (b)(9)—Process or System, 31 Fed. Prac. & Proc. Evid. § 7114 (1st ed. Apr. 2018) (stating "Rule 901(b)(9) governs the authentication of data produced by a machine purporting to measure or detect something, such as a radar gun, a breathalyzer, *a global positioning system device*, and the like" (emphasis added)); *see also* Rule 902(13), FRE (allowing "[a] record generated by an electronic process or system that produces an accurate result" to be certified). Thus, we hold that the State needed to present "[e]vidence describing [the] process or system used to produce" the GPS records and "showing that the process or system produces an accurate result" in accordance with Rule 901(b)(9), SCRE, to authenticate Wilson's GPS records in this case.

We emphasize that "[n]o elaborate showing of the accuracy of the recorded data is required"; however, the State must make *some* showing to authenticate the records. *People v. Rodriguez*, 224 Cal. Rptr. 3d 295, 309 (Ct. App. 2017). Other jurisdictions have allowed GPS records to be authenticated by someone who has general knowledge and experience with the system used, explains how the records are generated, and confirms the accuracy of the result. *See, e.g.*, *United States v. Brooks*, 715 F.3d 1069, 1077–79 (8th Cir. 2013) (affirming, as to the specific device's accuracy, that the GPS records were authenticated because the Government's witness "had been trained by the company, he knew how the device worked, . . . he had demonstrated the device for customers dozens of times," other testimony confirmed the device's accuracy, and any brief lapse in the device's transmission was explained); *United States v. Espinal-Almeida*, 699 F.3d 588, 612–13 (1st Cir. 2012) (stating "[t]he issues surrounding the processes employed

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[9] *See United States v. Espinal-Almeida*, 699 F.3d 588, 610 (1st Cir. 2012) (finding a serial number sufficient to identify the GPS device, but evaluating whether the GPS data was properly authenticated under Rule 901(b)(9), FRE, because it is the provision "typically . . . employed to authenticate data generated by a mechanism" as "evidence derived from the operation of a machine or instrument normally depends for its validity on the premise that the device was in proper working order" (citations omitted)); *see also United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (similar); *United States v. Lamons*, 532 F.3d 1251, 1265 (11th Cir. 2008) (similar)).

by the GPS and software, and their accuracy, were not so scientifically or technologically grounded that expert testimony was required to authenticate the evidence, and thus the testimony of . . . someone knowledgeable, trained, and experienced in analyzing GPS devices, was sufficient to authenticate the GPS data and software generated evidence" given the "testimony about the processes employed by both the GPS and the software"); *Rodriguez*, 224 Cal. Rptr. 3d at 309–10 (holding the GPS data was properly authenticated through the sergeant's testimony as he "testified about his familiarity and knowledge of how the ankle monitor transmitted defendant's location through GPS data, the computer software used to track the ankle monitor and the GPS data, and how the GPS report was generated" as well as "testified about the accuracy and reliability of the GPS report generated from the ankle monitor's signals"); *State v. Kandutsch*, 799 N.W.2d 865, 875–76 (Wis. 2011) *superseded by statute on different grounds*, Wis. Stat. § 907.02, *as recognized in In re Commitment of Jones*, 911 N.W.2d 97 (May 4, 2018) (finding "the State was permitted to authenticate and lay a foundation for the EMD report by providing testimony describing the electronic monitoring system and the process by which the daily summary reports are generated and showing that this process produces an accurate result" through the department of correction's agents, who were familiar with its operation and testified regarding the installation of the specific device and its accuracy).

One jurisdiction, North Carolina, appears to use the same or similar vendor as the one used in this case—Omni Link—and has found an officer's testimony sufficient to authenticate GPS records. In *State v. Jackson*, 748 S.E.2d 50 (N.C. Ct. App. 2013), an individual, wearing an electronic monitoring device, was accused of sexually assaulting a victim. At trial, the State introduced evidence from the defendant's electronic monitoring device in order to place the defendant at the scene of the assault. *Id.* at 53. On appeal, the court evaluated whether the GPS tracking evidence was properly authenticated. 748 S.E.2d 50. The court stated, "Regarding the specific electronic monitoring device worn by defendant, [a trained sergeant] identified the device as the Omni–Link 210." *Id.* at 54. The sergeant "described the different components of the device" and "testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the electronic monitoring device at least every four minutes." *Id.* In addition, he explained how the "tracking data is then uploaded from the device to a secured server where it is stored" and "that the device primarily uses GPS signals, which are very accurate, usually within four to ten meters." *Id.* He also testified that he "never had any issue with the accuracy of the

data." *Id.* at 54. Moreover, the court noted that the sergeant "described how he retrieved the data for defendant's electronic monitoring device for [the specific dates at issue] and produced the event log entered into evidence." *Id.* The court held that the evidence was properly authenticated and admitted. *Id.* at 55.

After reviewing various authorities, we require that a witness should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue. As noted, the witness need not be an expert.[10] However, even under the minimally burdensome test we set forth, Agent Powell failed to properly authenticate the accuracy of the GPS records. Thus, it was error for the trial court to admit this evidence because the GPS records were not properly authenticated.

V.

Despite this error, we hold that the error was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt presented against Petitioner.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) (citing *Pagan*, 369 S.C. at 212, 631 S.E.2d

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[10] *See, e.g.*, *Johnson v. State*, 179 A.3d 984, 995 (Md. 2018) (recognizing "[c]ourts in other jurisdictions have admitted evidence derived from GPS tracking devices over objections to the lack of technical expertise of the sponsoring witness," such as "tracking reports from GPS devices concealed in currency stolen from banks, data reports from GPS monitoring devices worn by probationers, and data on a GPS device seized from drug smuggling boat," and rejecting "a categorical rule that expert testimony is required whenever location and duration information derived from a GPS device is offered into evidence" (citing *Brooks*, 715 F.3d 1069; *United States v. Thompson*, 393 Fed. Appx. 852, (3d Cir. 2010); *Jackson*, 748 S.E.2d 50; *Thissell*, 928 N.E.2d 932; *Espinal-Almeida*, 699 F.3d 588 (footnotes omitted))).

at 267). "A harmless error analysis is contextual and specific to the circumstances of the case." *Id.* at 447–48, 710 S.E.2d at 60. "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006).

Under the circumstances presented in this case and based on the evidence described in the first section of this opinion, the error did not contribute to the verdict and was harmless beyond a reasonable doubt.

VI.

In sum, we hold the State failed to authenticate the GPS records because Agent Powell's testimony—"[w]e use it in court all the time"—failed to authenticate the GPS evidence concerning its accuracy. However, the error was harmless beyond a reasonable doubt. The court of appeals is affirmed in result.

AFFIRMED IN RESULT.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David M. Repko, Respondent,

v.

County of Georgetown, Petitioner.

Appellate Case No. 2016-001300

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27837
Heard March 27, 2018 – Filed August 29, 2018

REVERSED

Robert L. Widener, of Columbia, and David J. Mills, of Charleston, both of McNair Law Firm, PA, for Petitioner.

Ryan Patrick Compton, Thomas William Winslow, and Stephen Lewis Goldfinch Jr., all of Goldfinch Winslow LLC, of Murrells Inlet, for Respondent.

Robert E. Lyon, Jr. and John K. DeLoache, Sr., both of Columbia, for Amicus Curiae, South Carolina Association of Counties.

JUSTICE JAMES: We granted Georgetown County's petition for a writ of certiorari to review the court of appeals' decision in *Repko v. County of Georgetown*, 416 S.C. 22, 785 S.E.2d 376 (Ct. App. 2016). Georgetown County argues the court of appeals erred in (1) construing the County Development Regulations as creating a private duty of care to Respondent David Repko; (2) holding the South Carolina Tort Claims Act[1] (TCA) preempted certain language contained in the Regulations; (3) applying the "special duty" test; (4) finding *Brady Development Co., Inc. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), distinguishable from the instant case; (5) reversing the trial court's ruling that the County is entitled to sovereign immunity under the TCA; and (6) rejecting the County's additional sustaining ground that Repko's claim is barred by the statute of limitations. We address only issue (5) and hold the court of appeals erred in reversing the trial court's determination that the County was immune from liability under subsection 15-78-60(4) of the TCA (2005); we therefore reverse the court of appeals and reinstate the directed verdict granted to the County by the trial court. We vacate the court of appeals' opinion.

I.

In the early 2000s, Harmony Holdings, LLC (the Developer) began developing Harmony Township (Harmony), a residential subdivision in the County. In South Carolina, most localities will not allow a developer to sell lots in a residential development without the required infrastructure—roads, water, drainage, and sewer—being completed. The County adopted regulations addressing the completion of infrastructure in major residential subdivisions. The record on appeal contains only Article V of the Regulations (Article V). Article V, Section 3-1 (Section 3-1) provides:

> Financial guarantees may be posted in lieu of completing improvements required by [the Regulations] to allow for the recording of a final plat or to obtain building permits for properties for which ownership will be transferred. . . .
>
> Acceptance of financial guarantees is discretionary and [the] County reserves the right to refuse a financial

[1] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2017).

> guarantee for any remaining improvements and require that such improvements be completed before the recording of a final plat or issuance of building permits. Acceptance of a financial guarantee by [the] County shall not be construed as an obligation to any other agency, utility or property owner within affected developments.

Therefore, in the discretion of the County, a developer could post cash, bonds, letters of credit, or other financial guarantees instead of completing the infrastructure before selling lots. When the Developer began developing Harmony Phase 2-D-1 in 2006, the County determined it would allow the requirement of a financial guarantee to be satisfied by the Developer's posting of a letter of credit (LOC) to cover the remaining cost of completion of infrastructure. An LOC is a letter issued by a bank that entitles the person named in the letter to draw up to a specified sum from the bank. The County had policies and procedures in place that governed its oversight of the completion of infrastructure and reductions in the LOC. One such policy was the requirement that the LOC be at least equal to 125% of the cost of completing the remaining infrastructure. If the County handled LOC procedures properly, as the Developer completed certain stages of infrastructure, the County would take steps to verify the completion of the work, and the County would notify the issuing bank that the LOC could be reduced accordingly. If handled properly, this arrangement would allow the County to draw on the LOC if the Developer failed to complete or properly complete the required infrastructure.

In 2006, the Developer submitted an LOC from Wells Fargo in the amount of $1,301,705.63—representing 125% of the projected cost of completing the infrastructure—to the County planning department for Harmony Phase 2-D-1. By April 2007, the County had approved the Developer's requests to reduce the LOC four times; after the fourth reduction, the LOC totaled $156,704.03. However, the cost of completing the remaining infrastructure was over one million dollars. In August 2007, the cost of unbuilt infrastructure remained over one million dollars, and the Developer informed the County it no longer had the financial means to complete any additional infrastructure. At that point, the LOC was approaching its expiration date. Shortly thereafter, the Developer declared bankruptcy. A new developer took over the project and requested the County to authorize the release of LOC funds to help complete the infrastructure; however, the County deemed this new developer to be untrustworthy and refused to allow the release of the LOC funds. The new developer withdrew from the project. Those who purchased lots in

Harmony Phase 2-D-1 are unable to build on their lots because the infrastructure has not been completed.

II.

Respondent David Repko, the owner of two lots in Harmony Phase 2-D-1, commenced this action against the County alleging that the County negligently and grossly negligently failed to comply with or enforce its rules, regulations, and written policies governing its handling of the LOC. The County answered, alleging it did not owe a private duty of care to Repko and alleging that even if it did, the TCA barred Repko's claims. Specifically, the County pled it was immune from liability pursuant to subsections 15-78-60(1), (2), (4), (5), (12), and (13) of the TCA. Only subsections (4) and (12) are pertinent to this appeal. The County also alleged Repko's claims were barred by the two-year statute of limitations in section 15-78-110 of the TCA.

The case went to trial, and at the close of Repko's case, the trial court granted the County's directed verdict motion, finding (1) the Regulations did not create a private duty of care owed by the County to Repko and (2) the County was immune from liability under subsections 15-78-60(4), (5), and (13) of the TCA. The trial court ruled the County was not entitled to a directed verdict pursuant to the TCA's two-year statute of limitations. The trial court agreed with Repko's argument that subsection 15-78-60(12) did not apply to this case and ruled the County was not entitled to immunity under subsection (12). The court of appeals reversed the directed verdict and remanded for a new trial. *Repko v. Cty. of Georgetown*, 416 S.C. 22, 42, 785 S.E.2d 376, 386 (Ct. App. 2016).

We address only the court of appeals' holding that the trial court erred in granting a directed verdict under subsection 15-78-60(4) of the TCA. As our holding on this point is dispositive of the appeal, we need not address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

III.

An appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629

S.E.2d 642, 648 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). When reviewing a ruling on a motion for a directed verdict, this Court, like the trial court, must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Hurd v. Williamsburg Cty.*, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005).

In a negligence action, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Id.* There is a dispute as to whether the Regulations created a private duty of care owed by the County to Repko. We need not resolve that dispute, as we conclude that even if such a duty was created, the County is immune from liability to Repko under subsection 15-78-60(4) of the TCA.

Repko's action against the County is based upon his contention that the County was grossly negligent in allowing the Developer's LOC to be reduced from the original $1,301,705.63 to $156,704.03 without first ascertaining that the LOC continued to cover 125% of the cost of remaining infrastructure. The essence of Repko's claim is that the County was grossly negligent in failing to comply with or enforce its rules, regulations, and policies governing its handling of the LOC. The County maintains that even if it were grossly negligent, it is immune from liability to Repko pursuant to subsection 15-78-60(4) of the TCA. We agree with the County.

In response to our abolition of the doctrine of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the General Assembly enacted the TCA. *See* S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2017). Section 15-78-40 provides that a political subdivision such as the County is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, *subject to the limitations upon liability and damages, and exemptions from liability and damages*" found in the TCA. (emphasis added). Subsection 15-78-20(a) provides in part, "The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions." Subsection 15-78-20(f) provides, "The provisions of [the TCA] establishing limitations on and exemptions to the liability of the [governmental entity or political subdivision], while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the [governmental entity or political subdivision]." Section 15-78-60 lists forty exceptions to the waiver of sovereign immunity.

In its answer to Repko's complaint, the County pled several of the exceptions to the waiver of immunity found in section 15-78-60, namely those in subsections (1), (2), (4), (5), (12), and (13). Of these six, subsection (4) is the centerpiece of the County's claim of immunity. Subsection 15-78-60(4) provides:

> [A] governmental entity is not liable for a loss resulting from[] adoption, *enforcement*, or *compliance* with any law or *failure to* adopt or *enforce any law*, whether valid or invalid, *including, but not limited to, any* charter, provision, *ordinance*, resolution, rule, *regulation*, or *written policies*[.]

(emphasis added).

