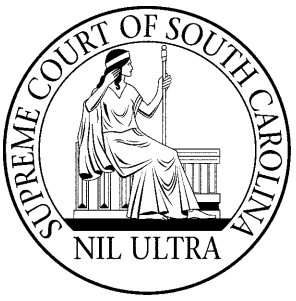

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 10, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27436 - Clifford C. Hansen v. Fields Company, LLC	Pending
2014-MO-021 - Seyed D. Tahaei v. Sherri L. Tahaei	Pending
2014-MO-022 - Travelers Property v. Senn Freight	Pending
2014-MO-031 - Andreal Holland v. J. C. Witherspoon, Jr.	Pending
2014-MO-034 - Barbara Clark v. Fred Henderson Moore	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5257-State v. Jefferson Perry	Pending
5258-State v. Wayne Stewart Curry	Pending
5259-State v. Victor A. White	Pending
5261-State v. Roderick Pope	Pending
5265-State v. Wayne McCombs	Pending
5267-Steve Bagwell v. State	Pending
2014-UP-203-Helena P. Tirone v. Thomas W. Dailey	Denied 09/04/14
2014-UP-215-Yossi Haina v. Beach Market, LLC	Pending
2014-UP-217-State v. Douglas Bret Bishop	Denied 09/04/14
2014-UP-224-State v. James E. Wise	Pending
2014-UP-235-Rest Assured, LLC v. SCDEW	Pending
2014-UP-240-Robert A. Warren, Jr. v. State	Pending
2014-UP-255-Loretta Katzburg v. Peter Katzburg	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-273-Gregory Feldman et al. v. William Casey et al.	Denied 09/04/14
2014-UP-299-Lucille Smith v. The Heirs at law of Benjamin Days	Pending
2014-UP-304-State v. Tawanda Allen	Pending
2014-UP-305-Tobacco Merchant v. City of Columbia Zoning	Pending
2014-UP-306-Yadkin Valley v. Oaktree Homes	Pending
2014-UP-307-Desiree Gabriel Brown v. Wendell Brown	Pending
2014-UP-317-Cherry Scott v. Heritage Healthcare	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending

2014-UP-323-SCDSS v. Rubi Bertaud-Cabrera Pending

2014-UP-324-State v. Randy Jarrod Crosby Pending

2014-UP-325-Madeleine Arata v. Village West Owners Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4909-North American Rescue v. Richardson Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

5008-Willie H. Stephens v. CSX Transportation Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al. Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual Pending

5025-State v. Randy Vickery Pending

5031-State v. Demetrius Price Pending

5052-State v. Michael Donahue Pending

5055-Hazel Rivera v. Warren Newton Pending

5077-Kirby L. Bishop et al. v. City of Columbia Pending

5078-Estate of Livingston v. Clyde Livingston Pending

5092-Mark Edward Vail v. State Pending

5099-Roosevelt Simmons v. Berkeley Electric Pending

5112-Roger Walker v. Catherine Brooks Pending

5118-Gregory Smith v. D.R. Horton Pending

5119-State v. Brian Spears	Pending
5140-Bank of America v. Todd Draper	Pending
5151-Daisy Simpson v. William Simpson	Pending
5152-Effie Turpin v. E. Lowther	Pending
5156-State v. Manuel Marin	Pending
5160-State v. Ashley Eugene Moore	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5191-Jacqueline Carter v. Verizon Wireless	Pending
5193-Israel Wilds v. State	Pending
5195-Laura Riley v. Ford Motor Company	Pending
5196-State v. James Anderson	Pending
5197-Gladys Sims v. Amisub	Pending
5198-State v. Julia Gorman and Robert Palmer	Pending
5200-Tynyasha Horton v. City of Columbia	Pending
5201-Phillip Grimsley v. SLED	Pending
5203-James Teeter v. Debra Teeter	Pending
5209-State v. Tyrone Whatley	Pending
5214-State v. Alton W. Gore, Jr.	Pending
5217-H. Eugene Hudson v. Mary Lee Hudson	Pending
5224-State v. Alex Lorenzo Robinson	Pending

5227-State v. Frankie Lee McGee	Pending
5230-State v. Christopher L. Johnson	Pending
5231-Centennial Casualty v. Western Surety	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-062-State v. Christopher Stephens	Pending

2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending

2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-020-Joseph Marshall v. Carrie Marshall	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-056-In the matter of the care and treatment of P. Guess	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-082-W. Peter Buyck v. Williams Jackson	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-091-State v. Eric Wright	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-103-State v. David Vice	Pending
2014-UP-113-State v. Jamaal Hinson	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending
2014-UP-121-Raymond Haselden v. New Hope Church	Pending
2014-UP-122-Ayree Henderson v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-159-City of Columbia v. William K. Wilson	Pending
2014-UP-167-State v. David G. Johnson	Pending

2014-UP-172-Willie Rogers v. Charles Carr	Pending
2014-UP-173-Reda Reilly v. Kevin Reilly	Pending
2014-UP-178-State v. Anthony R. Carter	Pending
2014-UP-180-State v. Travas D. Jones	Pending
2014-UP-183-Allison Johnson v. Russell Johnson	Pending
2014-UP-187-State v. Mark Peters	Pending
2014-UP-192-Lawrence Terry v. Allen University	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alfred Adams, Petitioner.

Appellate Case No. 2012-212779

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27445
Heard May 7, 2014 – Filed September 10, 2014

REVERSED AND REMANDED

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

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia, and Solicitor Scarlett Wilson, of Charleston, for Respondent.

JUSTICE KITTREDGE: Believing Petitioner Alfred Adams was a drug dealer, officers from the North Charleston South Carolina Police Department (NCPD), acting without a warrant, placed a Global Positioning System (GPS)[1] device on a vehicle driven by Adams. After monitoring Adams' travel to Atlanta, Georgia, and upon his return to South Carolina, law enforcement stationed a drug canine unit on the interstate within the NCPD's jurisdiction, with instructions to conduct a traffic stop on Adams' vehicle. An officer conducted the requested traffic stop and discovered cocaine in Adams' possession, which resulted in Adams' arrest. Adams moved to suppress the drugs, arguing that the warrantless installation of the GPS device violated the Fourth Amendment. The trial court denied Adams' motion, finding no constitutional violation. The court of appeals found the warrantless installation of the GPS device violated the Fourth Amendment but determined that the exclusionary rule did not apply because "Adams's traffic violations were intervening criminal acts sufficient to cure the taint arising from unlawfully installing the [GPS] device and monitoring the vehicle." *State v. Adams*, 397 S.C. 481, 489, 725 S.E.2d 523, 527–28 (Ct. App. 2012). We reverse and remand.

I.

In 2008, a confidential informant approached the NCPD and informed officers that Adams was selling cocaine and heroin in the North Charleston area. The confidential informant informed officers that Adams purchased drugs from Atlanta and New York. After an investigation, officers installed a GPS device on the undercarriage of Adams' car, which was parked in a public garage in Charleston. Officers inexplicably did not obtain a warrant or court authorization for the installation of the GPS device. Thereafter, the officers monitored Adams' movements by way of the GPS data. Five days after installing the device, the GPS data indicated that Adams' vehicle was in Atlanta.