The County also pled it was entitled to immunity pursuant to subsection 15-78-60(12), which provides:

> [A] governmental entity is not liable for a loss resulting from[] licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority *except when the power or function is exercised in a grossly negligent manner*[.]

(emphasis added).

After Repko rested at trial, the County moved for a directed verdict under subsections (4), (5), (12), and (13). Again, only subsections (4) and (12) are at issue in this appeal. During argument of the directed verdict motion, Repko argued subsection (12) did not apply to this case because the County's actions did not involve a licensing power or function. Specifically, Repko argued to the trial court that the duty owed to him by the County "doesn't have anything to do with the licensing function." The trial court agreed and stated in its ruling from the bench, "I don't think [subsection (12)] is applicable, the licensing function." In its written order, the trial court did not grant a directed verdict to the County pursuant to subsection (12) but granted a directed verdict to the County pursuant to subsections (4), (5), and (13).

Repko moved for reconsideration and argued, among other things, that because the County simply pled it was entitled to immunity under subsection (12), the gross negligence standard contained in subsection (12) must be read into the immunity provisions contained in subsections (4), (5), and (13). Repko had never presented this argument prior to the motion for reconsideration. The trial court summarily denied Repko's motion in a form order. It is settled that "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). As we discuss in section B below, even if this issue had been timely raised to the trial court, the County was entitled to a directed verdict as a matter of law.

As we discuss in section A immediately below, Repko never argued to the trial court or even to the court of appeals that the immunity provision in subsection 15-78-60(12) applied to the facts of this case. However, the court of appeals *sua sponte* raised and ruled upon the issue. In so doing, the court of appeals did not squarely address the issue of whether the gross negligence exception contained in subsection (12) must be read into the immunity provision contained in subsection (4). Again, we address the merits of this argument in section B below.

A.

We first conclude the court of appeals erred in *sua sponte* raising and ruling upon an issue that Repko never advanced to the trial court. As noted, Repko successfully argued at the directed verdict stage that the duty owed to him by the County "doesn't have anything to do with the [County's] licensing function." At no time before the trial court or in his brief to the court of appeals did Repko argue that his loss resulted from the County's exercise of its licensing powers or functions, as contemplated by subsection (12).[2] Despite the fact that Repko never took such a position, the court of appeals raised the argument *sua sponte* and concluded:

> Subsection 15-78-60(12) grants immunity for losses resulting from the "renewal" of a permit. The County approved reductions of the letter of credit and, in doing so, allowed the renewal of the permit to sell lots even though the letter of credit had been improperly reduced. Based on

[2] Though not dispositive of this issue, we are compelled to note that Repko advanced to the trial court the opposite of the argument the court of appeals *sua sponte* raised and ruled upon.

> this evidence, a jury could have found subsection 15-78-60(12) applied.

Repko, 416 S.C. at 41, 785 S.E.2d at 385-86.

This was error. An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level. In *I'On, L.L.C. v. Town of Mt. Pleasant*, we noted "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). We also clarified that while an appellate court may affirm a lower court judgment for any reason appearing in the record, "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record." *Id.* at 421-22, 526 S.E.2d at 724.

The court of appeals *sua sponte* raised and ruled upon an issue Repko never presented to the trial court. Therefore, we reverse the court of appeals' holding that a jury issue exists as to whether subsection 15-78-60(12) applies to the facts of this case.

B.

Because it concluded that "a jury could have found subsection 15-78-60(12) applied," the court of appeals did not address the issue Repko presents to this Court—whether the gross negligence standard contained in subsection (12) must be read into subsection (4) simply because the County initially pled it was entitled to immunity under subsection (12). Repko has advanced no theory of liability other than the County's grossly negligent failure to comply with or enforce its rules, regulations, and policies governing the handling of the LOC. This claim runs headlong into the County's central defense under subsection (4) that it is immune from liability for such a failure.

Repko's very able appellate counsel rightly conceded at oral argument that because subsection (4) does not contain a gross negligence standard, standing alone, subsection (4) would entitle the County to immunity from liability from its failure to comply with or enforce the Regulations. However, Repko claims our case law requires the gross negligence standard contained in subsection (12) to be read into subsection (4) simply because the County initially pled it was entitled to immunity under subsection (12). We disagree.

This Court and the court of appeals have held that when an applicable exception to the waiver of immunity contains a gross negligence standard, that gross negligence standard must be read into all other applicable exceptions that do not contain a gross negligence standard. Consequently, the immunity provision containing the gross negligence standard must actually apply to the case before it can be read into another immunity provision. In *Steinke*, we held:

> In sum, we recognize the trial court often faces Tort Claims Act cases in which at least one of the asserted exceptions contains the gross negligence standard while other asserted exceptions do not. We hold that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception.

336 S.C. at 398, 520 S.E.2d at 155 (emphasis added). In *Chakrabarti v. City of Orangeburg*, the court of appeals held that "[w]hen an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions." 403 S.C. 308, 319, 743 S.E.2d 109, 115 (Ct. App. 2013).

In *Plyler v. Burns*, a conservatorship beneficiary sued the Horry County probate court, claiming the probate court mishandled the administration of the conservatorship. 373 S.C. 637, 643-44, 647 S.E.2d 188, 191-92 (2007). The probate court pled it was entitled to immunity pursuant to subsections 15-78-60(1), (2), and (3); none of these subsections contain a gross negligence standard. *Id.* at 651-52, 647 S.E.2d at 196. The trial court dismissed the action, ruling the probate court was immune from liability pursuant to all three subsections. *Id.* at 652, 647 S.E.2d at 196. The plaintiff claimed subsections (12) and (25) also applied to the probate court's actions and that since these two subsections contain a gross negligence standard, the gross negligence standard should have been read into subsections (1), (2), and (3). *Id.* We held the trial court did not err in refusing to read the gross negligence standard into subsections (1), (2), and (3) because subsection (12) had "*no applicability*" to the case and because subsection (25) was "*similarly inapplicable*." *Id.* at 653, 647 S.E.2d at 197 (emphasis added).

Repko argues *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), stands for the proposition that when a governmental entity simply pleads an immunity provision containing a gross negligence standard, the gross negligence standard must

be read into all other immunity subsections. In *Jones*, the defendant sheriff pled he was entitled to immunity from suit pursuant to subsections 15-78-60(6) and (21), neither of which contains a gross negligence standard. 387 S.C. at 344-45, 692 S.E.2d at 903. The plaintiff claimed subsection 15-78-60(25), which contains a gross negligence standard, applied to the case; however, the sheriff did not plead subsection (25) as a basis for immunity, and nothing within subsection (25) was applicable to the case. *Id.* at 347-48, 692 S.E.2d at 904-05. We affirmed the trial court's grant of a directed verdict to the sheriff. *Id.* at 349, 692 S.E.2d at 905. While we did conclude in *Jones* that the gross negligence standard in subsection 15-78-60(25) was not to be read into other applicable subsections because the sheriff did not plead subsection (25) as a basis for immunity, we emphasized our holding in *Steinke* that "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." 387 S.C. at 347, 692 S.E.2d at 904 (emphasis added) (quoting *Steinke*, 336 S.C. at 397, 520 S.E.2d at 154).

Repko also argues *Proctor v. Department of Health & Environmental Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), supports his argument that the gross negligence standard of subsection 15-78-60(12) should be read into the other subsections simply because the County pled subsection (12). In *Proctor*, Mr. Proctor owned a DHEC-permitted waste tire recycling and processing facility. The permit greatly enhanced the delivery of waste tires to his facility by new tire wholesalers and retailers. *Id.* at 287-88, 628 S.E.2d at 500-01. DHEC concluded Proctor was in violation of the regulations governing his permit, levied a fine against him, and removed him from the rebate list of approved facilities. *Id.* at 288, 628 S.E.2d at 501. Proctor sued DHEC pursuant to subsection 15-78-60(12), alleging DHEC was grossly negligent in revoking its approval for him to be on the rebate list. *Id.* at 289-90, 628 S.E.2d at 502. As noted, subsection (12) contains a gross negligence standard. DHEC claimed it was entitled to immunity under subsections 15-78-60(1), (2), (3), (4), (5), (12), and (13). *Id.* at 297, 628 S.E.2d at 506. At trial, DHEC did not challenge the applicability of subsection (12) as it was squarely applicable to the facts of the case; rather, DHEC argued it was entitled to a directed verdict because its conduct did not rise to the level of gross negligence. The trial court denied DHEC's motion for a directed verdict under all subsections, and the trial court charged the jury that the gross negligence standard in subsection (12) was to be read into all other applicable subsections providing for immunity. The court of appeals affirmed, holding that since Proctor proceeded on the theory that DHEC was liable under subsection (12), the trial court's charge was proper. *Id.* at 312, 628

S.E.2d at 514. *Proctor* is of no assistance to Repko, because in *Proctor*, subsection (12)—with its gross negligence standard—was applicable to the facts of that case. In the instant case, subsection (12) is not applicable in the first instance, and no other immunity subsection containing a gross negligence standard is applicable to this case.

Plyler and *Steinke* clearly dictate that in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence standard must first apply to the case. We disavow any suggestion to the contrary in *Jones*. In many instances, a governmental entity may initially plead entitlement to immunity pursuant to a subsection containing a gross negligence standard. In many of those instances, that particular immunity may ultimately not apply to the facts of the case. In such a case, the gross negligence standard contained in that immunity is not to be read into applicable immunity subsections that do not contain a gross negligence standard. We reaffirm our holding in *Steinke* "that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception." 336 S.C. at 398, 520 S.E.2d at 155.

Here, at the directed verdict stage, Repko argued—correctly we must add—that subsection 15-78-60(12) did not apply to this case. The trial court agreed and so ruled. Repko is left only with the argument that the gross negligence standard in subsection (12) should be read into subsection 15-78-60(4) simply because the County originally pled subsection (12) as a defense. This argument fails as a matter of law; standing alone, subsection (4) provides immunity to the County. Therefore, we find the trial court correctly directed a verdict for the County pursuant to subsection 15-78-60(4).

IV.

The trial court properly granted a directed verdict to the County on the ground that the County is immune from liability pursuant to subsection 15-78-60(4) of the TCA. We therefore **REVERSE** the court of appeals and reinstate the directed verdict. We vacate the opinion of the court of appeals.

BEATTY, C.J., KITTREDGE, J., and Acting Justice Gordon G. Cooper, concur. HEARN, J., concurring in result only in a separate opinion.

JUSTICE HEARN: I concur in the result reached by the majority but write separately, as I believe the first question we must address is whether the County owed a private duty to Repko. *Arthurs ex rel. Estate of Munn v. Aiken Cty.*, 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001) ("Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue."). Because I agree with the trial court that the County owed no such duty, I would reverse the court of appeals on that ground, thus ending the inquiry.

As the majority discussed, the County promulgated regulations concerning the completion of infrastructure in certain residential communities. Section 3.1 of the ordinance expressly states, "Acceptance of a financial guarantee by Georgetown County shall not be construed as an obligation to any other agency, utility or property owner within the affected developments."

In viewing this provision, it is important to note that this Court has recognized that the public duty rule and the South Carolina Tort Claims Act are not incompatible. *Arthurs*, 346 S.C. at 103, 551 S.E.2d at 582 (holding the public duty rule is still applicable where the plaintiff's claim is grounded upon a statutory duty, even after the enactment of the Tort Claims Act). Under the public duty rule, where a statute levies a duty on public officials to "discharg[e] their statutory obligations," they generally are not liable in a private cause of action because the statute is presumed to be for the benefit of the public rather than any individual member. *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 446, 697 S.E.2d 575, 577 (2010). Because this rule forecloses a finding of a legal duty, it is a negative defense that strikes at the core of a plaintiff's negligence claim, unlike the affirmative defense of immunity, which bars liability for an otherwise prima facie case of negligence. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 389, 520 S.E.2d 142, 150 (1999).

However, an exception to the public duty rule applies where the statute demonstrates the drafter's intent to impose a duty upon public officials for the benefit of a specified class of persons. To ascertain legislative intent, this Court has applied the six-factor "special duty test" adopted in *Jensen v. Anderson County Dep't of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991).[3] There, the Court explicitly

[3] As set forth in *Jensen*, the special duty test encompasses:

> (1) an essential purpose of the statute is to protect against a particular kind of harm;

recognized the test "is in itself an attempt to determine legislative intent;" in other words, the focus of the inquiry is to determine when the legislature intended to create a special duty owed to a particular class of persons. *Id.* at 201, 403 S.E.2d at 618. Because the special duty test is merely a tool of statutory construction, I do not believe it is essential that it be applied when the relevant provision unambiguously demonstrates an intent not to impose a private duty. *Arthurs*, 346 S.C. at 104, 551 S.E.2d at 582 ("[I]t is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach.").

As the majority described, the County passed an ordinance regulating the planning and development of subdivisions whereby a developer could not sell a lot until the infrastructure was completed—including storm water management, grading of the roads, and utilities. However, section 3.1 afforded the County discretionary authority to accept a developer's financial guarantee in lieu of compliance with the required infrastructure, thereby permitting the developer to sell lots while infrastructure work continued. Section 3.1's text expressly provides the County's discretionary authority "shall not be construed as an obligation to any other agency, utility or property owner…" Because that language clearly evinces the County's intent *not* to create a duty to property owners, an analysis under the special duty test in *Jensen* provides minimal, if any, additional guidance in ascertaining the County's intent. While that test is designed to ascertain when the legislature has been "sufficiently specific" to permit an aggrieved party to seek a remedy against a public official, here, the County has been more than "sufficiently specific" that it owes *no* duty to the property owners.

> (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
> (3) the class of persons the statute intends to protect is identifiable before the fact;
> (4) the plaintiff is a person within the protected class;
> (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
> (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen, 304 S.C. at 200, 403 S.E.2d at 617.

The court of appeals viewed section 3.1 as a disclaimer preempted by the South Carolina Tort Claims Act. *Repko v. Cty. of Georgetown*, 416 S.C. 22, 35, 785 S.E.2d 376, 382 (Ct. App. 2016). However, whether an ordinance creates a duty of care concerns only a threshold element of a negligence claim rather than an immunities analysis. Because the Tort Claims Act does not create causes of action or establish duties of care, it does not conflict with the ordinance. *See Arthurs*, 346 S.C. at 105, 551 S.E.2d at 583 ("The TCA does not create causes of action, but removes the common law bar of sovereign immunity in certain circumstances."). Therefore, I do not believe section 3.1 was preempted by the Tort Claims Act.

Furthermore, this Court's decision in *Brady Development Co., Inc. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993), guides our analysis. In *Brady*, pursuant to a Hilton Head Development Standards Ordinance, a developer posted a letter of credit guaranteeing completion of certain infrastructure requirements, including water and sewer service. *Id.* at 74, 439 S.E.2d at 267. The town permitted the developer to draw on the letter of credit as the developer completed installing the infrastructure. *Id.* at 74–75, 439 S.E.2d at 267. Nearing completion of the water and sewer service, the Public Service District denied approval of the infrastructure systems because the developer failed to pay a construction fee, and it eventually declared bankruptcy. Soon thereafter, Brady Development Company purchased a lot and contracted with a builder to construct a house. *Id.* The builder repeatedly inquired about the water and sewer service to no avail. After the house was substantially completed, it remained vacant due to the lack of water and sewer service, and it eventually burned down. *Id.*

Brady filed a lawsuit against the Town of Hilton Head Island, alleging it negligently administered the development ordinance. *Id.* During the trial, the Town moved for a directed verdict, arguing the ordinance did not create a special duty. *Id.* The trial court denied the motion, and the jury found in favor of Brady. *Id.* at 76, 439 S.E.2d at 267. On appeal, this Court reversed, holding the Town did not owe a duty to Brady because the essential purpose of the ordinance was "to protect the public from the dangers of overdevelopment on the Island of Hilton Head" rather than "to protect against a particular kind of harm." *Id.* at 76, 439 S.E.2d at 268. Having failed to satisfy the first element of the special duty test, the Court declined to impose a private duty. Further, the Court concluded if the Town owed a duty, it effectively would be "an insurer of all developments it undertook to inspect and control…and would likely discourage all efforts at such control." *Id.* at 77, 439 S.E.2d at 268.

Significantly, the Court in *Brady* rejected imposing a private duty into an ordinance that was silent on whether such a duty was created. The Court did look to the ordinance to determine the first element of the test—the essential purpose of the statute, as the ordinance stated, "The purpose of this chapter is to promote the public health, safety and general welfare…and to facilitate the timely and adequate provision of transportation, water, sewage disposal, schools, parks and other requirements." *Id.* Citing that provision, the Court concluded the ordinance did not create a special duty because the first element was not satisfied.

The facts here are even more compelling than in *Brady* because the ordinance clearly demonstrates the County's intent *not* to confer a private duty. Finding that a duty existed here would require overruling *Brady*.[4] Therefore, because I believe the County did not owe a duty, I would decline to reach the immunities issue under the Tort Claims Act. Accordingly, I concur in result only.

[4] Even an analysis under the special duty test reaches the same result because Repko fails to satisfy the third element—the class of persons the statute intends to protect is identifiable before the fact. Section 3.1 specifically noted, "Acceptance of a financial guarantee by [the County] shall not be construed as an obligation to *any. . . property owner within the affected development*." Therefore, it would be illogical to consider Repko, as a property owner, as part of a class the County intended to protect when the ordinance expressly provides otherwise.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patti Silva, as personal representative for the Estate of Adrian Silva, Plaintiff,

v.

Allstate Property and Casualty Insurance Company, Defendant.

Appellate Case No. 2017-002110

CERTIFIED QUESTIONS

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Richard M. Gergel, United States District Court Judge

Opinion No. 27838
Heard June 13, 2018 – Filed August 29, 2018

FIRST QUESTION ANSWERED

Edward K. Pritchard, III, of Pritchard Law Group, LLC, of Charleston, for Plaintiff.

R. Hawthorne Barrett, of Columbia, and Robert E. Kneece, III and John S. Wilkerson, III, of Charleston, all of Turner Padget Graham & Laney, P.A., for Defendant.

JUSTICE HEARN: We accepted two certified questions from the United States District Court for the District of South Carolina arising from a dispute over uninsured motorist (UM) coverage: first, whether a police officer who conducts an investigation of an accident qualifies as a "witness" under Section 38-77-170 of the South Carolina Code, and second, whether injuries suffered during a drive-by shooting "arise out of" the operation of the vehicle for insurance purposes. Because we answer the first question, "No," we decline to reach the second question.

FACTUAL BACKGROUND

At approximately 3:30 a.m. on January 3, 2016, law enforcement responded to a 911 call about an apparent motorcycle accident in Richland County. Arriving at the scene, officers found Adrian Silva and his motorcycle in a roadside ditch; police then determined Silva had been shot to death, finding five gunshot wounds on the left side of his body. In the course of their investigation, officers recovered three gun shell casings near the motorcycle and reviewed surveillance video from a nearby church. The video revealed an unknown vehicle following Silva ninety seconds prior to the 911 call. Although police were unable to locate anyone who observed the shooting, investigators believed an individual inside the vehicle shot Silva and then fled the scene.

Thereafter, Silva's wife sought to recover UM benefits, and in an effort to comply with section 38-77-170,[1] attached an affidavit from Richland County Sheriff's Department Investigator Joe Clarke who opined an individual from the unknown vehicle killed Silva in a drive-by shooting. Clarke noted the pattern of Silva's injuries—notably, all five gunshots struck Silva's left side—indicated the assailant drove alongside him and opened fire. Additionally, investigators were only

[1] Section 38-77-170 enables recovery for injuries caused by a phantom driver if three requirements are satisfied. Only the second condition is at issue here, providing, "[t]he injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit."

able to find three shell casings, suggesting the two remaining casings may have ejected into the vehicle.

Allstate declined to pay the claim, arguing further investigation was necessary.[2] Wife then filed a "John Doe" wrongful death action. After Allstate failed to provide benefits, Wife filed a declaratory judgment action in federal court seeking $75,000 each in bodily injury and property damage coverage, as well as damages for acting in bad faith. Allstate moved for summary judgment, asserting two grounds for denying coverage: (1) Clarke's affidavit did not satisfy section 38-77-170's witness requirement because Clarke did not personally observe the accident, and (2) Silva's injuries did not "aris[e] out of the ownership, maintenance, or use of [a] motor vehicle…." S.C. Code Ann. § 38-77-140 (2015). In response, Wife moved for partial summary judgment and alternatively, sought certification of both issues to this Court.

CERTIFIED QUESTIONS PRESENTED

1. Can a law enforcement officer who conducts an official investigation of an accident that was not contemporaneously observed by any identified, surviving person be a "witness" under South Carolina Code § 38-77-170?

2. Do injuries caused by a drive-by shooting "arise out of" the use of a motor vehicle under Section 38-77-140 of the South Carolina Code where the shooting victim was operating a motor vehicle followed by the assailant vehicle and blocked from escape by the assailant vehicle during the shooting?

DISCUSSION

Wife asserts Clarke's investigative report satisfies the plain language of section 38-77-170 because that provision only requires a "witness" rather than the narrower concept of an "eyewitness." Conversely, Allstate contends an affiant must actually observe the underlying events to qualify as a witness. We agree with Allstate.

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[2] Under the policy covering the motorcycle, Silva had $25,000 per person for bodily injury and $25,000 for property damage. Additionally, Silva was named on a separate policy that covered two cars, with UM limits of $50,000 per person for bodily injury and $50,000 for property damage. Eventually, Allstate tendered $1,602.31 for property damage to the motorcycle.

Ordinarily, an insured has no right of recovery against his insurer for injuries caused by an unknown vehicle, unless three requirements are fulfilled:

> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, *or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle*; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

S.C. Code Ann. § 38-77-170 (2015) (emphasis added). Because Silva's injuries were not caused by physical contact with the unknown vehicle, Wife must produce a signed affidavit by someone who witnessed the events. *Id.*

The cardinal rule of statutory interpretation is to ascertain the intent of the General Assembly. *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017). Furthermore, "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." *Jackson v. Charleston Cty. Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994) (quoting *Laurens Cty. Sch. Dist. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992). However, if a statute is unambiguous, "'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Fullbright*, 420 S.C. at 272, 802 S.E.2d at 797 (quoting *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439, 581 S.E.2d 836, 838 (2003).

We have repeatedly noted the purpose of this statute is to protect against fraudulent claims. *Gilliland v. Doe*, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004) (noting the witness requirement is a "safeguard" enacted to prevent fraudulent claims); *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992) ("The purpose of the second condition in this statute is to assure adequate proof the accident involved a second unknown vehicle."). While section

38-77-170 does not define "witness," Black's Law Dictionary sets forth two definitions: "1. Someone who sees, knows, or vouches for something <a witness to a testator's signature>. 2. Someone who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit <the witness to the signature signed the affidavit>." *Witness*, *Black's Law Dictionary* (10th ed. 2014). In keeping with the General Assembly's intent to thwart fraudulent claims, the first definition is more persuasive as it provides a mechanism to dispel improper claims—consistent with the statute's purpose—while the second definition encompasses anyone who signs an affidavit, regardless of whether the claim is proper or fraudulent. Moreover, requiring a witness to observe the facts of the accident is consistent with our jurisprudence.

In *Gilliland*, this Court addressed the sufficiency of a witness's testimony concerning the causal connection between an unknown driver and the insured's injuries. As Gilliland left a grocery store, two young men followed in their pickup truck. *Gilliland*, 357 S.C. at 198, 592 S.E.2d at 627. Frightened, Gilliland sped away, but the truck "rode her bumper" for nearly two miles until she lost control and hit a tree. *Id.* At trial, a witness testified that she saw two sets of headlights come around a curve, and after the accident, the truck's headlights "'arc[ed] through a field' as if it were making a U-turn." *Id.* at 198–99, 592 S.E.2d at 627. The Court noted the witness's testimony—from an individual who observed part of the accident—was sufficient circumstantial evidence to survive the respondent's JNOV motion. *Id.* at 202, 592 S.E.2d at 629.

Our court of appeals has also addressed the requirements of section 38-77-170(2) on several occasions. *Tucker v. Doe*, 413 S.C. 389, 776 S.E.2d 121 (Ct. App. 2015); *Bradley v. Doe,* 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007); *Shealy v. Doe,* 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006). In *Tucker*, a truck driver lost control of his tractor-trailer shortly after midnight when he swerved to avoid a steel bearing block in the road, causing him to collide with a concrete column supporting an overpass. Tucker submitted an affidavit from another motorist who was driving approximately 150 feet behind the truck as it veered off the interstate. *Id.* at 393, 776 S.E.2d at 124. The motorist stated he observed the truck lose control and strike the concrete column; however, Tucker's insurer asserted the affidavit did not comply with section 38-77-170 because it did not provide information suggesting the unknown driver proximately caused the accident, nor did the affiant see the steel bearing block located in the road. *Id.* at 398, 776 S.E.2d at 126. The court of appeals rejected that assertion, noting the motorist's account was analogous to the witness's

testimony in *Gilliland* because both observed the accidents in question despite their inability to provide direct evidence of the involvement of an unknown driver. *Id.* at 401, 776 S.E.2d at 128.

Furthermore, in *Bradley*, an insured swerved off a road and crashed into a tree after leaving a Waffle House at 3:00 a.m. *Bradley,* 374 S.C. at 624, 649 S.E.2d at 154. An individual stopped to help and noticed a white trash bag in the road near the scene of the accident. *Id.* While assisting Bradley, the individual heard another motorist strike the bag, dragging it down the road. *Id.* at 624, 649 S.E.2d at 155. A third individual, who left the Waffle House shortly before Bradley, noted he narrowly dodged a trash bag in the road near the site of Bradley's crash. *Id.* Further, approximately a quarter-mile down the road, he observed a street sweeper inadvertently drop a similar trash bag onto the road. *Id.* In a split decision, the majority held Bradley's failure to produce a witness who actually observed the crash defeated his claim for UM benefits under section 38-77-170. *Id.* at 633–35, 649 S.E.2d at 159–60.

Finally, in *Shealy*, two passengers thrown from the bed of a pickup truck when it crashed were not considered "witnesses" when they merely relayed information provided by the driver. *Shealy,* 370 S.C. at 196, 634 S.E.2d at 46. A day after the accident, the driver informed the passengers he swerved to avoid crashing into an unknown vehicle, and although neither passenger actually observed the driver lose control, both signed an affidavit attesting to the driver's account. *Id.* at 197, 634 S.E.2d at 46. The court of appeals held Shealy failed to satisfy the witness requirement because neither passenger provided independent evidence that someone other than the driver witnessed the accident. *Id.* at 205, 634 S.E.2d at 52.

Our jurisprudence thus requires that in order to comply with section 38-77-170(2), the affiant must have observed at least some part of the incident. While circumstantial evidence may be sufficient to satisfy the "truth of the facts" prong of this provision, it does not satisfy the statutory requirement that the affiant actually witness the accident.[3] Moreover, we must honor the General Assembly's effort to

[3] *See Gilliland*, 357 S.C. at 201, 592 S.E.2d at 628 (noting circumstantial evidence that an unknown vehicle contributed to the victim's injuries is sufficient to satisfy the "truth of the facts" prong); *but see Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("The plain language of [section] 38–77–170 requires that where the accident involves no physical contact between the insured's vehicle and the

balance compensation for those injured by unknown motorists while safeguarding against fraudulent claims. As the court of appeals has recognized, this policy choice occasionally is "lamentable to the injured party, but mandated by the statute." *Shealy*, 370 S.C. at 201, 634 S.E.2d at 49. Here, Clarke's knowledge is derived solely from his investigation, and he did not observe the underlying facts of Silva's death. While we concede Clarke presents circumstantial evidence of the manner of Silva's death, the statute requires more, specifically, that "the accident must have been witnessed" by the affiant. S.C. Code Ann § 38-77-170(2). We acknowledge the purpose behind this requirement—to prevent fraudulent claims—is not advanced in this particular case. Indeed, we do not doubt the veracity of Clarke's affidavit; however, we must remain faithful to the language in the statute. As the General Assembly has done before, it certainly is capable of amending this provision.[4] Consistent with the language of the statute, we conclude Clarke does not qualify as a witness because he failed to observe the incident; accordingly, we answer the first question, "No."

Because our answer is dispositive of the underlying claim, we decline to address question two. *See Howell v. United States Fid. & Guar. Ins. Co.*, 370 S.C. 505, 511, 636 S.E.2d 626, 629 (2006) (declining to address subsequent certified questions when the first is dispositive).

FIRST QUESTION ANSWERED.

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

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unidentified vehicle, the accident *must* have been witnessed by someone other than the owner or operator of the insured vehicle.").

[4] The General Assembly first enacted the John Doe statute in 1963, which required the insured to show physical contact with the unknown vehicle. In 1987, the statute was amended to enable recovery where there was no physical contact, provided an independent person witness the accident. Finally, two years later, the affidavit requirement was added whereby a witness must attest to the facts, subject to criminal penalties for providing false information. *See Gilliland*, 357 S.C. at 199–200, 592 S.E.2d at 627–28; *see also Tucker*, 413 S.C. at 399, 776 S.E.2d at 127.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pee Dee Health Care, P.A., Respondent,

v.

Estate of Hugh S. Thompson, Petitioner.