When Adams' vehicle was returning toward Charleston, investigators contacted Sergeant Timothy Blair and instructed him to position himself, along with a drug

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[1] "Global Positioning System (GPS) data is a technique by which radio signals are received . . . from a system of satellites in geosynchronous orbit and interpreted by programs to provide highly accurate location data." *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 137 (E.D.N.Y. 2013).

canine, at a rest area on Interstate 26 in North Charleston. Sergeant Blair, who was aware that Adams was a suspected drug dealer, was instructed be on the lookout for Adams and to conduct a traffic stop. Soon thereafter, Sergeant Blair observed Adams' vehicle and pulled onto the interstate behind it. A short time later, Adams committed an improper lane change. Sergeant Blair did not, however, initiate a traffic stop. Instead, Sergeant Blair continued to follow Adams, observed another traffic violation, and waited for Adams to drive near Charleston Southern University before turning on his blue lights and directing Adams to pull over.

This was no ordinary traffic stop. Sergeant Blair immediately called for backup and drew his weapon as he approached the vehicle. The backup officer, Officer James Greenawalt, arrived one or two minutes later. Sergeant Blair directed Greenawalt to remove Adams from the vehicle and run a license check. Meanwhile, Sergeant Blair used the dog to conduct a perimeter sniff of Adams' vehicle. The dog alerted to the driver's door of Adams' vehicle.

At this point, Sergeant Blair instructed Greenawalt to pat Adams down for weapons. In doing so, Greenawalt felt a "jagged, round object" near Adams' groin that he believed to be narcotics. Greenawalt retrieved the item, which was 141.62 grams of cocaine.

Adams was charged with trafficking cocaine and possession with the intent to distribute cocaine within proximity of a school.

II.

Prior to trial, Adams moved to suppress the seized evidence, contending that the installation and monitoring of the GPS device violated the Fourth Amendment and section 17-30-140 of the South Carolina Code (2014), which requires officers to obtain a court order prior to installing a mobile tracking device.

In response, the State first contended that there was no constitutional violation, relying on *United States v. Knotts* for the proposition that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. 276, 281 (1983). Second, the State admitted that the officers did not obtain court authorization pursuant to section 17-30-140. In fact, the officers did not even know about the statute's

existence. The State nevertheless claimed that, even if the officers violated the statute, suppression was not warranted absent a constitutional violation.

The trial court found that officers violated section 17-30-140 by not obtaining a court order prior to installing the GPS device. Clearly disturbed by the State's failure to comply with section 17-30-140, the trial court remarked: "Start following the statute or at some point in time, [the evidence is] going to be suppressed." Ultimately, however, the trial court found no constitutional violation and concluded that the statutory violation alone did not warrant suppression of the drug evidence.

The case proceeded to a bench trial. The trial court found Adams guilty of trafficking cocaine and sentenced him to twenty-five years in prison and a $50,000 fine.[2]

Adams appealed to the court of appeals, during the pendency of which, the United States Supreme Court issued *United States v. Jones*, 132 S. Ct. 945 (2012). In *Jones*, the Supreme Court held that "the Government's [warrantless] installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 132 S. Ct. at 949. While the Supreme Court's holding of a Fourth Amendment violation was unanimous, the majority's rationale was based on a theory of trespass, characterizing the government's conduct as the physical occupation of private property for the purpose of obtaining incriminating evidence. *Id.*

Relying on *Jones*, the court of appeals found that the failure to obtain a warrant violated the Fourth Amendment. *Adams*, 397 S.C. at 488–89, 725 S.E.2d at 527. However, the court of appeals held that the exclusionary rule did not apply because "Adams's traffic violations were intervening criminal acts sufficient to cure the

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[2] The trial court directed a verdict of acquittal for Adams on the proximity charge, for the proximity charge was the result of the officer's decision to conduct the traffic stop near Charleston Southern University. As the trial court observed, "all [Adams] was doing was following the direction of the police officer who stopped him [with] a blue light and he just happened to be across the street from Charleston Southern University." After directing a verdict for Adams, the trial court agreed to the State's request to *nolle pros* the proximity charge.

taint arising from unlawfully installing the device and monitoring the vehicle." *Id.* at 489, 725 S.E.2d at 527.

We issued a writ of certiorari to review the court of appeals' decision. The State has not challenged the court of appeals' holding that officers violated the Fourth Amendment. Thus, the only question before this Court is whether suppression may be avoided by the intervening criminal acts doctrine, or some other alternative sustaining ground.

III.

"In criminal cases, this Court only reviews errors of law." *State v. Gamble*, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing *State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)). However, this Court reviews questions of law de novo. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted).

A.

Adams contends that the court of appeals erred in finding that his traffic violations were intervening criminal acts that dissipated the taint from the unlawful search and concluding the facts did not warrant suppression. We agree.

The exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The remedy of exclusion "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citation omitted). However, "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009) (citing *Illinois v. Gates*, 462 U.S. 213, 223 (1983)). To that end, courts have recognized several exceptions to

the exclusionary rule,[3] two of which are implicated in this case—the attenuation/intervening act doctrine and the good-faith reliance exception. We turn first to the court of appeals' holding that suppression was not warranted because Adams' traffic violations were intervening criminal acts.

"Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible." *United States v. Najjar*, 300 F.3d 466, 477 (4th Cir. 2002) (citing *Wong Sung v. United States*, 371 U.S. 471, 484–85 (1963)). "However, not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint." *Id*. "To determine whether the derivative evidence has been purged of the taint of the unlawful search, we [may] consider several factors, including: (1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *United States v. Gaines*, 668 F.3d 170, 173 (4th Cir. 2012) (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)).

The court of appeals relied on *State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999), to support its finding of attenuation. We find *Nelson* inapplicable to this case. In *Nelson*, a police officer was driving behind the defendant and flashed his high beam lights to get the defendant's attention. 336 S.C. at 189, 519 S.E.2d at 787. The defendant responded by driving through a stop sign. *Id*. The officer followed and conducted a traffic stop. *Id*. After approaching the vehicle, the officer smelled alcohol, and the defendant refused to participate in field sobriety tests. *Id*. On appeal, this Court held that "even assuming [the officer's] initial attempt to stop Defendant would have violated the Fourth Amendment, [the officer] was nonetheless justified in making the stop after Defendant committed the subsequent traffic infractions." *Id*. at 193, 519 S.E.2d at 789. This Court's rationale was that "'[t]here is a strong policy reason for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest.'" *Id*. at 194, 519 S.E.2d at 790 (quoting *United States v. Sprinkle*, 106 F.3d 613, 619 (4th Cir. 1997)).

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[3] *See, e.g., United States v. Leon*, 468 U.S. 897, 919 (1984) (good-faith reliance); *Nix v. Williams*, 467 U.S. 431, 443 (1984) (inevitable discovery); *United States v. Crews*, 445 U.S. 463, 471 (1980) (independent source doctrine); *Wong Sun v. United States*, 371 U.S. 471, 486–91 (1963) (attenuation).

Here, however, Adams' traffic violations provide an insufficient attenuation from the taint of the illegal search. The traffic stop was entirely predicated on the information obtained from the GPS device and law enforcement's desire to search Adams and his vehicle for drugs. The patrol officer was instructed to find a basis to stop Adams' vehicle so that a search for drugs could be conducted. Even the trial court, without the benefit of *Jones*, repeatedly referred to the stop of Adams' vehicle as "a trap," noting that officers "would have never got[ten] behind [Adams] to get the traffic violation if [officers] hadn't had the tracking device." The court of appeals characterized the traffic violations as "intervening criminal acts sufficient to cure the taint arising from unlawfully installing the device[,]" a view which we respectfully reject. *Adams*, 397 S.C. at 489, 725 S.E.2d at 527–28.