Appellate Case No. 2017-000681

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27839
Heard June 14, 2018 – Filed August 29, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jon Rene Josey, of Turner Padget Graham & Laney, P.A., of Florence, and John J. James II, of Paulling & James, L.L.P., of Darlington, for Petitioner.

James Mixon Griffin, of Griffin Davis Law Firm, and Ariail Elizabeth King, of Lewis Babcock L.L.P., both of Columbia, for Respondent.

JUSTICE FEW: This is an appeal from the circuit court's decision to impose sanctions against Pee Dee Health Care, P.A., and its attorney[1] for conduct that occurred before the circuit court entered summary judgment against it. The issue we address is whether a motion for sanctions filed nine days after remittitur from Pee Dee Health's unsuccessful appeal of the summary judgment order is untimely under the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA) and Rule 11 of the South Carolina Rules of Civil Procedure. We find the motion was untimely under the FCPSA, but the circuit court did not abuse its discretion in finding the motion timely under Rule 11.

I. Facts and Procedural History

Pee Dee Health Care, P.A. is a medical clinic in Darlington. Doctor Hugh Thompson Jr.[2] worked there as a physician from 1998 through 2001. Pee Dee Health paid Dr. Thompson a salary to treat patients, and in exchange, Dr. Thompson assigned to Pee Dee Health the right to receive all payments from the Centers for Medicare and Medicaid Services (CMS) for services Dr. Thompson provided. In 1994, four years before Dr. Thompson began working for Pee Dee Health, his medical license was suspended and he was placed on the Medicare and Medicaid excluded providers list. Although Dr. Thompson's license was reinstated in 1998, he failed to seek removal of his name from the excluded providers list until 2002. Dr. Thompson was therefore on the excluded providers list during his entire tenure at Pee Dee Health.

In 2007, six years after Dr. Thompson left Pee Dee Health, CMS discovered Dr. Thompson had been on the excluded providers list while working for Pee Dee Health, and demanded Pee Dee Health reimburse CMS for all payments it made to Pee Dee Health in connection with Dr. Thompson's services. CMS estimated the total amount of these "overpayments" to be $208,821.03 plus interest. Pee Dee Health opposed this claim through multiple levels of federal administrative appeals. The federal administrative law court found Pee Dee Health "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees

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[1] Pee Dee Health's appellate counsel was not involved in any of the misconduct upon which the sanctions order was based.

[2] The court of appeals incorrectly gave to Dr. Thompson the suffix of "III" instead of "Jr." His estate, however, which is the party to this action, is named "Estate of Hugh S. Thompson," with no suffix.

through due diligence prior to entering the employment relationship," and therefore found Pee Dee Health was "at fault regarding the overpayment."[3] The Medicare Appeals Council upheld this decision, finding Pee Dee Health "failed to exercise due diligence in determining [Dr. Thompson's] exclusion status during the hiring process and when completing federal application forms."

In 2010, having exhausted its federal administrative appeals, Pee Dee Health brought an action in probate court against Thompson's estate[4] seeking to recover the amount it was forced to pay to CMS. After Thompson's estate disallowed the claim, Pee Dee Health filed an amended complaint in probate court and removed the case to circuit court pursuant to subsection 62-1-302(d)(5) of the South Carolina Code (Supp. 2017). The amended complaint included twenty separate causes of action.[5]

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[3] The administrative law court based its decision on Title 42, Chapter 7 of the United States Code, which provides, "Any person (including an organization, agency, or other entity . . .) that . . . arranges or contracts (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a Federal health care program . . . for the provision of items or services for which payment may be made under such a program . . . shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty . . . . In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim . . . ." 42 U.S.C. § 1320a-7a(a)(6) (2012).

[4] Dr. Thompson passed away on November 5, 2009.

[5] Those causes of action included: (1) "breach of fiduciary duty"; (2) "negligent misrepresentation based on defendant's pecuniary interest"; (3) "breach of duty of loyalty to employer"; (4) "negligence"; (5) "breach of contract"; (6) "breach of contract accompanied by a fraudulent act"; (7) "interference with contractual relations"; (8) "fraud and misrepresentation"; (9) "failure to disclose"; (10) "deliberate concealment"; (11) "professional malpractice accompanied by fraud, misrepresentation, and negligence"; (12) "money had and received"; (13) "promissory estoppel"; (14) "quantum meruit"; (15) "constructive fraud and constructive trust"; (16) "constructive fraud without scienter"; (17) "equitable indemnity"; (18) "conversion"; (19) "equitable restitution"; and (20) "civil conspiracy."

Thompson's estate sought to disqualify Pee Dee Health's attorney Tony R. Megna—who also served as Pee Dee Health's chief executive officer—on the basis that he was a necessary fact witness in the case. *See* Rule 3.7(a), RPC; Rule 407, SCACR ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."). The circuit court disqualified Megna.

Pee Dee Health and Thompson's estate then filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of Thompson's estate, and made specific findings that there was no genuine issue of material fact regarding each of Pee Dee Health's twenty causes of action. The circuit court summed up its decision by stating,

> The Court finds, as a matter of law and fact, that Pee Dee Health cannot prove an absence of fault in causing the existence of the debt being sued upon. Pee Dee Health's fault has been adjudicated with finality in federal administrative proceedings and Pee Dee Health is collaterally estopped from asserting that it is not at fault. Furthermore, under South Carolina substantive law . . . , Pee Dee Health is now barred from asserting this claim—it could have easily discovered the truth of matters and it had a non-delegable duty imposed by federal law to do so.

Pee Dee Health filed a motion to alter or amend the summary judgment order, but the motion was "dismissed as improper" because the motion was filed by Megna, whom the circuit court had previously disqualified.

Pee Dee Health appealed to the court of appeals, bringing its total of pending appeals in this case to three. One of the other appeals focused on whether the circuit court erred in dismissing an appeal from the probate court before the case was removed, and the other focused on whether the circuit court erred in disqualifying Megna. The court of appeals consolidated the three appeals and issued an unpublished decision affirming in part and dismissing in part. *See Pee Dee Health Care, P.A. v. Thompson*, 2013-UP-311 (S.C. Ct. App. filed July 3, 2013). The court of appeals

denied Pee Dee Health's petition for rehearing, and this Court denied its petition for a writ of certiorari. The court of appeals issued the remittitur on January 7, 2014.

Nine days later, on January 16, 2014, Thompson's estate filed a motion for sanctions against Pee Dee Health, Megna, and Megna's law firm pursuant to the FCPSA[6] and Rule 11 of the South Carolina Rules of Civil Procedure. The estate alleged Pee Dee Health pursued litigation it knew was meritless in probate court and circuit court, and alleged Megna engaged in a pattern of "abusive, manipulative, and disrespectful" conduct, much of which the estate alleged was improper because it occurred after—and in violation of—the circuit court's disqualification order. All of the alleged misconduct occurred before Pee Dee Health filed its appeal from the summary judgment order.

Pee Dee Health filed a motion to strike the estate's motion on the ground the circuit court no longer had jurisdiction, and the motion was otherwise untimely. After a hearing, the circuit court found the motion was timely under Rule 11 and issued an order imposing $34,150 in sanctions against Pee Dee Health, Megna, and Megna's law firm. In explaining its decision to impose sanctions, the circuit court stated,

> This Court does not take the imposition of sanctions under Rule 11 lightly, but finds it appropriate here due to Megna's conduct in this case—specifically, his refusal to accept this Court's order disqualifying him as counsel and his unwarranted and meritless attempts to entangle uninvolved third-party attorneys in this case through inappropriate discovery requests. . . . Megna's conduct has caused [Thompson's estate] to incur substantial and unnecessary legal bills, which have diminished the size of the estate, not to mention the inordinate delay in closing the estate. This conduct has also required the Court to spend significant time addressing these matters through hearings and phone conferences.

Although the court did not explicitly deny sanctions under the FCPSA, the court's order is clear the sanctions were imposed pursuant to Rule 11 only.

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[6] S.C. Code Ann. §§ 15-36-10 to -100 (2005 & Supp. 2017).

Pee Dee Health and Thompson's estate appealed. Pee Dee Health argued the circuit court erred in finding the motion was timely under Rule 11, and challenged the sanctions order on the merits. The estate argued the motion was also timely under the FCPSA. The court of appeals affirmed the circuit court's decision to deny sanctions under the FCPSA, finding the estate's motion untimely. *Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 572, 795 S.E.2d 40, 48 (Ct. App. 2016) (citing *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (stating "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment")). As to Rule 11, the court of appeals reversed the circuit court's decision to impose sanctions, but only on the question of timeliness. 418 S.C. at 571, 795 S.E.2d at 48. The court of appeals explained that although Rule 11 did not contain a time limit, the purpose behind the Rule would be best served by a time limit that required the party seeking sanctions to file its motion "within a reasonable time of discovering the alleged improprieties." 418 S.C. at 570, 795 S.E.2d at 47 (citing *Griffin v. Sweet*, 525 S.E.2d 504, 506 (N.C. Ct. App. 2000)). Thompson's estate filed a petition for a writ of certiorari, which we granted.

II. The FCPSA

The FCPSA provides an attorney or party "shall be sanctioned for a frivolous claim or defense" if certain conditions are met. *See* S.C. Code Ann. § 15-36-10(C)(1)(a), (b), (c) (Supp. 2017) (listing conditions that give rise to sanctions). As to when a motion for sanctions must be filed, subsection 15-36-10(C)(1) provides,

> At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

Id. South Carolina appellate courts have interpreted this subsection to require a party to file its motion for sanctions under the FCPSA within ten days of the entry of judgment. *See, e.g.*, *Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (stating "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment" (citing *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002))).

Here, the circuit court granted summary judgment on September 1, 2011. The estate filed its motion for sanctions under the FCPSA on January 16, 2014. The estate's motion was not timely under the FCPSA. The circuit court was correct to deny sanctions under the FCPSA, and the court of appeals was correct to affirm.

III. Rule 11

Pee Dee Health argued to the circuit court and court of appeals that the ten-day time limit applicable under the FCPSA should also apply to sanctions motions filed under Rule 11. However, Rule 11—unlike the FCPSA—does not contain any time limit for filing a motion for sanctions, and South Carolina appellate courts have never interpreted Rule 11 to include a specific time limit. In fact, in *Russell*, we stated, "There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment," and "we decline to address what time limit is proper with regard to the Rule 11 sanctions because the issue is not before us." 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11.

Now the question is before us. To determine if there is a time limit on the filing of a Rule 11 motion, and if so what that time limit is, we turn first to the language of the rule, which provides,

> The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
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> . . . .
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> If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Rule 11(a), SCRCP.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). If a statute or rule is "plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.* (citing *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 558 S.E.2d 511 (2002)). Rule 11 clearly does not include a ten-day time limit. It is not possible under our rules of construction to read a ten-day time limit into a Rule that does not contain a ten-day time limit. In respect to timing, therefore, the plain meaning of Rule 11's lack of specific time limit is that there is no specific time limit. If this Court wanted to impose such a specific time limit on Rule 11 motions, then our Constitution requires we do so through our article V, section 4A rule-making authority. *See* S.C. CONST. art. V, § 4A ("All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly . . . .").

Although Rule 11 does not contain a specific time limit, the law does not allow a person to sit on legal rights indefinitely. Therefore, there are a number of important considerations a circuit court must make when determining whether a motion for sanctions under Rule 11 is untimely. The first and most important consideration is whether the court still retains jurisdiction over the case. "The jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established. For instance, once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling." *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001) (citing *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993)).

There is nothing in the estate's Rule 11 motion that is not "consistent with" the court of appeals' ruling on the consolidated appeals. In particular, the Rule 11 motion was based primarily on the circuit court's order disqualifying Megna and its summary judgment order finding no merit to Pee Dee Health's claims. Both of these orders

were upheld on appeal. Therefore, we find the circuit court retained jurisdiction to hear a Rule 11 motion filed nine days after remittitur.[7]

This finding is consistent with *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1986), in which the Fourth Circuit found the district court retained jurisdiction to rule on a Rule 11[8] motion that was made "several months

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[7] As the discussion following this finding demonstrates, the timeliness question is broader than simply whether the court retains jurisdiction. The court of appeals appears to have equated timeliness with jurisdiction, "agree[ing]" with Pee Dee Health that "the motion was untimely and, therefore, the court lacked jurisdiction to consider it." 418 S.C. at 564, 795 S.E.2d at 44. Equating timeliness with jurisdiction was error.

[8] *Hicks* involved Rule 11 of the Federal Rules of Civil Procedure. Our Rule 11 is based on the pre-1983 version of the federal rule, *see Burns v. Universal Health Servs. Inc.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (Ct. App. 2000), which also contained no time limit, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398, 110 S. Ct. 2447, 2457, 110 L. Ed. 2d 359, 377 (1990) (noting that Rule 11 contains no time limit, but stating, "District courts may, of course, 'adopt local rules establishing timeliness standards,' for filing and deciding Rule 11 motions"). The federal rule was amended in 1983 to change the standard for finding a violation from bad faith to failure to make a "reasonable inquiry" into the factual and legal bases of the filing. *See* Advisory Comm. Note on Fed R. Civ. P. 11, reported at 97 F.R.D. 198 (1983). The rule was amended again in 1993 to include—among other things—a safe harbor provision, which allows a party to withdraw or correct an alleged frivolous pleading or motion within twenty-days of being served with a motion for sanction. Fed. R. Civ. P. 11(c)(2). The federal rule still does not contain an explicit time limit. However, the safe harbor provision effectively prevents a party from filing a motion for sanctions after the conclusion of the case. *See* 2 James Wm. Moore et al., Moore's Federal Practice § 11.22[1][c] ("The 21 day, safe-harbor service requirement controls not only the earliest date on which a motion may be filed . . . , it also indirectly controls the last date on which a Rule 11 sanctions motion may be filed. At the very least, a party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the 'safe harbor' provision would be nullified."). Unlike the federal rule, our Rule 11 does not have a safe harbor provision.

after the conclusion of all appellate proceedings." 805 F.2d at 1167. In *Hicks*, the plaintiffs filed seven separate causes of action against their employer. 805 F.2d at 1166. The district court granted summary judgment, and the Fourth Circuit affirmed. *Id.* In its opinion affirming the district court, the Fourth Circuit "reprimanded counsel for having asserted and prosecuted 'baseless' claims," which in turn prompted the defendants to file a motion for sanctions pursuant to Rule 11 "after the conclusion of the appeal." 805 F.2d at 1166. The plaintiffs argued the district court no longer had jurisdiction to consider the motion. *Id.* The Fourth Circuit rejected the plaintiffs' argument, and explained that in the absence of an applicable local rule in the district, the district court had jurisdiction to consider and grant the Rule 11 motion and "the only time limitation arises out of those equitable considerations that a district judge may weigh in his discretion." 805 F.2d at 1167.