We cannot endorse the court of appeals' reasoning, which would unwittingly provide a blueprint for circumventing the protections of the Fourth Amendment. Indeed, were we to sanction the intervening acts rule under these circumstances, law enforcement would be free to install a GPS device on a suspect's vehicle without a warrant, track the suspect with impunity, and cure all ills from the underlying Fourth Amendment violation by waiting for a fortuitous traffic offense. *See Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J. dissenting) ("[United States Supreme Court precedent] allow[s] the police to stop vehicles in almost countless circumstances." (citing *Whren v. United States*, 517 U.S. 806 (1996)); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 Cal. L. Rev. 199, 210 n.61 (2007) ("Many traffic officers say that by following any vehicle for 1 or 2 minutes, they can observe a basis on which to stop it.") (citation and quotation omitted)). Such an affront to the Fourth Amendment would render *Jones* meaningless and would not serve the exclusionary rule's stated purpose of deterring unlawful police conduct. *See State v. Brown*, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012) ("[T]he exclusionary rule's sole purpose is to deter future Fourth Amendment violations . . . .").

Because each of the three attenuation factors weighs against admission of the seized evidence, we hold that Adams' traffic violations were not intervening criminal acts sufficient to dissipate the taint from the underlying Fourth Amendment violation.[4]

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[4] *Accord United States v. Lee*, 862 F. Supp. 2d 560, 564–67 (E.D. Ky. 2012) (applying the exclusionary rule when officers installed a GPS device without a

B.

By way of additional sustaining ground, the State invites us to find that the exclusionary rule should not apply because the officers relied in objective good faith on binding precedent that authorized the placement of a GPS device without a warrant. The presence of our state statute requiring a warrant and the absence of any pre-*Jones* binding precedent in this federal circuit authorizing the placement of a GPS device without a warrant compel us to reject the proposed additional sustaining ground.

In *Davis v. United States*, the United States Supreme Court stated that the exclusionary rule does not apply in cases where "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." 131 S. Ct. 2419, 2427 (2011) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)). The *Davis* court explained, "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Id*. at 2429 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)). "But by the same token, when binding appellate precedent *specifically authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Id*. (first emphasis added). This is so because "[a]n officer who conducts a search in reliance on binding appellate precedent does no more than 'ac[t] as a reasonable officer would and should act' under the circumstances." *Id*. (quoting *Leon*, 468 U.S. at 920).

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warrant, waited for the defendant to return from a drug pickup, and pulled the defendant over for not wearing a seatbelt, based on a finding that the illegal installation of the GPS device did not sever the causal connection between the illegal search and the stop); *State v. Jackson*, 435 S.W.3d 819, 827 (Tex. App. 2014) (finding that exclusion was appropriate even though officers observed the defendant commit a speeding violation); *Hamlett v. State*, 753 S.E.2d 118, 128 (Ga. App. 2013) (excluding evidence seized after a GPS device was installed on defendant's vehicle without a warrant and officers pulled the defendant over for having a broken brake light).

The State contends that two United States Supreme Court cases—*United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Karo*, 468 U.S. 705 (1984)—constitute binding precedent that specifically authorized officers to install a tracking device on Adams' car without a warrant. We disagree.

In *Knotts*, law enforcement, with the owner's consent, concealed a beeper[5] in a container of chloroform that was eventually loaded onto a target vehicle. 460 U.S. at 278. Law enforcement then monitored the beeper and maintained surveillance on the target vehicle, ultimately arresting Knotts several days after he took possession of the container. *Id*. at 279. The Supreme Court found no Fourth Amendment violation, upholding the warrantless use of the beeper because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id*. at 281.

One year later, in *Karo*, the Supreme Court "addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure." *Jones*, 132 S. Ct. at 952 (citing *Karo*, 468 U.S. at 713). In *Karo*, law enforcement officers installed a beeper inside a container of chemicals prior to the container being transferred to the buyer. *Karo*, 468 U.S. at 707. "As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later." *Jones*, 132 S. Ct. at 952 (citing *Karo*, 468 U.S. at 708). The Court held that, because the beeper was installed with the consent of the owner of the container, no search or seizure occurred because "[t]he mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest." *Karo*, 468 U.S. at 712.

Neither *Knotts* nor *Karo* involved, much less expressly or impliedly authorized, a physical trespass as occurred in this case. As the Supreme Court observed in *Jones*, "*Knotts* noted the limited use which the government made of the signals from [the] particular beeper, and reserved the question whether different

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[5] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *Knotts*, 460 U.S. at 277. Conversely, a GPS device uses "signals from multiple satellites" to relay location data (often accurate to within 50 to 100 feet) to a computer. *Jones*, 132 S. Ct. at 948. This distinction is noteworthy because beepers serve as aids to law enforcement already conducting physical surveillance, while a GPS enables officers to take a passive role and simply monitor location data from a computer.

constitutional principles may be applicable to dragnet-type law enforcement practices of the type that GPS tracking [makes] possible . . . ." *Jones*, 132 S. Ct. at 952 n.6 (internal citations and quotations omitted). Moreover, no pre-*Jones* precedent in this federal circuit extended *Knotts* or *Karo* to the installation and monitoring of a GPS device. We conclude *Knotts* and *Karo* did not constitute binding precedent that authorized law enforcement's warrantless actions in this case.

Having found no support in federal jurisprudence for the State's use of the GPS in this case, we turn now to South Carolina law.

Prior to *Jones*, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices. In 2002, as a part of the South Carolina Homeland Security Act,[6] the legislature enacted a statute that provides that "[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State." S.C. Code Ann. § 17-30-140(A). This statutory requirement "provide[s] law enforcement . . . with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties." Act No. 339, 2002 S.C. Acts 3625.

At the suppression hearing, the State acknowledged to the trial court that the officers involved in the investigation did not know about this statutory requirement but sought to justify the failure to obtain a court order pursuant to the statute on the basis that the officers "didn't know they had to." We reject this proposition, for it is a well-established principle, often advanced by the State in criminal prosecutions, "that ignorance of the law is no excuse." *State v. Binnarr*, 400 S.C. 156, 160 n.7, 733 S.E.2d 890, 892 n.7 (2012). There would be a "fundamental unfairness [in] holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it." *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (internal

[6] Act No. 339, 2002 S.C. Acts 3619.

citation omitted) (quoting *Bryan v. United States*, 524 U.S. 184, 196 (1998)). In fact, the officers' lack of knowledge of the existence of section 17-30-140 is exacerbated in this case because the statute had been in effect for almost *six years* at the time the NCPD was investigating Adams.

Because the only binding law in this case was a statute that *forbade* law enforcement officers from installing a GPS device on Adams' car without court authorization, there is no support for the State's invocation of the good-faith reliance exception as an additional sustaining ground to uphold the conviction.[7]

IV.

The exclusionary rule is a judicially created remedy for a Fourth Amendment violation. The primary rationale for the exclusionary rule is to deter police misconduct. Where there is no misconduct, and thus no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction. Other judicially created rules—such as the intervening acts doctrine and the good-faith reliance exception—have developed to avoid suppression. As discussed above, we are constrained to reject the State's reliance on the intervening acts doctrine and the good-faith reliance exception. We do not make our decision lightly. In reversing the court of appeals, we are mindful of and respect greatly the burdens faced daily by our state's law enforcement officers. We are guided by the rule of law, which provides no basis to uphold the denial of Adams' motion to suppress. In law, the ends do not justify the means.

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[7] *Accord State v. Mitchell*, 323 P.3d 69, 78 (Ariz. Ct. App. 2014) (rejecting application of the good-faith exception rule because "no binding Arizona or Supreme Court authority explicitly authorized law enforcement to trespass onto private property to obtain information"); *People v. LeFlore*, 996 N.E.2d 678, 691 (Ill. 2013) (rejecting application of the good-faith exception in a GPS case); *State v. Allen*, 997 N.E.2d 621, 626–27 (Ohio Ct. App. 2013) (rejecting application of the good-faith exception in light of the "unsettled nature of the issue surrounding Fourth Amendment constraints on GPS attachment and tracking" prior to *Jones*).

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Robert G. Howe, Respondent

Appellate Case No. 2014-001875
Appellate Case No. 2014-001876

ORDER

The Office of Disciplinary Counsel petitions the Court to transfer respondent to incapacity inactive status pursuant to Rule 28 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, Peyre T. Lumpkin, and the appointment of attorneys to assist the Receiver pursuant to Rule 31, RLDE. Respondent consents to the issuance of an order transferring him to incapacity inactive status and to the appointment of the Receiver and attorneys to assist the Receiver.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin 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 account(s) 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 account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to

Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

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

The Court appoints Donald H. Howe, Sr., Esquire, and James Kevin Holmes, Esquire, to assist the Receiver in performing the duties imposed by Rule 31, RLDE.

The appointments shall be for a period of no longer than nine months unless an extension of the period of the appointments is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 5, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Denise Hogan, Katrina Massey, and Michael Jackson,
Defendants,

Of whom Katrina Massey is the Appellant.

In the interest of minor children under the age of eighteen.

Appellate Case No. 2013-001751

Appeal from Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5269
Heard July 23, 2014 – Filed September 3, 2014

REVERSED AND REMANDED

Phyllis Walker Ewing and Trudy Hartzog Robertson, both of Moore & Van Allen, PLLC, of Charleston, for Appellant.

Wolfgang Louis Kelly, of South Carolina Department of Social Services, of North Charleston, for Respondent.

Joshua Keith Roten, of Charleston, for the Guardian ad Litem.

PER CURIAM: In this permanency planning appeal, we hold the family court erred in finding it lacked jurisdiction to order reunification when no merits hearing was ever held to determine whether the children were abused or neglected. We also find the family court erred in dismissing the oldest son from the action when he was removed pursuant to a removal action and custody was never permanently awarded to a third party. We reverse and remand with instructions for the family court to hold a merits hearing on the underlying removal action.

FACTS

This removal action began November 10, 2010. At the December 13, 2010 merits hearing, Katrina Massey (Mother) and Michael Jackson (Father) agreed the South Carolina Department of Social Services (DSS) should retain legal and physical custody of their children (Daughter and Son) and Mother and Father would complete treatment plans. However, Mother and Father contested findings of abuse and neglect, and the family court scheduled mediation. Following mediation, Mother and Father agreed DSS should retain legal and physical custody of Daughter, and Denise Hogan, a relative, should have legal and physical custody of Son. The family court approved the agreement on January 24, 2011, finding the parties stipulated the order was being issued without an affirmative finding of fact on the existence of harm or threat of harm to the minor children. The order stated, "[DSS] specifically reserves the right to pursue such a finding of fact at any subsequent [h]earing in this matter, and the rights of all parties to present evidence in support of or in defense against such a finding is likewise reserved."

Mother gave birth to another son (Baby) on February 16, 2011, and the family court issued an ex parte order removing Baby and placing him in DSS's custody. The family court scheduled a merits hearing in Baby's case for April 14, 2011, but it was continued at DSS's request. On May 16, 2011, the family court held a merits hearing in Baby's case, and it issued a final order regarding Father. The family court continued the issues regarding Mother so she could obtain counsel.

The family court scheduled a merits hearing for Baby's case on June 20, 2011, but it was continued because some of the parties were not served. The case was

continued again on August 3, 2011, because it was contested. The family court scheduled mandatory mediation for September 9, 2011, but it was continued because there were not enough mediators.[1] A November 17, 2011 order removed the case from the docket due to docketing error.

On December 16, 2011, the family court held a merits hearing for Baby's case and a permanency planning hearing for Daughter and Son's case. The parties again agreed (1) the order would be issued without an affirmative finding of fact as to the existence of harm or threat of harm by Mother; (2) legal and physical custody of Daughter and Baby should remain with DSS; and (3) legal and physical custody of Son should remain with Hogan.

On February 26, 2013, the family court held a permanency planning hearing for all the children. At the beginning of the hearing, DSS noted the parties had not reached an agreement about the permanent plan. DSS argued reunification could not be a goal because section 63-7-1700(F) of the South Carolina Code (Supp. 2013) prohibits an extension for reunification after a child has been in foster care for eighteen months. Father and Mother asserted they had a right to a merits hearing before proceeding with the permanency planning hearing because the family court never made a finding of abuse and neglect. Citing *South Carolina Department of Social Services v. Smith*,[2] DSS asserted the family court did not need to make a finding of abuse or neglect before determining the children's permanent plan. The guardian ad litem agreed with DSS, and the family court determined it lacked jurisdiction to order reunification based on subsection (F) because the children had been in foster care for more than eighteen months.

Next, the guardian ad litem moved to have Son dismissed from the case pursuant to section 63-7-1670(C)(2) of the South Carolina Code (2010). The guardian ad litem noted Son was placed in relative custody more than eighteen months before and argued the clear language of the statute indicated jurisdiction with respect to Son had terminated. DSS agreed, and the court dismissed Son from the action, finding it no longer had jurisdiction pursuant to subsection (C)(2). In its final order, the family court determined Daughter's and Baby's permanent plan would be

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[1] For the benefit of the bench and bar, we note that requiring mediation for DSS removal actions contradicts Rule 3(b)(8), ADR, which exempts family court cases initiated by DSS from mandatory mediation.

[2] 343 S.C. 129, 134-35, 538 S.E.2d 285, 287-88 (Ct. App. 2000).

termination of parental rights (TPR) and adoption concurrent with relative custody. Mother's appeal followed.

STANDARD OF REVIEW

In reviewing the decision of the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). Although this court retains its authority to make its own findings of fact, we recognize the superior position of the family court in making credibility determinations. *Id.* at 392, 709 S.E.2d at 655.

LAW/ANALYSIS

I. Merits Hearing

"Upon receipt of a removal petition under this section, the family court shall schedule a hearing to be held within thirty-five days of the date of receipt to determine whether removal is necessary." S.C. Code Ann. § 63-7-1660 (D) (2010). "[A] merits hearing must be *scheduled* to be held," but not necessarily *completed*, within thirty-five days. *S.C. Dep't of Soc. Servs. v. Gamble*, 337 S.C. 428, 432, 523 S.E.2d 477, 479 (Ct. App. 1999). A party may request a continuance if exceptional circumstances exist, and if the family court grants the continuance, the merits hearing "must be completed within sixty-five days following receipt of the removal petition." S.C. Code Ann. § 63-7-710 (E) (2010).

> The court may continue the hearing on the merits beyond sixty-five days without returning the child to the home only if the court issues a written order with findings of fact supporting a determination that the following conditions are satisfied, regardless of whether the parties have agreed to a continuance:
>
> (1) the court finds that the child should remain in the custody of the department because there is probable cause to believe that returning the child to the home would seriously endanger the child's physical safety or emotional well-being;

> (2) the court schedules the case for trial on a date and time certain which is not more than thirty days after the date the hearing was scheduled to be held; and
>
> (3) the court finds that exceptional circumstances support the continuance or the parties and the guardian ad litem agree to a continuance.

Id. "The court shall not order that a child be removed from the custody of the parent or guardian unless the court finds that the allegations of the [removal] petition are supported by a preponderance of evidence including a finding that the child is an abused or neglected child . . . ." S.C. Code Ann. § 63-7-1660(E) (2010).