The second consideration for a circuit court to make is to analyze the timing of the motion in light of the multiple purposes of Rule 11. As the Fourth Circuit explained in *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), "the primary . . . purpose of Rule 11 is to deter future litigation abuse." 914 F.2d at 522. However, there are additional purposes, including "compensating the victims of the Rule 11 violation, . . . punishing present litigation abuse, streamlining court dockets and facilitating court management." *Id.* (citing *White v. Gen. Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990)).

To analyze whether the timing of the estate's Rule 11 motion is consistent with the purposes of the rule, we begin with the premise that early filing—and quick resolution—of legal claims is always to be promoted. We recognize, however, that accusing the opposing party of misconduct under Rule 11 does not always "deter future litigation abuse." In fact, the common experience of trial lawyers across the country is that accusing an opposing lawyer or party of Rule 11 misconduct will often draw "return fire."[9] That is particularly true in a case where the opposing

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[9] In 1985, we adopted a version of Rule 11 similar to the federal rule in place until 1983. *See Burns*, 340 S.C. at 513, 532 S.E.2d at 9; Rule 11, SCRCP, Note (West 1986). When the federal rule was amended in 1983, the Advisory Committee stated, "Experience shows that in practice Rule 11 has not been effective in deterring abuses." Advisory Comm. Note on Fed R. Civ. P. 11, reported at 97 F.R.D. 198 (1983). Many legal commenters have agreed with this assessment. *See, e.g.*, Louis P. DiLorenzo, *Civility and Professionalism*, N.Y. St. B.J. 8, 10 (January 1996) ("Another explanation often cited for this explosion in incivility is, in some ways,

lawyer has repeatedly engaged in "vexatious" behavior that "caused . . . substantial and unnecessary legal bills," and "required the court to spend significant time addressing these matters through hearings and phone conferences," as the circuit court found was true in this case. When that occurs, not only can additional future abuse be likely, but the secondary purposes of "streamlining court dockets and facilitating court management" can be frustrated by the delays that result from the litigation of sanctions motions.

As counsel for the estate explained, he based his decision to wait to file the Rule 11 motion until after remittitur in part on his goal of achieving a successful—and timely—result for his client, at the least cost to his client. Counsel explained his experience with Megna throughout the protracted litigation led him to believe that a sanctions motion would only exacerbate the already contentious litigation, further delaying a decision on the merits and costing his client more money. In other words, counsel considered the circumstances of the case and concluded that filing a motion for sanctions would not "deter future litigation abuse," but rather would only encourage more abusive behavior, which counsel determined to be against his client's interests in getting the litigation resolved quickly and inexpensively.

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the most interesting: Rule 11. . . . The prospect for Rule 11 sanctions has become a justification in itself for new levels of aggressiveness."); Maryann Jones, *"Stop, Think & Investigate": Should California Adopt Federal Rule 11?*, 22 Sw. U. L. Rev. 337, 352-53 (1993) ("Many attorneys believe that 'Rule 11 injures the civility of litigation because it causes lawyers to impugn one another's motives and professionalism . . . .' At least one empirical survey shows that both lawyers and judges believe that the rule has aggravated relations among lawyers. Other studies suggest that sanctions have become but another device in a litigator's bag of tricks, an additional tactic of intimidation and harassment.'"); Drew Erteschik and Colin McGrath, *The Rule 11 Motion: Don't Do It*, (June 28, 2018), http://www.lawyersmutualnc.com/risk-management-resources/articles/the-rule-11-motion-dont-do-it (as to filing a Rule 11 motion, stating, "Stop and think before picking a fight." (citing *Krantz v. Owens*, 607 S.E.2d 337 (N.C. Ct. App. 2005) (considering the circuit court's order on a Rule 11 motion filed in response to opposing party's Rule 11 motion and stating, "This adversarial battle between counsels strains the patience of this Court.")).

Counsel compares the situation to a lawyer's duty to report opposing counsel's unethical behavior to the Commission on Lawyer Conduct under Rule 8.3 of the Rules of Professional Conduct, Rule 407, SCACR, and cites to a recent South Carolina Bar Ethics Advisory Opinion stating a lawyer may wait to report the misconduct "at the conclusion of the litigation or appeal," if the lawyer determines reporting the misconduct immediately would be adverse to his client's interests. "The Committee believes it is appropriate for a lawyer to consider any potential adverse impact to his or [her] client in determining the timing of a report against another lawyer." S.C. Bar Ethics Advisory Opinion, 16-04.

Counsel's considerations resonate in South Carolina. Unlike other parts of the country, the atmosphere of litigation here is relatively collegial, and it is vitally important to our profession that we maintain that atmosphere to the extent possible. We are concerned that a rule requiring a party to file a Rule 11 motion for sanctions during the course of active litigation—or else it be found untimely regardless of these valid considerations—would endanger our collegial atmosphere, unnecessarily delay the resolution of claims, and thus be inconsistent with the purposes of Rule 11. Under the circumstances of this case, we find these to be reasonable and valid considerations by the estate's counsel.

Pee Dee Health argues, however, counsel's considerations became far less important the moment the circuit court issued its summary judgment order. Though this is a valid point, we find it does not completely undermine counsel's justification for waiting. At the time the circuit court filed its decision to grant summary judgment, Pee Dee Health already had two other appeals pending at the court of appeals. The appeal of the summary judgment order made it three. Both the appeal of the circuit court's order disqualifying Megna and the appeal of the summary judgment order related directly to the basis on which the estate ultimately sought sanctions. If either order were reversed, it would undermine the estate's grounds for the sanctions motion.

In addition, even if the likelihood Megna and Pee Dee Health would respond with more abusive behavior was diminished after summary judgment, it is also likely the circuit court would not have heard the sanctions motion while the appeals were pending based on the impression the motion dealt with "matters decided in the order[s]," which would arguably be stayed pending the resolution of the appeals. *See* Rule 241(a), SCACR (providing "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order"). We saw this occur

in *Russell*, where two of Judge Russell's[10] children challenged his will and trust based on alleged undue influence. 370 S.C. at 10, 633 S.E.2d at 724. "After extensive discovery was conducted, the trial court granted summary judgment in favor of the defendants." 370 S.C. at 10, 633 S.E.2d at 725. Shortly after judgment was entered, several defendants filed Rule 11 motions. However, the motions were not litigated until after we affirmed the summary judgment on appeal. *Id.*; *see also Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 225, 578 S.E.2d 329, 338 (2003) (*Russell I*). In *Russell*, summarizing and quoting our 2003 decision in *Russell I*, we stated "the record was 'devoid of any evidence that [anyone] influenced the execution or any modification of the will,'" and "there was 'no evidence to make out a *prima facie* case of undue influence.'" *Id.* (quoting *Russell I*, 353 S.C. at 219, 224, 578 S.E.2d at 335, 337). "Following remittitur," the defendants in the will contest "[sought] to enforce the no-contest clauses . . . in [the] will and . . . trust." *Id.* In the course of this post-remittitur action, the circuit court imposed over $500,000 in sanctions against one of Judge Russell's children who challenged his will and trust. 370 S.C. at 11, 633 S.E.2d at 725.

The third consideration a court should make when determining if a Rule 11 motion is untimely is embodied in the common law doctrine of laches, which we have defined as the "neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done" promptly. *Jefferson Pilot Life Ins. Co. v. Gum*, 302 S.C. 8, 11, 393 S.E.2d 180, 181 (1990). As we have explained, laches bars a cause of action "if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 174, 666 S.E.2d 236, 243 (2008) (quoting *Chambers of S.C., Inc. v. Cty. Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993)); *see also Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (stating a party seeking to defend on the basis of laches "must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice"). In situations where the circuit court determines these

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[10] *See* 370 S.C. at 10 n.1, 633 S.E.2d at 724 n.1 ("Testator served as an active judge on the United States Court of Appeals for the Fourth Circuit until his death on February 22, 1998, at the age of 92. Prior to his appointment to the federal bench, Testator served as Governor of South Carolina, United States Senator from South Carolina, and President of the University of South Carolina.").

elements are met, the court may find laches prevents a party from pursuing sanctions under Rule 11.

Finally, we come to the basis of the court of appeals' decision finding the motion in this case untimely—reasonableness. As a general proposition, we cannot disagree with the court of appeals' holding "that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties." 418 S.C. at 570, 795 S.E.2d at 47 (citing *Griffin*, 525 S.E.2d at 508)). Other courts that have addressed the question of the timeliness of a Rule 11 motion have also imposed a reasonableness standard. *See, e.g.*, *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (finding the court had jurisdiction to impose sanctions after the plaintiffs voluntarily dismissed the lawsuit under Rule 41, and stating "a party should make a Rule 11 motion within a reasonable time"). We agree with the court of appeals, therefore, that a Rule 11 motion is untimely if the circuit court—considering all relevant circumstances in the context of the litigation—determines the motion was not filed in a reasonable period of time after the discovery of the alleged misconduct.

In light of all these considerations, we turn to the circuit court's decision to grant the Rule 11 motion in the face of Pee Dee Health's timeliness challenge. We review the decision for abuse of discretion. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (stating an appellate court "reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard").[11] First, the circuit court had jurisdiction to "take . . . action consistent with the appellate court's ruling," which we find includes the estate's Rule 11 motion. Second, as we have explained, the timing of the estate's motion is not inconsistent with the purposes of Rule 11. Third, laches does not apply to this case because there

[11] The decision to impose sanctions is one in equity, and thus the appellate court reviews the circuit court's factual findings de novo. 378 S.C. at 437-38, 663 S.E.2d at 50. If the appellate court agrees with the factual findings, then it reviews the circuit court's decision to impose sanctions and the amount of sanctions for an abuse of discretion. 378 S.C. at 438, 663 S.E.2d at 50. We also review an equity court's procedural rulings—such as a ruling on timeliness of a Rule 11 motion—for abuse of discretion. *See Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 487 n.2 (2018) (noting "the standard for reviewing a family court's evidentiary or procedural rulings" is "an abuse of discretion standard").

is no evidence the timing of the Rule 11 motion caused Pee Dee Health to do anything different than what it otherwise would have done, or to suffer any prejudice.

Finally, again, we come back to the question of reasonableness. Counsel for the estate articulated sound reasons for not filing a Rule 11 motion while the case was pending in circuit court. Those reasons lost some of their strength after the circuit court entered summary judgment, but we cannot say they do not remain sound reasons. We are also persuaded by the fact Rule 11 permits a trial court to award sanctions "upon its own initiative," Rule 11, SCRCP, and there is no stated restriction on when the trial court must do so. Certainly it would be reasonable for a trial court that finds a party brought causes of action "without good grounds to support them"—as the circuit court found in this case—and that wishes to grant sanctions on that basis, to wait to see if its order on the merits is upheld on appeal before granting sanctions.

Considering the estate's reasons for the timing of the Rule 11 motion in the context of our clear statement in *Russell* "declin[ing] to address what time limit is proper," 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11, in light of the practical fact we allowed post-remittitur sanctions to be imposed in that case, 370 S.C. at 11, 633 S.E.2d at 725, and in light of the trial court's apparent authority to award sanctions post-appeal "upon its own initiative," we cannot say the circuit court abused its discretion[12] in finding the estate's counsel did not act unreasonably in waiting until after the appeals were resolved before filing the Rule 11 motion.

IV. Conclusion

We **AFFIRM** the court of appeals' finding that the estate's motion for sanctions under the FCPSA was not timely. As to the Rule 11 motion, we **REVERSE** and

[12] The court of appeals erred by conducting its own reasonableness analysis instead of deferring to the discretion of the circuit court. *See* 418 S.C. at 571, 795 S.E.2d at 48 (stating, "In light of our thorough review of the record, . . . we find the Estate's delay in filing the motion for sanctions until final resolution of the merits appeal failed to come in line with the underlying purposes of Rule 11," and "In our view, the Estate's delay in bringing the motion for sanctions failed to serve the deterrence and efficiency purposes of Rule 11 and, therefore, was unreasonable.").

REMAND to the court of appeals to address the merits of Pee Dee Health's appeal from the circuit court's imposition of sanctions.

BEATTY, C.J., and HEARN, J., concur. KITTREDGE, J., concurring in a separate opinion in which Acting Justice John D. Geathers, concurs.

JUSTICE KITTREDGE: I concur in result. I write separately to present my concerns regarding the timing of Rule 11 motions under the South Carolina Rules of Civil Procedure.

I agree fully with the majority that the circuit court correctly did not award sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA)—the motion for sanctions was untimely. I add a brief comment regarding the FCPSA as it relates to timing. The FCPSA, under section 15-36-10(C)(1), requires a party to file its motion for sanctions "[a]t the conclusion of a trial." The statute, however, is silent as to a time limit to file the motion. This Court has imposed a ten-day time limit following the entry of judgment in the trial court. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006).

Turning to the key issue before the Court, I agree with the majority that the law imposes a reasonableness standard in the timing of a Rule 11 motion. While the question is close, under the circumstances presented, I would not find an abuse of discretion in the trial court's determination of reasonableness concerning the timing of the Rule 11 motion. "The only time limitation in filing Rule 11 arises out of equitable considerations." *In re Kunstler*, 914 F.2d 505, 513 (4th Cir. 1990) (internal quotation marks and citation omitted). Here, equitable considerations arguably support the finding that the Estate of Thompson's Rule 11 motion for sanctions was timely. The primary consideration in support of upholding the finding of timeliness is the absence of any genuine surprise or prejudice to Pee Dee Health. Specifically, Pee Dee Health knew, or should have known, the Estate of Thompson would seek sanctions for the misconduct of attorney Megna. Indeed, one of the underlying appeals related to this very matter. As observed by the Fourth Circuit Court of Appeals, "there are countervailing considerations" to warrant a delay in filing a motion for sanctions, such as when the prevailing party changes "after the appellate procedures have run their course." *Hicks v. S. Maryland Health Sys. Agency*, 805 F.2d 1165, 1167 (4th Cir. 1986). Once the circuit court's findings concerning attorney Megna were upheld on appeal, the Estate acted reasonably promptly.