We hold the family court had the authority to order a merits hearing, and it should have done so at the parents' request. Section 63-7-1660(E) is plain and unambiguous, and it mandates a finding of abuse or neglect before a child can be retained in foster care. Here, the family court was presented with the conundrum of holding a permanency planning hearing for children who had been in foster care for more than two years without any affirmative finding they were abused or neglected.[3] Had the family court previously made a finding of abuse or neglect, it would have been correct in finding it could not order an extension for reunification. *See* S.C. Code Ann. § 63-7-1700(F) (Supp. 2013) ("[T]he court may order an extension of the [placement] plan . . . but in no case may the extension for reunification continue beyond eighteen months after the child was placed in foster care."). However, because the family court never made an affirmative finding of

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[3] During oral argument, DSS asserted an agreement to hold a finding in abeyance is a finding within the meaning of section 63-7-1660(E). We find this interpretation is in error. An agreement to hold a finding in abeyance is not an affirmative finding. *See* S.C. Code Ann. § 63-7-20(2) (2010) ("'Affirmative determination' means a finding by a preponderance of evidence that the child was abused or neglected by the person who is alleged or determined to have abused or neglected the child and who is mentioned by name in a report or finding."). Further, by its plain language, the stipulation reserved the "rights of all parties to present evidence in support of or in defense against such a finding." We find the stipulation reserved the parents' rights to request a merits hearing, and they were entitled to such a hearing at their request.

abuse or neglect and the parents never had an opportunity to present evidence to contest such a finding, the family court had more options at the permanency planning hearing, and it should have scheduled a merits hearing at the request of the parents.[4]

In *Ex parte Morris*, 367 S.C. 56, 66, 624 S.E.2d 649, 654 (2006), our supreme court held:

> It is error, in the face of a request by a party for an evidentiary hearing, for the family court to issue a permanency planning order based on an examination of the file and pleadings, the arguments of counsel, and the [guardian ad litem's] report, but without considering testimony and evidence at a hearing where witnesses are subject to direct and cross-examination.

We acknowledge the family court here did not prohibit Mother from presenting testimony at the permanency planning hearing. However, its finding it lacked jurisdiction to order reunification rendered any consideration of evidence moot. Based on the plain language of section 63-7-1700(D) of the South Carolina Code (Supp. 2013), the family court had the jurisdiction and the authority to return the children to Mother if it determined the children could "be safely maintained in the home [because Mother] remedied the conditions that caused the removal and the return of the child[ren] . . . would not cause an unreasonable risk of harm." § 63-7-1700(D). We hold the family court also had the jurisdiction and authority to order a merits hearing at Mother's request.

We take this opportunity to address a practice in Charleston County removal actions we find troubling. During oral argument, DSS stated it commonly allows parties to "reserve" findings of abuse and neglect and then proceeds with the removal action by agreement. DSS indicated it does not intend to pursue a finding of abuse or neglect when the parties agree to hold the finding in abeyance, and it

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[4] The family court must make appropriate findings in order to exceed the statutory timeframe. S.C. Code Ann. § 63-7-710(E). The remedy for the failure to timely complete the merits hearings is to "petition for the return of [the] children or move to vacate the order granting custody to DSS." *S.C. Dep't of Soc. Servs. v. Meek*, 352 S.C. 523, 532, 575 S.E.2d 846, 850-51 (Ct. App. 2002).

asserted such a practice is permissible under *South Carolina Department of Social Services v. Smith*, 343 S.C. 129, 538 S.E.2d 285 (Ct. App. 2000).

In *Smith*, this court considered whether a family court had jurisdiction over a TPR action when the children were removed from the mother without a finding of abuse or neglect. *Id*. at 134-35, 538 S.E.2d at 287-88. This court first noted the family court had jurisdiction over all TPR actions. *Id*. at 135, 538 S.E.2d at 288. Although it believed the family court may have made a finding of abuse or neglect in a prior order, this court held "the lack of such a finding in this case did not deprive the family court of jurisdiction over a proceeding for [TPR]." *Id*.

We are troubled by Charleston County DSS's interpretation of *Smith* to support its position that it does not need to seek a finding of abuse or neglect in a removal action. Such an interpretation clearly contradicts section 63-7-1660(E). When this court decided *Smith*, it did not intend for *Smith* to be construed so broadly. We find this practice is in clear contravention of the removal statutes and could violate the fundamental right parents have to raise their children. *See S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 505, 757 S.E.2d 388, 391 (2014) ("[P]arents have a fundamental liberty interest in the care, custody, and management of their children.").

Because Mother is entitled to a hearing on the merits, we reverse and remand this case for a merits hearing. At the hearing, the family court must determine whether Mother abused or neglected the children. This hearing shall occur within thirty-five days of the remittitur.

II. Dismissal of Son

DSS asserts the January 25, 2011 order transferring legal and physical custody of Son to Hogan was a final order that permanently transferred custody of Son. Although the order purports to be a final order, the actions of the parties show the transfer of custody was a relative placement pending completion of the placement plan rather than an order awarding Hogan permanent custody. The family court addressed Son's custody at a May 25, 2011 judicial review hearing when the parties agreed custody of Son should remain with Hogan. The family court addressed Son's custody again at a December 16, 2011 permanency planning hearing when the parties agreed custody of Son should remain with Hogan. Had the parties intended for the January 25, 2011 order to grant Hogan permanent

custody of Son, the parties would not have continued to address Son's custody at later hearings. Although DSS asserted the January 25, 2011 order awarded Hogan permanent custody of Son, it qualified that statement by asserting permanent custody was transferred "pending completion of the treatment plan." This qualification shows DSS did not intend the transfer of custody to be permanent. Thus, we find the order granting Hogan custody of Son was a relative placement pending the completion of the treatment plan rather than a final order transferring permanent custody to Hogan.

Additionally, we find the family court erred in dismissing Son from the action pursuant to section 63-7-1670(C)(2) of the South Carolina Code (2010). The Children's Code requires DSS to investigate all reports of suspected child abuse and neglect. S.C. Code Ann. § 63-7-900 (2010). "[I]f [DSS] determines by a preponderance of evidence that the child is an abused or neglected child and that the child cannot be protected from harm without intervention," it can file a petition with the family court to intervene and provide services without removing the child from the home. S.C. Code Ann. § 63-7-1650(A) (2010). "[I]f [DSS] determines by a preponderance of evidence that the child is an abused or neglected child and that the child cannot be safely maintained in the home," it can petition the family court to remove the child from the parents' custody. S.C. Code Ann. § 63-7-1660(A) (2010).

If the family court determines "the child shall remain in the home and that protective services shall continue," the family court must approve a treatment plan. S.C. Code Ann. § 63-7-1670(A) (2010). When the court approves a treatment plan, it must "specify a date upon which jurisdiction will terminate automatically, which must be no later than eighteen months after the initial intervention." S.C. Code Ann. § 63-7-1670(C)(2) (2010). "If the court orders that a child be removed from the custody of the parent or guardian, the court must approve a placement plan." S.C. Code Ann. § 63-7-1680(A) (Supp. 2013).

The legislature drafted two sections outlining plans for parents in abuse and neglect proceedings. By its plain language, section 63-7-1670 applies when a child remains in the home and DSS intervenes, and it requires the court to approve a *treatment* plan. In contrast, section 63-7-1680 applies when a child is removed from the home, and it requires the court to approve a *placement* plan. By naming the plans different things and describing them in different sections, the legislature

intended one section to apply to intervention actions and the other section to apply to removal actions.

DSS concedes Son was removed by a removal action, and the record shows DSS filed a removal petition rather than an intervention petition. This court has determined "intervention does not contemplate placement of children with third parties." *S.C. Dep't of Soc. Servs. v. Randy S.*, 390 S.C. 100, 107, 700 S.E.2d 250, 254 (Ct. App. 2010). Thus, this action was a removal action, and the statutes governing removal actions apply rather than the statutes governing intervention actions. *See id*. ("Because DSS in actuality initiated a removal action instead of an intervention action, it was required to follow the statutory procedures for removal and file a petition with the family court after [the children] were taken into [emergency protective custody]."). Because section 63-7-1670 applies to intervention actions rather than removal actions, the family court erred in applying it to this case and using it to dismiss Son. Accordingly, we reverse the family court's dismissal of Son from the action, grant DSS legal custody of Son, and remand for a merits hearing.

CONCLUSION

For the foregoing reasons, the order on appeal is

REVERSED AND REMANDED.

WILLIAMS, KONDUROS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

56 Leinbach Investors, LLC, Appellant/Respondent,

v.

Magnolia Paradigm, Inc, Respondent/Appellant.

Appellate Case No. 2012-213389

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5270
Heard June 11, 2014 – Filed September 10, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Donald H. Howe, of the Law Office of Donald H. Howe, LLC, of Charleston, for Appellant/Respondent.

William S. Barr, of Barr, Unger & McIntosh, LLC, of Charleston, for Respondent/Appellant.

KONDUROS, J.: In this cross-appeal, 56 Leinbach Investors, LLC (Leinbach) appeals the master-in-equity's determination it breached a lease agreement with Magnolia Paradigm, Inc. (Magnolia) when Leinbach leased a portion of the subject property to a third party. Leinbach further appeals the master's award of a $300 per month rent abatement as damages, arguing Magnolia suffered only nominal damages. Magnolia appeals the master's admission of parol evidence regarding the

scope of the subject property and the damages award, contending the master erred in reforming the lease and that rent abatement should be equivalent to the amount Leinbach is receiving under the third-party lease. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Leinbach and Magnolia entered into a lease agreement in 2003 whereby Magnolia leased from Leinbach a 1.21-acre undeveloped parcel of land for Baker Motors to use as employee parking. The parcel is located in Charleston County and adjoined another parcel owned by Leinbach and occupied by the Charleston Montessori School. Prior to signing the lease, the parties negotiated the terms including Magnolia submitting a planned design for construction of the parking area, which covered most of the 1.21 acres with the exception of a small wooded area. Leinbach sought $2,000 per month in rent, and after negotiations, the parties agreed upon $1,800 per month.[1]

In 2005, Optima Towers (Optima) approached Leinbach's sole member, Clyde Hiers, about leasing space to erect a communications tower on the property. Baker Motors was aware of the tower's erection because Optima coordinated with it regarding construction equipment at the site and the tower is immediately adjacent to the employee parking lot.

In late 2006, Magnolia decided to buy the leased property and discovered the tower had been erected within the wooded area of the 1.21 acres. In late 2007, Magnolia notified Leinbach it considered the erection of the tower to be a violation of the lease and began deducting $886.97, the amount Leinbach was receiving from Optima, from its monthly lease payments. Leinbach filed suit against Magnolia, alleging Magnolia breached the lease by failing to pay the full amount of rent due under the lease. Magnolia asserted the defense of abatement under the lease and counterclaimed for the $886.97 Optima was paying Leinbach under the tower lease. Both parties also asserted unjust enrichment claims. Neither party sought to terminate the lease.

The case was referred to the master, and a trial was conducted. The master concluded the leased property constituted the entire 1.21 acres and Leinbach

[1] The lease also provides for incremental increases in rent at certain intervals.

breached the lease by permitting the erection of the tower. However, it further concluded Magnolia had abandoned the wooded area and also breached the lease by withholding the $886.97 in payments each month. The master further determined the parties made a mutual mistake that allowed for reformation of the lease because neither Leinbach nor Magnolia understood the wooded area was covered by the lease agreement. The master then reformed the lease to reflect Magnolia's inability to use the wooded area. He determined Magnolia could not use one sixth of the leased property and reduced Magnolia's the monthly rent by that amount, $300 per month. These cross-appeals followed.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).

"An action for breach of contract seeking money damages is an action at law." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 89, 594 S.E.2d 485, 491 (Ct. App. 2004) (internal quotation marks omitted). On appeal of an action at law, this court will affirm the master's factual findings if there is any evidence in the record which reasonably supports them. *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006).

"Actions involving reformation of instruments are equitable in nature." *Crewe v. Blackmon*, 289 S.C. 229, 233, 345 S.E.2d 754, 756 (Ct. App. 1986). In an action in equity, tried by the master, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Fox v. Moultrie*, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008).

LAW/ANALYSIS

I. Leinbach's Breach of the Lease

Leinbach contends the master erred in finding it breached the lease agreement because "demised premises" included the entire 1.21 acres of property described in the lease. We disagree.

"When [a] contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." *Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011, *rev'd on other grounds*, 407 S.C. 407, 756 S.E.2d 148 (2014). "[E]xtrinsic evidence may only be considered if the contract is ambiguous." *Preserv. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013).

Article I, Section 1.01 of the lease, entitled "Demised Premises," indicates "Landlord hereby demises and leases to Tenant, and Tenant hereby takes and leases from Landlord, certain premises (herein called the "Demised Premises") consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate located at Leinbach Dr.[,] City of Charleston, State of South Carolina and more particularly described as parcel H-2 of TMS# 349-01-00-045 . . . ."

Although other sections of the lease discuss the permissible use of the demised premises, the contract unambiguously indicates the entire 1.21 acres constitutes the demised premises.[2] Article XII entitled "Title to Premises" states, "the Demised

[2] With respect to Magnolia's argument the master erred in admitting parol evidence to determine the meaning of the contract, we agree the lease was not ambiguous and did not required extrinsic evidence to ascertain the extent of demised premises. However, extrinsic evidence regarding the plans for Magnolia's parking area and use of the demised premises was relevant to the question of damages because the plans demonstrate the speculative nature of any future use of the wooded area in dispute.

Premises shall hereafter be subject to no leases, easements, covenant, restriction or the like which in any manner would prevent or interfere with Tenant." Additionally, Tenant is "entitled to lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy all the rights, herein granted without any let, hindrance, ejection, molestation or interference by any person."

The tower's presence within the demised premises deprives Magnolia of full, quiet, peaceful possession, and the Optima lease interferes with Magnolia's use of the property in some manner, although not to the extent Magnolia argues. Consequently, we affirm the master's ruling that Leinbach breached the lease.

II. Reformation of the Lease

Magnolia contends the master erred in reforming the lease based on mutual mistake. We agree.

"A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." *George v. Empire Fire & Marine Ins., Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001). "A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Before equity will reform a contract, the *existence of a mutual mistake must be shown by clear and convincing evidence*." *Id*. (emphasis added); *see also* 66 Am. Jur. 2d *Reformation of Instruments* § 1 (2011) ("Reformation of a contract is an extraordinary equitable remedy and should be granted with great caution and only in clear cases of fraud or mistake.").

The master concluded:

> While I find [Leinbach] breached its lease with [Magnolia], I further find that [Magnolia's] failure to utilize the area in question amounted to an abandonment of that part of the demised premises which resulted in a mutual mistake of fact - both parties were unaware that the "wooded area" was contained within the demised premises at the time that either lease was entered into. I further find that this abandonment occurred prior to

> [Leinbach]'s breach of the express terms of the lease by again renting part of the demised premises."

Initially, we note that neither party, at trial or on appeal, contends they made a mutual mistake. Furthermore, we find the preponderance of evidence in the record does not support a finding of mutual mistake at the time the contract was formed with respect to whether the wooded area was included in the 1.21 acres constituting the demised premises.