Therefore, while it was perhaps reasonable to delay filing the Rule 11 motion for sanctions in this case, I believe the filing of the motion nine days after the remittitur was transmitted from the appellate court to the circuit court is on the outer limits of reasonableness. As noted by the United States Supreme Court, "Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate that there would be a lengthy delay prior to their imposition" and, "[r]ather, 'it is anticipated that in the case of pleadings the sanctions

issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) (quoting Advisory Committee Note on Fed. R. Civ. P. 11). "There may be circumstances under which Rule 11 sanctions should not be granted," such as when "the motion is filed an inordinately long time after the dismissal" of a case. *In re Kunstler*, 914 F.2d at 513. "However, these considerations are equitable, and must be resolved on a case by case analysis. The party seeking sanctions may avoid such problems by notifying his opponent and the court of his intention to pursue sanctions at the earliest possible date." *Id.*

Accordingly, for matters occurring during trial court proceedings, and to ensure the opposing party receives notice at the earliest possible date, the better course of action in my judgment is to file a Rule 11 motion for sanctions not later than ten days following entry of judgment in the trial court. I take no issue with the Estate's argument that the "psychology of litigation" warranted delaying the filing of the Rule 11 motion—doing so piecemeal during trial court proceedings would have been throwing fuel on the fire. In this regard, I commend Justice Few, for he has compellingly set forth in the majority opinion the policy goals sought to be achieved in pursuing Rule 11 sanctions. Those policy considerations weigh heavily in favor of allowing a party to delay filing a Rule 11 sanctions motion, up to a point. I believe the concerns for further abusive ("return fire") conduct are essentially over once the proceedings in the trial court are concluded.

Conversely, Pee Dee Health's position that a party must promptly file a motion for Rule 11 sanctions following each alleged incident of misconduct would, as the majority observes, likely delay the proceedings further, increase the costs of litigation, and invite "return fire." I do not suggest a party is foreclosed from filing a Rule 11 motion for sanctions every time a party believes a violation has occurred; such a course of action may not be wise, but the rule does not prevent it.

The better practice under these circumstances would be to file a Rule 11 motion not later than ten days following entry of judgment in the trial court. This approach would have the added benefit of allowing a Rule 11 motion to be considered in tandem with a motion for sanctions under the FCPSA. If the matters on appeal are unrelated to the motion, the trial court may proceed and address the motion. *See* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; . . . [n]othing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the

appeal."). If the motion relates to the matters on appeal, then further proceedings in the trial court are stayed, pending resolution of the appeal. The point here is that the parties would have notice of any alleged sanctionable conduct as the appeal proceeds. It seems unfair to me for a party to hold Rule 11 allegations close to the vest, and assert the motion for the first time after the remittitur is transmitted to the trial court. As noted above, that potential unfairness is not present in this case and, therefore, I concur that the trial court did not abuse its discretion in finding that the Rule 11 motion was timely.

I add a final comment to the majority's reliance on the purported ability of a trial court to award Rule 11 sanctions "upon its own initiative" at any time. The majority posits that a trial court retains jurisdiction to *sua sponte* award Rule 11 sanctions after the remittitur is transmitted to the trial court. I categorically reject any suggestion that a trial court may, on its own initiative, award Rule 11 sanctions post-remittitur. I would hold that a trial court's authority to impose Rule 11 sanctions upon its own initiative ends ten days following entry of judgment.

Acting Justice John D. Geathers, concurs.

The Supreme Court of South Carolina

In the Matter of Aaron Cole Mayer , Respondent.

Appellate Case No. 2018-001521

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
August 24, 2018

The Supreme Court of South Carolina

In the Matter of Suzanna Rachel MacLean, Respondent.

Appellate Case No. 2018-001543

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) and (b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
August 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lori Dandridge Stoney, Appellant,

v.

Richard S.W. Stoney Sr., Defendant/Respondent,

and Theodore D. Stoney Jr., Third-Party Intervenor/Respondent.

Appellate Case No. 2011-203410

Appeal From Orangeburg County
Peter R. Nuessle, Family Court Judge

Opinion No. 5593
Submitted May 4, 2018 – Filed August 29, 2018

REVERSED AND REMANDED

J. Michael Taylor, of Taylor/Potterfield, and Peter George Currence, of McDougall & Self, LLP, both of Columbia, for Appellant.

Charles H. Williams, of Williams & Williams, of Orangeburg, for Respondent Theodore D. Stoney Jr.

Donald Bruce Clark, of Donald B. Clark, LLC, of Charleston, and James B. Richardson Jr., of Columbia, for Respondent Richard S.W. Stoney Sr.

MCDONALD, J.: In this marital litigation, Lori Dandridge Stoney (Wife) separately appealed two family court orders. Upon our initial consideration of Wife's consolidated appeals, we reversed several findings of the family court and remanded for a new trial. *Stoney v. Stoney*, 417 S.C. 345, 790 S.E.2d 31 (Ct. App. 2016). Richard S.W. Stoney Sr. (Husband) and Theodore D. Stoney Jr. (Brother) each petitioned for a writ of certiorari. Our supreme court granted the writs, dispensed with further briefing, reversed, and remanded the case to this court "to decide the appeal applying the appropriate standard of de novo review articulated in *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)." *Stoney v. Stoney*, 422 S.C. 593, 813 S.E.2d 486 (2018).[1] We reverse and remand to the family court for proceedings consistent with this opinion.

FACTUAL BACKGROUND

On October 12, 1996, Husband and Wife married in Berkeley County. Prior to the marriage, the parties entered into a prenuptial agreement.[2] The parties have one child together (Child).[3]

At the beginning of the marriage, Husband and Wife practiced law together; however, Wife began her own practice in 1997. Around this time, the parties

[1] In its refiled opinion, the supreme court clarified that "*Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which [our appellate courts] review using an abuse of discretion standard." *Stoney*, 422 S.C. at 595 n.2, 813 S.E.2d at 487 n.2.

[2] Husband produced neither the original nor a signed copy of the prenuptial agreement; however, he did include a copy of an unsigned prenuptial agreement as an exhibit to his affidavit.

[3] Child was nine-years-old when this case was filed and twelve at the time of trial.

opened a restaurant called the Boathouse at Breach Inlet (BHBI)[4] on the Isle of Palms, and Husband eventually stopped practicing law to focus on the restaurant. Wife's practice of law also became subordinate to the family's needs and operation of the parties' business ventures.[5]

BHBI was very successful from the time it opened, and it became the source from which Husband financed his other ventures. Husband purchased four other restaurants and various businesses during the course of the marriage, making "loans" from BHBI to the new entities. These businesses were managed by Husband's company, Crew Carolina.

The couple's second restaurant was the Boathouse at East Bay Street (BHEB) in downtown Charleston. Although BHEB broke even, Husband closed the restaurant in January 2009. As of December 31, 2008, BHEB had a net asset value of negative $141,048. Husband and Brother jointly owned the real property on which BHEB was located.[6]

In 2003, the couple opened the Boathouse at Lake Julian (BHLJ) in Asheville, North Carolina, which closed in July 2008. As of December 31, 2008, BHLJ had a net asset value of negative $1,297,939, which included an allocation of $474,792.78 of a Carolina First/DI Carolinas consolidation loan. In 2004, the couple purchased Carolinas, an existing restaurant located on Exchange Street in downtown Charleston, which they subsequently renovated. As of December 31,

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[4] At the date of filing, the ownership structure of BHBI was as follows:

Husband—70%
Brother—10%
Wife—5%
Richard Stoney Jr. (in Trust)—5%
Child (in Trust with Wife as Trustee)—5%
Lawrence Stoney—5%

[5] The parties stipulated that Wife assisted Husband in the operation of the couple's restaurants and businesses.

[6] The property was later reopened as another restaurant.

2008, Carolinas had a net asset value of $89,539. Husband sold Carolinas[7] in January 2010 for over $550,000.[8] Additionally, Husband advanced funds and assisted a third-party with opening Choto, a restaurant in Knoxville, Tennessee.[9]

In February of 2009, the parties opened their final restaurant, the Boathouse at Ellis Creek (BHEC), which burned to the ground one month later. Husband received over $850,000 in insurance proceeds during the first year the parties were separated; however, he did not use this money to rebuild the restaurant.[10] Instead, these funds were used to satisfy obligations to other creditors and business partners. This account was drained by the time of trial. In his testimony, Husband explained, "every dime that I received for Ellis Creek was used to offset the massive amount of debt we had, and I believe that the forensic accountants have well covered that fact. . . . I am doing everything I can to rebuild Ellis Creek." Throughout the trial, Husband referred to "robbing Peter to pay Paul" to keep creditors at bay and allow certain businesses to continue operating.

Husband started three additional businesses shortly after Wife filed for divorce: Amen Street Fish & Raw Bar, J & S Fish, LLC, and Rice Market.

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[7] After Wife discovered the impending sale of Carolinas, she filed a motion for protection, which resulted in a February 17, 2011 order requiring that Brother's attorney hold in escrow the remaining proceeds and any funds still in escrow. At trial, Wife testified that she had received nothing from the sale of Carolinas.

[8] The majority of the sale price was paid up front to Husband; however, the buyer also gave Husband a note, $75,000 of which was paid off prior to trial. Husband stipulated at trial that he paid one of his business partners, Thomas Westfeldt, $270,000 from these proceeds, which reduced a $550,000 note held by Westfeldt. The remainder of this note is secured by the Isle of Palms property.

[9] Husband has obtained summary judgment and an award of $250,000 against Choto's owner; however, the collection of this sum had not yet occurred as of the date of oral argument. The family court did not address this judgment in its final order.

[10] The property has since reopened as another restaurant.

PROCEDURAL BACKGROUND

On April 23, 2009, Wife filed an action for divorce seeking sole custody of Child, child support, alimony, equitable division, and other relief. By consent order dated May 15, 2009, the family court approved a change of venue from Charleston County to Orangeburg County. That same day, the family court approved a consent order sealing the record.

On June 18, 2009, Husband filed an answer and counterclaim, seeking joint custody of Child, enforcement of a prenuptial agreement, equitable division of the marital property and debt, and certain other relief. In addition, Husband sought the imputation of income to Wife and to pay reasonable child support pursuant to the South Carolina Child Support Guidelines.

On July 10, 2009, Wife filed a reply and counterclaim, admitting she had signed a prenuptial agreement, but alleging it had been lost. On this same date, the Honorable Anne Gue Jones entered a temporary order. This temporary order adopted an agreement titled, "Consent Order Regarding Certain Child Issues," which, among other things, awarded custody to Wife and prohibited Husband from exposing Child to his paramours. The other issues raised remained contested. The court granted Wife exclusive use and possession of the couple's condominium in Charleston, and required Husband to pay Wife approximately $22,000 per month for Wife and Child's expenses. On February 26, 2010, a supplemental temporary order was issued, relieving Husband of certain obligations required by the July 10, 2009 temporary order.

On January 5, 2010, Brother filed a motion to intervene to protect his interests in certain real property, business concerns, and debts he asserts he is owed. The court granted Brother's motion to intervene by order dated February 22, 2010, finding "[Brother]'s interest in this action outweighs any privacy interest that [Wife] asserts. . . . [T]he interests of [Brother] and the property which is the subject of this action cannot be adequately protected because of the [Husband]'s tenuous financial condition."

On March 4, 2010, Brother filed a third-party complaint, requesting, among other things, a determination by the court that his loans to Husband (and to the parties on behalf of Husband) constituted marital debt. Husband answered Brother's

complaint on March 4, 2010, admitting all of Brother's claims and joining in the relief sought by Brother. Wife answered on March 29, 2010, asserting she had insufficient information to admit or deny the allegations. On August 2, 2010, the family court issued a consent order relieving Husband's counsel. From this point through the two-week trial, Husband acted pro se.

During the pendency of this action, Husband was held in willful contempt with regard to four petitions and one supplemental petition for rules to show cause, and an additional rule remains unresolved. Specifically, Wife initially filed two petitions for rules to show cause (Rule 1 and Rule 2a), and a supplemental petition (Rule 2b). Rule 1, Rule 2a, and Rule 2b were resolved by order dated February 25, 2010, in which the family court found Husband in willful contempt for failing "to make payments under the Temporary Order, while he had funds to pay for other personal expenses on his behalf."

Wife filed a third rule to show cause (Rule 3) against Husband on January 11, 2010, regarding a criminal domestic violence situation involving Brother and Husband that resulted in physical injury to Wife in Child's presence. On March 29, 2010, the family court found Husband to be in willful contempt. Additionally, the court required counseling for Husband and Child, appointed a parenting coordinator, and authorized Wife to tape her phone conversations with Husband.

Wife filed two additional petitions for rules to show cause (Rule 4 and Rule 5). In Rule 4, issued on June 29, 2010, Wife alleged that Husband failed to pay her regime fees, Wife and Child's uncovered medical/dental expenses, Child's private school expenses, and certain credit card obligations. In Rule 5, issued on October 8, 2010, Wife alleged Husband exposed Child to his paramour in violation of a specific restraining order.[11] Both Rule 4 and Rule 5 were resolved by order dated January 6, 2011, in which the family court again held Husband in willful contempt. Husband was sentenced to ninety days, suspended upon payment of the required expenses mentioned above, as well as a payment of $3,000 in attorney's fees to Wife's counsel.

[11] The family court found Husband "knowingly, willfully and even defiantly exposed the minor child to his paramour and has shown a blatant disregard" for the consent order.

Several motions, including Husband's January 25, 2011 motion to declare the contempt purged, were resolved by order dated March 24, 2011. In the March 24th order, the family court accepted Wife's agreement that Husband could purge his contempt sentence, based upon his assertion that he had made arrangements for support payments, as well as Husband's payment of the $3,000 in attorney's fees previously ordered. In that same order, the court denied Husband's motion to sell or pledge up to ten percent of his interest in BHBI as well as Wife's motion to either purchase BHBI or be awarded complete control over the day-to-day operations of the business. In a separate order, the family court required Husband and Wife to each contribute $5,000 toward a joint court-appointed CPA by March 25, 2011.

The two-week trial was held March 28–April 1, 2011, and May 23–27, 2011. When the trial started, Wife had complied with her $5,000 obligation to the CPA, but Husband had not. Wife filed another rule to show cause petition (Rule 6) on May 10, 2011, alleging Husband had failed to pay the previously ordered CPA fees and attorney's fees.[12] Despite Wife's requests, these contempt issues were never resolved. On June 17, 2011, after the trial concluded, but before the final order was issued, Wife filed a motion to reopen the case based on newly discovered evidence.

On July 18, 2011, the family court entered an interim order, addressing the divorce only. Despite Wife's request for a divorce on the ground of adultery, the court granted dissolution on the ground of one year's continuous separation. On September 22, 2011, Wife moved to alter or amend the interim order pursuant to Rules 52, 59, and 60, SCRCP, and Rule 2(a), SCRFC. The family court denied this motion by order dated October 15, 2011. Wife appealed on November 18, 2011.

On July 25, 2011, the family court emailed counsel for Brother, requesting that he submit two proposed orders to the court: one order denying Wife's motion to reopen and another setting out the trial court's final order in the case on all remaining issues. Instead, Brother's counsel drafted a single order (Final Order), incorporating both the family court's denial of Wife's motion to reopen as well as its rulings on the remaining property and support issues.