William Cochran, Jr. was operations manager for Baker Motors from 1993 until 2004 and negotiated the lease with Leinbach. He indicated the lease included the wooded area for a total of 1.21 acres even though it was not feasible to develop the area for parking at that time and testified as follows:

> Q. Do you recall why, if you look at the sketch there, why you didn't put any parking over in the corner, off the cul-de-sac?
>
> A. I was responsible for expense control. When this opportunity came and we decided to go with it, I wanted to get as many parking places as we could at the least amount expense of turning dirt. As they referred to it, that was a soccer field. It was compacted, that whole area. That was the easiest place to put it. I don't recall exactly, that's why that area was used and that's why this parking lot design was drawn. Over in the corner was an area that would've cost much more at the time to do. We had some trees to take down. We would have to fell and do that. We didn't need that at that time. And so the least expensive way I could turn this piece into a parking lot for us was what we did right there.
>
> Q. Did you ever feel that precluded you from putting parking over there or something over there in the future?
>
> A. I didn't think that it would preclude for anything because we had leased the entire parcel.

Additionally, Cochran testified he understood the rent proposed by Leinbach to be based upon its desire to make an 8 to 10% profit on its investment in the property, which would include the entire 1.21 acres. Corky Carnevale, Leinbach's real estate agent for securing the lease, testified the lease was for the entire 1.21 acres and corroborated Cochran's testimony regarding the rent calculation. Tommy B. Baker, sole member of Magnolia, testified his goal in signing the lease was to get as many parking spaces as he economically could and to secure the total property, 1.21 acres.

At trial, Hiers, took the position that because the lease said Baker Motors could use the property for approved parking, he could erect the tower on the wooded area as Baker Motors was not using it for parking. He stated, "*[w]e have never denied that the parcel has been inadvertently leased to two people*. Again, I contend that Mr. Baker was not interfered with. He got exactly what he bargained for. He saved over $100,000 by not trying to develop that finger of land for a few additional parking spaces." Additionally, Hiers acknowledged the demised premises is 1.21 acres and that he leased all of parcel H-2 to Magnolia. Furthermore, Hiers testified that while Magnolia did not have the absolute right to expand the parking area, it could have done so with his permission and the approval of the City of Charleston.

Hiers testified he was not heavily involved in the placement of the cell tower. "I told [Optima's representative] my plate was full at the time. And if he wanted to pursue this opportunity, he was going to need to contact the city, Mr. Baker, and everyone else, and he was responsible for getting this done if, in fact, that's what he wanted to do." This testimony indicates Hiers believed Baker had some interest in the property or there would be no need to contact him regarding the tower's construction. Hiers testified:

> Q. You made the unilateral mistake and leased out a portion of the property that you had previously leased to Mr. Baker to Optima Towers?
>
> A. Clearly that's why we are in court today.

We recognize Magnolia did not immediately object to the erection of the tower on the wooded area. However, that fact alone does not demonstrate by clear and convincing evidence that *at the formation of the lease* Magnolia did not intend to lease the entire 1.21 acre parcel. Baker testified he was not aware that a cell tower

was going up "adjacent or on the property" and he was not contacted about the construction of the tower. The record does not reveal how often Baker was at the premises or whether he parks in the employee lot. Furthermore, Cochran, the Baker employee most familiar with the terms of the lease, was not employed by Baker Motors at the time of the erection of the cell tower. Leinbach also owned the adjacent parcel of land and simple inattentiveness to the precise location of the tower could have resulted in its being built on the wooded area. This falls short of establishing clear and convincing evidence of an intent to have abandoned that portion of the property in 2003. Furthermore, the drawings relied upon by the master to create a mutual mistake through Magnolia's abandonment all depict the wooded area. Although parking spaces are not delineated in the wooded area, the land itself is included in the drawings and is in no way excluded from the terms of the lease. Additionally, Magnolia did not attempt to negotiate a lower rent based on the decision not to use the wooded area for parking.

Leinbach's mistake was unilateral and occurred three years after the signing of the Leinbach/Magnolia lease. While Magnolia did not object to the construction of the tower, that was a mistake that occurred *after* the inception of the lease and does not offer a basis for reformation.

> Although reformation corrects a mistake between the written document and the actual intent of the contracting parties, it will not rewrite a contract simply because it has become less favorable to one party. Under the remedy of reformation, the law will not make a better contract than that which the parties themselves have seen fit to enter into, or will not alter it for the benefit of one party to the detriment of another.
>
> Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation. Thus, a court may not substitute by reformation an agreement that it thinks is proper but to which the parties had never assented.

66 Am. Jur. 2d *Reformation of Instruments* § 1 (2011) (footnotes omitted).

While reformation of the lease allowed the master to fashion an equitable remedy that is very appealing, the preponderance of the evidence does not demonstrate clearly and convincingly the parties made a mutual mistake of fact at the time of the formation of the lease regarding whether the wooded area was included in the demised premises. Consequently, we reverse the master's ruling as to mutual mistake and reformation.

III. Damages and Magnolia's Breach of the Lease

Because we conclude the master erred in reforming the contract, we look to the damages provision in the lease to determine the result of Leinbach's breach and whether Magnolia breached the lease by abating rent. Section 6.03 discusses abatement of rent and provides:

> If Landlord creates a condition that *substantially interferes with the normal use* of the Demised Premises or appurtenant parking or service areas as allowed herein, the Rent and other charges due hereunder shall be abated during the time such interference persists, but such abatement persists . . . . (emphasis added).

The master concluded the tower was not a substantial interference with the normal use of the demised premises, and evidence in the record supports that finding. Consequently, Magnolia breached the lease by failing to pay the agreed upon rent, and Leinbach is entitled to payment of those funds.

Additionally, although we conclude Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages. Baker testified as follows:

> Q. And the tower that's there has not interfered at all with any of the parking on any of the sites?
>
> A. For the time being, yes.
>
> Q. Your testimony is, basically, you just really don't know what the future brings?

A. I don't think anybody does.

. . . .

Q. You don't know that it would make any economic sense [to expand parking into the wooded area]?

A. That would be for a future determination.

Q. You haven't run any numbers to see if it would make any economic sense?

A. There's no need for the moment.

While we do not condone the "double-leasing" of property, it appears the construction of the cell tower was based on a unilateral mistake by Leinbach further exacerbated by Magnolia's apparent failure to file a notice of lease or recognize at the time of the tower's construction it was being built within the demised premises. The basic law of damages in our jurisprudence requires proof of damages, and we can find no case law that suggests double-leasing, particularly in a commercial transaction, gives rise to damages per se.

> Speculative damages are damages that depend upon future developments which are contingent, conjectural, or improbable. As a general rule, courts will find that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto.
>
> The inability to measure damages with definite exactness does not make them speculative and does not bar recovery. The general rule is the same, whether the plaintiff seeks lost profits in a contract case or future medical expenses in a tort case: damages must be proved with reasonable, not mathematical, certainty, and no award can be made for speculative or conjectural damages.

> Thus, where future injury is only merely possible, rather than probable, or where the amount is speculative rather than reasonably certain, the plaintiff cannot recover.

11 S.C. Jur. *Damages* § 5 (1992) (footnotes and quotation marks omitted).

As previously discussed, although the use of the demised premises was not completely limited to parking, any other use was subject to Leinbach's approval and any expansion of the parking area was subject to approval from Leinbach and the City of Charleston.

Because Magnolia's normal use of the property was not substantially interfered with, it was not entitled to abate rent under section 6.03 of the lease. Therefore, it must pay Leinbach the rent that was previously abated, but Magnolia is entitled to nominal damages for Leinbach's breach.

IV. Unjust Enrichment

Magnolia further appeals the master's denial of its unjust enrichment claim contending the master erred in finding Leinbach's enrichment was not "unjust." We disagree.