[12] Husband has not appealed this order of contempt.

Upon receipt of the Final Order, Wife's counsel emailed and wrote the family court and opposing counsel, requesting an opportunity to respond to Brother's proposed order. However, the family court ignored this request, made no revisions to Brother's submitted proposed order, and issued its Final Order on September 6, 2011.

On September 22, 2011, Wife timely filed a motion to alter or amend the Final Order, which the family court denied by order dated November 30, 2011. Wife appealed the Final Order on January 6, 2012. The two appeals were subsequently consolidated.

Wife contends the family court erred in (1) permitting Brother to intervene or, in the alternative, failing to control the extent of Brother's intervention; (2) denying Wife's motion to reopen on the basis of newly discovered evidence; (3) imputing income of only $100,000 per year to Husband; (4) failing to award Wife alimony; (5) failing to make a proper child support determination; (6) failing to require that Husband maintain life insurance/other security; (7) erroneously apportioning the marital property in several respects; (8) failing to find Wife has a special equity in certain businesses; (9) declining to hold Husband in contempt; (10) failing to grant Wife a divorce on the ground of adultery; and (11) failing to award Wife attorney's fees.

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654–55 (emphasis omitted). "However, this broad scope of review does not require an appellate court to disregard the factual findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id*. at 387–88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually

supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 389–90, 709 S.E.2d at 654–55. However,

> *Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard. *See, e.g.*, *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (stating on appeal from the family court "the admission or exclusion of evidence is within the trial judge's discretion" (citing *Fields v. Reg'l Med. Cent. Orangeburg*, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005))); *Gov't Employee's Ins. Co., Ex parte*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) (stating on appeal from the family court, "The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court."); *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013) (stating on appeal from the family court, "The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge.").

Stoney v. Stoney, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018).

LAW/ANALYSIS

I. Brother's Intervention

Wife argues persuasively that the family court erred in its Final Order and decree of divorce on a number of bases. According to Wife, most problematic was "the trial court's surrender to the dictates of Husband's brother, the Third Party Intervenor, whose control was so great that the trial court instructed his attorney to prepare the Final Order in the case, then [signed] that order with no changes whatsoever and without allowing Wife's attorneys any input." (footnote omitted).

Wife contends the family court erred in allowing Brother to enter, and essentially control, the litigation. We agree and hold that even if the family court did not err in

permitting intervention, the degree to which the court permitted Brother's counsel to involve himself in matters wholly unrelated to those in which Brother had a purported interest was certainly erroneous.
Rule 24(a), SCRCP, provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). Thus, this court "should consider the practical implications of a decision denying or allowing intervention." *Id.* "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." *Id.* "A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Id.* (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

Pursuant to the family court's order granting intervention, Brother was allowed to enter the litigation on the following grounds: (1) Brother was joint owner of some of the marital property, (2) he was co-obligor on certain marital debts, (3) he had mortgaged some of his own property to obtain funds for Husband's businesses, and (4) he made loans to Husband to protect Husband's business interests. Wife notes Brother did not seek to enforce any debts he alleges were owed to him by Husband until he filed this motion to intervene approximately nine months after the marital litigation commenced.

Wife also argues Brother lacked standing because he was not a "real party in interest." As discussed above, a "real party in interest" is one with a "real, actual, material or substantial interest in the subject matter of the action." *See id.* In support of her claim, Wife cites to *Bailey*, in which our supreme court held former attorneys for a party to domestic litigation lacked standing to intervene in the action with regard to an attorney's fees payment. 312 S.C. at 458, 441 S.E.2d at 327. The *Bailey* court explained that "the real interest lies with the parties in the divorce action—the appellants—and they alone have a real proprietary interest in the subject matter of the proceedings. We find that [the attorneys'] interest as claimants asserting a right to attorney fees is peripheral and not the real interest at stake." *Id.*

Unlike the attorneys in *Bailey*, we find Brother satisfied the standing requirement of Rule 24, SCRCP. The record is replete with evidence that Brother had a property interest not only in the marital property, but also in other properties in which Wife argues she holds a marital interest. Brother was a co-obligor of much of the marital debt, which was confirmed by the court-appointed CPA, Tracy Amos. We also agree with the family court in that considering Husband's tenuous financial condition, Brother's interest in the various pieces of property—many of which are a substantial part of this litigation—could not be adequately protected unless Brother was allowed to intervene. Thus, we find the family court did not err in initially determining Brother had an interest in certain property matters at issue in this litigation.

However, our review of the record establishes that the family court abused its discretion in failing to control the depth of Brother's intervention. Throughout the trial, Brother's counsel was permitted to interject objections and comments regarding matters that had nothing to do with Brother's property interests in the litigation.

For example, despite Brother's assertions that he had no ownership interest in Rice Market, Brother objected to questions regarding Rice Market's ownership, stating it "was acquired after the date of filing." Other examples reflecting Brother's unrelated involvement include (1) interrupting Husband when he tried to offer a stipulation; (2) "shushing" Husband when he made comments that might be adverse only to Husband's case; (3) successfully objecting to the introduction of the parenting coordinator's affidavit, despite Husband's statement that he was in agreement with it; (5) successfully making objections during the testimony of one

of Wife's witnesses regarding Husband's false statements to various people about Wife's sexuality; and (6) cross-examining a former employee and babysitter of the couple regarding marital matters that had nothing to do with Brother or his financial interests. Of additional concern is that the family court requested that Brother's counsel draft the Final Order denying Wife's motion to alter or amend an interim order that dealt solely with the parties' grounds for divorce. There is simply no support in either the record or our case law to support the family court's decisions to allow (and even ask) Brother to involve himself—other than as a sworn witness—with issues related to either the grounds for the divorce or the parties' parenting and custody concerns.

We find the family court improperly allowed Brother to influence the manner in which the assets and debts in the divorce case were distributed between Husband and Wife. Further, the family court's direction that counsel for Brother prepare the orders following trial, which the family court subsequently approved as its Final Order, confirms the extent of Brother's influence on issues in this litigation that in no way involved Brother or his interests, such as custody, child support, alimony, and fault. *Cf. Ex parte Gov't Emp's Ins. Co.*, 373 S.C. at 138–39, 644 S.E.2d at 702 ("GEICO has no real interest in whether Cooper and Goethe have a valid common law marriage. GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court."); *id.* at 139, 644 S.E.2d at 703 ("[T]he subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits. Accordingly, GEICO does not have standing to intervene in the family court action because it does not have an interest sufficiently related to the subject matter of the action."); *Slatton v. Slatton*, 289 S.C. 128, 129–30, 345 S.E.2d 248, 249 (1986) (holding titleholder to automobile was entitled to opportunity to appear as a litigant in divorce proceeding and "to offer evidence to protect her property interest.").

Therefore, we hold that while granting the motion to intervene itself may have been proper, the family court's actions in repeatedly permitting Brother to participate (and even control) certain decisions unrelated to the protection of Brother's property interests were erroneous.

II. Wife's Motion to Reopen the Case

After the two-week trial concluded, but before the family court issued its order, Wife moved to reopen the case. Wife's motion was based on several documents she received relating to the sale of a ten-percent share in BHBI to Greg and Constance Holmes as well as Brother's interest in BHEC. Wife argued these documents were relevant to (1) the alleged debts owed to Brother, (2) the credibility of Husband and Brother, and (3) other relevant matters, including a possible undisclosed operating and ownership arrangement regarding BHBI. The family court denied Wife's motion to reopen.

Wife claims that on July 13 and 14, 2011, Constance Holmes gave her a number of documents, including the following:

- A document dated December 21, 2009, from Husband to Greg and Constance Holmes regarding a $175,000 loan secured by up to ten percent of Breach Inlet (BHBI) shares;

- A December 22, 2009 memorandum, from J & S Fish, LLC to Greg Holmes from Keith Jones[13] referencing a $250,000 loan to Crew Carolina secured by ten percent of the net restaurant stock of BHBI;

- A November 23, 2009 promissory note, in the amount of $75,000 (borrower Rice Market, LCC) to be organized and collateralized by an up to five percent interest in BHBI;

- A document titled "Private Placement Memorandum" on BHEC, stating Brother owns fifteen percent; and

- A December 23, 2009 promissory note, in the amount of $50,000 (borrower J & S Fish, LLC, d/b/a Amen Street Fish and Raw Bar) to Greg Holmes signed by Keith Jones.

[13] Keith Jones is the managing member of J & S Fish, LLC, which is the company that operates "The Amen Street Fish and Raw Bar."

To reopen a case based on newly discovered evidence, "a movant must establish that the newly discovered evidence: '(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.'" *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (quoting James F. Flanagan, *South Carolina Civil Procedure* 484 (2d ed. 1996)).

These documents are clearly material to at least one property in which Wife claims she holds an equitable interest and Brother claims a debt. Despite this (and the fact that Husband denied the existence of certain of these documents), the family court offered the following unsupported analysis: (1) the documents would not have affected the outcome of the case, (2) they could have been discovered prior to trial, and (3) Wife sought to use the documents to impeach Husband and Brother.

As to the document dated December 21, 2009, Wife contended throughout the trial that the monies from the Holmes—be it Greg and Constance Holmes or Holmes Capital—were loans. On the other hand, Husband and his accountant, Chip Robinson, contended Holmes Capital purchased a ten percent interest in BHBI. In sum, either Husband owns a sixty versus seventy percent interest in BHBI, or he or his businesses owe repayment of the loan (or loans) to the Holmes. The family court found the net effect of this was immaterial, relying upon its dubious finding that the marital estate had a negative net worth.

The family court's immateriality finding was erroneous, however, because the documents, properly considered, would have affected the outcome of the litigation. The categorization of the "sale" of assets versus "loans" from Brother (and others), as well as the manner in which Husband conducted the accounting relating to BHBI (the only income producing property found to be marital), were the key issues at trial with respect to the valuation of the marital estate and its apportionment.

For example, the Ellis Creek "Private Placement Memorandum" provides Brother was given a fifteen percent interest in BHEC, perhaps with no monetary investment in this particular venture. If this fifteen percent interest was in repayment of certain loans made by Brother, it should have offset at least some of the negative value the family court assigned the marital estate. Because the family court found the marital estate had a negative net worth based in large part upon

Brother's marital debt allegations, business documents addressing Brother's ownership interests in marital assets or business ventures Husband may have financed (even in part) with marital funds certainly would have affected the outcome of the litigation in a properly conducted trial.

The Private Placement Memorandum and Rice Market documents are also material to Husband's control of BHBI, and his repeated use of this asset to fund subsequent business ventures. As noted previously, BHBI was the only remaining income-producing business the family court found to be marital property. And it is not insignificant that Wife holds her own pre-apportionment five percent interest as well as a five percent interest as trustee on behalf of Child. The family court's ruling left Husband in control of not only the only marital income-producing asset, but also Wife and Child's non-marital percentage ownership interests. Thus, it is difficult to discern how such documents could *not* have affected the outcome of the litigation.

Nor can we agree that these documents could have been discovered prior to trial,[14] as the record is replete with evidence that Husband was evasive and uncooperative with discovery. This, along with the family court's repeated refusal to mandate that Husband comply with Rule 20, SCRFC's Financial Declaration requirement, mandates reversal.

III. Husband's Imputed Income

Wife argues the family court erred in imputing income of only $100,000 per year to Husband. Specifically, Wife claims the family court "completely disregarded the overwhelming evidence presented at trial" that Husband's actual income is $892,958 per year. To the extent Husband argues Wife has not preserved the

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[14] It is difficult to determine how the family court reached its conclusion that Wife could have discovered the documents prior to trial because Husband, an attorney, testified that certain of these documents did not exist. *See e.g.*, *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610–11 (2003) ("Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney—an officer of the court—suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.").

imputation issue for review, we disagree. We find the family court's analysis of Husband's income was incomplete and erroneous.

In *Marchant v. Marchant*, 390 S.C. 1, 7, 699 S.E.2d 708, 711 (Ct. App. 2010), the wife alluded to the fact that the husband was capable of earning more in the final hearing; however, she did not request a finding that the husband was voluntarily underemployed for the purpose of imputing income, and the family court did not rule on the issue of income imputation. *Id.* This court subsequently determined that wife was required to file a Rule 59(e), SCRCP, motion to seek a ruling on that point, and she failed to do so. *Id.*

Here, however, Wife raised the issue of Husband's income several times to the family court, and she filed a Rule 59(e), SCRCP, motion seeking that the family court alter or amend its ruling on this issue. Additionally, the court-appointed CPA testified that she neither analyzed Husband's income nor his lifestyle. Despite Wife's repeated requests, Husband was not required to provide a current financial declaration at the start of trial or during the two separate trial weeks.[15] Throughout the two-week trial, Husband referred to a financial declaration that was over a year old, and Wife's counsel systematically dismantled it on cross-examination. Significantly, the family court failed to consider evidence presented regarding the various funds Husband received from his business entities, which he in turn used for personal expenses or to satisfy other obligations.

In *Grumbos v. Grumbos*, 393 S.C. 33, 43, 710 S.E.2d 76, 81 (Ct. App. 2011), the family court imputed additional income to Husband for purposes of calculating alimony, recognizing that "it was difficult to determine Husband's earning potential. Husband's testimony lacks credibility." In affirming, this court explained that "[w]ithout a meaningful representation of Husband's current income, the family court was required to resort to other credible evidence, namely the parties' expenses, in assessing income." 393 S.C. at 43, 710 S.E.2d at 82.

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[15] Husband filed only two financial declarations, one in June of 2009, and one in January of 2010, each reflecting his income to be $8,333 per month. These financial declarations include only the income Husband received from Crew Carolina. They in no way accurately reflect the disbursements paid directly to certain creditors on Husband's behalf, to Husband to cover certain personal expenses, or to Husband (or others for Husband) to fund other business concerns.

Here, Husband's business records reflected distributions of the following: (1) approximately $76,000 from Crew, identified only as "Cash Disbursements"; (2) another $266,000 from Crew, identified only as "Miscellaneous Expenses"; and (3) over $258,000 from BHBI, identified only as "Miscellaneous Expenses."

Husband's testimony that none of these expenses or disbursements were for his personal use is contradicted when examined in conjunction with his financial records. Specifically, the following were paid to or on Husband's behalf by Crew and BHBI: (1) approximately $14,000 for Husband's trips to France, New York, and Chicago; (2) approximately $4,400 in payments to Child's private school; (3) $42,000 in one year paid for his life insurance premiums; (4) thousands of dollars in payments on condo and farm mortgages; and (5) thousands of dollars paid to employees doing personal labor.

Husband claimed on multiple occasions throughout the trial that he was "broke" and survived on just $250 per week; however, as explained herein, the evidence shows Husband actually lived a comfortable lifestyle, despite his claims that he was likely being forced into bankruptcy. Based on the foregoing, we reverse and remand the income determination because the family court's imputation of only $100,000 in income per year to Husband was erroneous.

IV. Alimony

Wife argues the family court erred in failing to award her alimony, pointing to several factors she believes weigh heavily in favor of a substantial award of permanent alimony. Because we hold the family court improperly calculated Husband's imputed income, we reverse the denial of alimony and remand for the family court to conduct an appropriate alimony analysis.

"Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage." *Reiss v. Reiss*, 392 S.C. 198, 208, 708 S.E.2d 799, 804 (Ct. App. 2011). "If an award of alimony is warranted, the family court has a duty to make an award that is fit, equitable, and just." *Id.* South Carolina law provides that "[t]he family court may grant alimony in such amounts and for such term as the judge considers appropriate under the circumstances. *Id.*

In determining an award of alimony, the family court must consider the following factors:

> (1) duration of the marriage; (2) the physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of the children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the family court considers relevant.

Id. at 209, 708 S.E.2d at 804–05 (citing S.C. Code Ann. § 20-3-130(C) (2014)). "However, '[t]he family court is only required to consider relevant factors.'" *Id.* at 209, 708 S.E.2d at 805 (alteration in original) (quoting *King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009)). Further, "[a]limony is not intended to be a reward to one nor a punishment to the other. It is basically for the purpose of maintaining the status quo as near as possible [as] established by the parties." *Kane v. Kane*, 280 S.C. 479, 484, 313 S.E.2d 327, 330 (Ct. App. 1984).

Because the family court erred in calculating Husband's income and the marital debt—and reached no calculation as to the value of the marital estate, discussed *infra*—we reverse the denial of alimony to Wife and remand for the family court to consider Wife's entitlement to alimony in conjunction with an appropriate equitable apportionment analysis.

V. Child Support Determination

Wife argues the family court erred in its determination of child support by (1) not properly calculating Husband's income when it set the child support and (2) not considering the needs of Child. Because we hold Husband's income was improperly calculated, the child support award must be reversed as well.

In the Final Order, the family court ordered Husband to pay directly to Wife monthly child support of $821 pursuant to the South Carolina Child Support Guidelines. The family court based this number upon an imputed income to Wife of $45,000 annually and to Husband of $100,000 annually. Additionally, the family court ordered Husband to provide health insurance for Child; however, Wife was ordered to pay the first $250 of uncovered medical, dental, and prescription expenses incurred per calendar year.

In support of her argument that the family court should have departed from the Child Support Guidelines and required Husband to provide additional benefits, Wife cites to *Rabon v. Rabon*, 288 S.C. 338, 342 S.E.2d 605 (1986). The court in *Rabon* held the trial court erred when it failed to consider the cost of private schooling for the children when they could benefit from enrollment and father was able to afford to contribute. *Id.* at 340, 342 S.E.2d 606–07. In this case, Wife points out that Child grew up with the benefit of the following: (1) private schooling at Ashley Hall School, (2) attending summer camps, (3) a nice home, (4) vacation homes, (5) music lessons, (6) extensive travel, and (7) horseback riding/showing.

However, unlike the father in *Rabon*, it is not clear whether Husband can afford to pay for Child's private school education. While we agree with the family court that "both parties' standard of living must be substantially decreased as they have in the past lived off monies borrowed from various people or companies," we must remand this issue to the family court because Husband's income was not properly determined.

VI. Life Insurance to Secure Award of Alimony

Wife argues the family court erred in failing to require Husband to maintain life insurance or other security for alimony and child support. We remand this question for the court's consideration in conjunction with its alimony analysis and the recalculation of child support.

"The family court may order the payor spouse to obtain life insurance as security for an alimony or child support obligation if the supported spouse can demonstrate the existence of special circumstances with reference to her need for security and the payor spouse's ability to provide it." *Smith v. Smith*, 386 S.C. 251, 264, 687 S.E.2d 720, 727 (Ct. App. 2009). "In considering whether the supported spouse

has demonstrated a need for such security, the family court shall consider 'the supported spouse's age, health, income, earning ability, and accumulated assets.'" *Id.* (quoting *Wooten v. Wooten*, 364 S.C. 532, 553, 615 S.E.2d 98, 109 (2005)). "If a need for security is found, the family court should then consider 'the payor spouse's ability to secure the award with life insurance by considering the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plan carried by the parties during the marriage.'" *Id.* (quoting *Wooten*, 364 S.C. at 553, 615 S.E.2d at 109).

Wife argues "the circumstances justify requiring Husband to secure his alimony and child support payments with the same life insurance he had for the benefit of Wife and daughter during the marriage." As to these circumstances, Wife pointed out that Husband, who was fifty-nine at the time of trial, is fifteen years older than Wife. Additionally, Child was twelve years old at the time of trial.

Our review of the record and the family court's orders does not demonstrate that the family court properly considered the need for the security or Husband's "income, earning ability, and accumulated assets" with respect to any of its findings. Thus, we reverse and remand the question of requiring Husband to maintain life insurance or other support security.

VII. Equitable Division of Marital Assets and Debts

Wife argues the family court erred in identifying, valuing, and apportioning various marital assets and debts. Specifically, Wife asserts the family court erred in: (1) its determination and apportionment of the marital interests in BHBI; (2) finding no "special equity" or transmutation in Kensington Plantation and the King Street properties; (3) its determination and apportionment of the "debts" owed to Brother; (4) ordering that Wife be responsible for certain debts owed to Brother; (5) failing to credit the marital estate with 50% of the $175,000 upfit monies; (6) reducing the value of 101 Palm Boulevard by $424,203; (7) failing to apportion valuable marital artwork between the parties; and (8) failing to include Wife's debts in the equitable division.

The equitable apportionment statute, section 20-3-620(B) of the South Carolina Code (2014), enumerates the factors that must be considered by the family court in determining the appropriate division of marital assets. *See Smith v. Smith*, 327 S.C.

448, 460, 486 S.E.2d 516, 522 (Ct. App. 1997) (discussing the predecessor statute to section 20-3-620).

> These [factors] include, *inter alia*, the duration of the marriage, marital misconduct by either spouse, the health of each spouse, the income of each spouse, and the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker.

Id.

As set forth above, the family court's conduct of the trial with regard to Brother's interest in the marital estate and Husband's debts owed to Brother was problematic and erroneous, leading to its finding that "[t]here is no equity in the marital assets." The root of this error, exacerbated by the conduct of the two-week trial itself, was the failure of the family court to "ensure that the debts were incurred for the joint benefit of the parties during the marriage." *See Allen v. Allen*, 287 S.C. 501, 507, 339 S.E.2d 872, 876 (Ct. App. 1986) (reversing portions of equitable distribution award which charged marital estate with loans from husband's sister and denied wife any interest in office building erroneously determined to have no equity to divide). In *Allen*, our court emphasized that "loans from close family members must be closely scrutinized for legitimacy." *Id*. No such scrutiny was applied in this matter.

We find the family court erred in ignoring the extent to which Kensington Plantation and the King Street properties have been interwoven with the debts owed Brother and the ongoing financing of the marital (and Husband's newer) business ventures. This, in addition to the errors noted above with regard to the family court's lack of concern with the unauthorized sale of ten percent of BHBI (and the undisclosed documents detailing such), the income from BHBI that the court failed to attribute to Husband, the failure of the court to consider Brother's undisclosed interest in BHEC, and the use of BHBI funds for such new ventures as Amen Street, J & S Fish, LLC, and Rice Market requires reversal of the entire equitable apportionment analysis as to both marital assets and marital debt.

VIII. Wife's Special Equity in New Businesses

Wife argues Husband has used marital funds from the couple's various businesses to fund the construction and operation of Amen Street Fish and Raw Bar, J & S Fish, LLC, and the Rice Market restaurant despite Husband's claims that BHBI—his only income-producing asset—struggles to make payroll. For the aforementioned reasons, we reverse the family court's denial of a special equity to Wife. On remand, in consideration of this question, the family court must determine if the new businesses have been supported with funds either (1) earned by BHBI prior to the date of filing or (2) in which Wife and Child hold a percentage interest.

IX. Contempt

Wife argues the family court erred in failing to find Husband in contempt for refusing to pay his portion of the fee for the court-appointed CPA as well as the fees Husband was ordered to pay Wife's attorney upon consideration of the sixth rule to show cause. We agree.

"Contempt results from the willful disobedience of an order of the court." *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *Smith v. Smith*, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. § 63-3-620 (Supp. 2015) ("An adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court, or who violates any provision of this chapter, may be proceeded against for contempt of court."). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting *Spartanburg Cty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988)). "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." *Smith-Cooper v. Cooper*, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001).

Husband's contempt sentence from the sixth rule to show cause was suspended on the condition that he make the court-ordered payments to the court-appointed CPA and Wife's attorney. Because Husband failed to make the two payments, the family

court erred in failing to hold Husband in contempt or in any way address his nonpayment.

X. Grounds for Divorce

Wife next argues the family court erred in failing to grant her a divorce on the ground of adultery because the court's findings in the interim order granting the divorce on the ground of the parties' one-year separation are not supported by the preponderance of the evidence.[16] As Wife presented the clear and positive evidence necessary to establish infidelity while scant evidence supports the findings in the interim order, we agree and reverse.

In *Brown v. Brown*, 379 S.C. 271, 277–78, 665 S.E.2d 174, 178 (Ct. App. 2008), this court held proof of adultery must be made by a clear preponderance of the evidence and it may be proven by circumstantial evidence that shows a disposition to commit the offense as well as the opportunity to do so. "Generally, 'proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed.'" *Id.* at 278, 665 S.E.2d at 178 (quoting *Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985)).

The record here is well-developed on the question of Husband's adultery; thus, this court may make its own findings in accordance with the preponderance of the evidence. *Thomson v. Thomson*, 377 S.C. 613, 623, 661 S.E.2d 130, 135 (Ct. App. 2008) (recognizing the appellate court may, "[when] the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence." (quoting *Badeaux v. Davis*, 337 S.C. 195, 203, 522 S.E.2d 835, 839 (Ct. App. 1999))).

In his Answer and Counterclaim, Husband admitted his adultery as to one paramour, but denied it as to another. Wife presented evidence from a private investigator, however, which belied Husband's denial. After the filing of the Answer and Counterclaim—and at trial—Husband admitted to his adulterous relationships with both women. Although we decline to detail here all of the evidence presented by Wife, one event bears mention. Less than two months after

[16] Neither party sought a divorce on the ground of one year separation in their pleadings.

the parties' separation, one of the paramours spent the night with Husband while Child was present. When Wife learned of this occurrence, she filed the action seeking a divorce.[17]

The family court's own final order acknowledges Husband's fault—in the section of the order in which the court denies Wife alimony. The court found, "The Defendant [Husband] was at fault for having sexual relationships *either at or after* the parties' separation . . . prior to the issuance of the Court's Temporary order . . . ." (*Emphasis added*). Yet the court's interim order granting the divorce ignores Wife's evidence and Husband's admissions, finding simply that "the ultimate and proximate cause for the break-up of this marriage was the separation of the parties, not the post separation adultery." In light of these conflicting findings, the family court's erroneous finding of a 2007 separation date,[18] Husband's admissions, and the corroborated evidence presented by Wife, we grant Wife a divorce on the ground of adultery.

XI. Attorney's Fees

Finally, Wife argues the family court erred in not awarding her attorney's fees and costs. We agree.

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses to either party in a divorce action. "A family court should *first* consider the following factors as set forth in *E.D.M. v. T.A.M.*, in deciding *whether* to award attorney's fees and costs: (1) each party's

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[17] Wife clearly established Husband committed adultery with one employee paramour around the time the parties separated—the catalyst for the separation—and with a second employee paramour shortly after the separation of the parties but prior to the date of filing—the catalyst for the divorce action.

[18] For example, the interim order finds plaintiff's former counsel testified the parties separated in 2007. He did not. He merely stated Husband told him the parties had separated. Husband admitted to spending a single night on his boat in 2007. Testimony at trial established March 2009 as the time of the parties' separation. Wife returned home from a trip with Child to find that Husband had not stayed at the home on the previous night. The parties separated after this incident. Phone records and Husband's admissions corroborated this testimony.

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." *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010) (citing *E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816). "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) (citing *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666).

Here, the Final Order generally acknowledges the *E.D.M.* factors in deciding whether to award attorney's fees, but this finding is significantly impacted by the family court's erroneous rulings on Husband's income, alimony, and child support. Further, "if the substantive results obtained by counsel are reversed on appeal, the attorney's fee award must also be reversed." *Sexton v. Sexton*, 310 S.C. 501, 503–04, 427 S.E.2d 665, 666 (1993); *see also*, *E.D.M. v. T.A.M.*, 307 S.C. 471, 477, 415 S.E.2d 812, 816 (1992) (reversing the award of attorney's fees where the substantive results achieved by counsel were reversed on appeal).

A proper calculation of Husband's true income would establish his greater ability to pay fees. In addition, Husband's behavior in eliciting six rules to show cause, as well as his conduct throughout the trial, significantly increased the costs of this litigation. Thus, we reverse and remand with instructions for a proper analysis and award of Wife's attorney's fees and costs, including the ongoing suit costs she will likely incur on remand.

As to expert costs, the family court found both parties should equally bear the costs of the court-appointed CPA, Tracy Amos. We agree with Wife's argument that there is nothing in the Final Order regarding the reallocation of fees previously ordered to be paid to Amos. Therefore, we conclude this matter should also be remanded to the family court for a determination of the proper allocation of litigation expenses, including the impact of the rulings to be made on any open contempt issues.

CONCLUSION

"When an order from the family court fails to make specific findings of fact in support of the court's decision, the appellate court may remand the matter to the family court" but when the record is sufficient, the court "may make its own

findings of fact in accordance with the preponderance of the evidence." *Thomson*, 377 S.C. at 623, 661 S.E.2d at 135.

Unfortunately, the record here simply does not provide the information necessary for this court to make its own findings as to Husband and Wife's actual marital assets and debts, Husband's true income, the BHBI income not properly distributed to Wife and Child (with respect to both marital income and in accordance with their percentage ownership interests), the income Husband diverted to fund his ongoing business ventures, any legitimate debts that may be owed Brother, and the extent to which Brother may or may not have an interest in certain marital properties.[19] Because of the conduct of the trial, Wife did not have a full and fair opportunity to develop the record and present the necessary evidence on these issues. Thus, we are unable to simply correct any error found in our de novo review. Instead, we must reverse and remand for the family court to proceed in accordance with this opinion. We grant Wife's request for a divorce on the ground of adultery.

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.

[19] Regrettably, this is in large part due to Husband's antics and the family court's repeated failure to address his contemptuous behavior.