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). "To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct. App. 2013).

In the instant case, an express contract exists covering the issue of abatement of rent — the relief sought by Magnolia. However, because of the unusual circumstances of this case, in which the express contract arguably does not address the type of breach at issue, we address Magnolia's unjust enrichment argument. *See Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F. Supp. 2d 703, 707 (D.S.C. 2007) ("While parties are permitted under South Carolina law to pursue quasi-contractual claims when there is no valid contract between parties, or there is some question as to whether contract is enforceable or applies to dispute,

when parties agree that valid and enforceable contract exists that covers dispute between them, such claim is superfluous.").

Magnolia claims Leinbach is being unjustly enriched by Optima's monthly rent payment. However, Magnolia failed to demonstrate it is entitled to that money. While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Hiers's consent to a sublease for the tower construction would have been questionable at best. Hiers testified the Optima lease was incredibly beneficial to him because it could offset the failure of the Charleston Montessori School to timely pay its rent. Additionally, the construction of the cell tower was a matter of public concern and debate because of its proximity to the school. Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course. Accordingly, Magnolia was not entitled to the lease payments, and it is not unjust or inequitable for Leinbach to retain them.

V. Remaining Issues

Finally, Magnolia contends the master erred in calculating the arrearages it owed Leinbach under the reformed lease and in not granting Magnolia attorney's fees. Because of our ruling as to damages and reformation, these issues need not be addressed. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the determination of a prior issue is dispositive).

CONCLUSION

In conclusion, we hold the master erred in reforming the lease between Leinbach and Magnolia based on mutual mistake. Furthermore, we find that although Leinbach breached the lease agreement by permitting erection of the tower within the demised premises, Magnolia failed to prove it was entitled to rent abatement under the lease or restitution based on its unjust enrichment claim. We remand this case to the master to determine the amount of damages due to Leinbach and for the entry of nominal damages to Magnolia in light of our decision.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Stogsdill, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

Appellate Case No. 2013-000762

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 5271
Heard March 12, 2014 – Filed September 10, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

Richard G. Hepfer, of South Carolina Department of Health and Human Services, of Columbia, for Respondent.

Anna Maria Darwin and Sarah Garland St. Onge, of Columbia, for Amicus Curiae, Protection and Advocacy for People With Disabilities, Inc., Amy Landers May, of Columbia, for Amicus Curiae, the South Carolina Chapter of the National Academy of Elder Law Attorneys, Kirby Mitchell, of Greenville, for Amicus

Curiae, South Carolina Legal Services, of Greenville, and Stephen Suggs, of Columbia, for Amicus Curiae, the South Carolina Appleseed Legal Justice Center.

KONDUROS, J.: Richard Stogsdill appeals the Administrative Law Court's (ALC's) order affirming the South Carolina Department of Health and Human Services' (DHHS's) decision approving the reduction in services to him. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Stogsdill is a Medicaid-eligible man receiving services under the South Carolina Intellectual Disabilities/Related Disabilities (ID/RD) Waiver (Waiver).[1] His mental capacity is normal, but because of premature birth, he suffers from significant physical disabilities that require aid in nearly every activity of daily living. Under the Waiver, the South Carolina Department of Disabilities and Special Needs (DDSN) beneficiaries can be provided a mix of services. Waivers permit eligible recipients to receive these services without the requirement of institutionalization. On January 1, 2010, the five-year renewal of the Waiver went into effect. The renewed Waiver included a cap or limit on some services and excluded others. DHHS administers the state Medicaid program and is responsible for the overall administration of the Waiver. DDSN is responsible for the day-to-day operation of the Waiver.

Prior to the Waiver changes, Stogsdill was receiving a combined sixty-nine hours of Personal Care Aide (PCA) and Companion Care services per week and approximately thirty-six hours of Respite Care per week. PCA services consist of hands-on personal care that the person needs to accomplish his or her activities of daily living such as bathing, toileting, dressing, and eating. Companion Care services are similar to PCA services but include an aspect of community integration. Respite Care can be a range of services, including personal care but is designed to provide services when the normal caregiver is absent or needs relief.

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[1] This is the former Mentally Retarded/Related Disabilities (MR/RD Waiver).

The Waiver capped any combination of PCA and Companion Care services at twenty-eight hours per week. The normal cap for Respite Services is sixty-eight hours per month, approximately sixteen hours per week, but exceptions can be granted for up to 240 hours per month, approximately fifty-six hours per week. Under these new limits, Stogsdill's services were reduced to twenty-eight hours per week of all PCA services, including Companion Care services, and sixty-eight monthly hours of Respite Care. After an application by his Service Coordinator, Stogsdill's Respite Care hours were increased to 172 hours per month. His occupational therapy and speech therapy were discontinued. Stogsdill appealed the reduction in services through the administrative process finally ending with the ALC affirming the reduction in services. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC." *Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct. App. 2012), *cert. pending*.

> The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2013).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When determining whether the record

contains substantial evidence to support an administrative agency's findings [the appellate court] cannot substitute its judgment on the weight of the evidence for that of the agency." *S.C. Dep't of Mental Health v. Moore*, 295 S.C. 42, 45, 367 S.E.2d 27, 28 (1988) (citations and internal quotation marks omitted). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Fragosa v. Kade Constr., LLC*, 407 S.C. 424, 428, 755 S.E.2d 462, 465 (Ct. App. 2013) (internal quotation marks omitted).

LAW/ANALYSIS

I. Lawfulness of Reduction in Waiver Services

Stogsdill maintains the ALC and DHHS erred as a matter of law in concluding the 2010 caps were "lawful" based solely on the federal agency, Center for Medicare and Medicaid Services (CMS), approving them. Stogsdill contends the changes do not carry the force and effect of law because they were not passed as regulations pursuant to the APA. We disagree.

"'Regulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4) (2005).

> [W]hether an agency's action or statement amounts to a rule—which must be formally enacted as a regulation—or a general policy statement—which does not have to be enacted as a regulation—depends on whether the action or statement establishes a binding norm. When the action or statement so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion, then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm.

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 475-76, 636 S.E.2d 598, 610 (2006) (citations and internal quotation marks omitted).

We agree with Stogsdill that DDSN has established a binding norm by reducing the types and amount of services offered under the Waiver. The record presents no explanation for the reduction in services to Stogsdill other than the cap put in place by the 2010 Waiver renewal. However, based on the relevant statutory scheme and federal/state nature of Medicaid and the Waiver, DDSN was not required to pass a regulation to enact the cap as an enforceable provision.

South Carolina elected to participate in the Waiver Medicaid program in 1991. Pursuant thereto, the legislature created DDSN and designated it as the "state's intellectual disability, related disabilities, head injuries, and spinal cord injuries authority for the purpose of administering federal funds allocation to South Carolina." S.C. Code Ann. § 44-20-240, -270 (Supp. 2013). Federal regulations set forth the manner in which Waiver requests and renewals are made and approved. The governor, the head of the state Medicaid agency, or an authorized designee may submit the Waiver request. 42 C.F.R. § 430.25(e) (2013). The request is then reviewed by CMS regional and central office staff who submit a recommendation to the CMS Administrator. 42 C.F.R. § 430.25(f)(2) (2013). The Administrator may approve or deny waiver requests, and a request is considered approved unless, within ninety days after the request is received by CMS, the Administrator denies the request or sends the State a written request for additional information needed to reach a final decision. 42 C.F.R. § 430.25(f)(2)(i), (3) (2013). No one disputes the 2010 Waiver was so approved.

In *Doe v. South Carolina Department of Health and Human Services*, 398 S.C. 62, 70, 727 S.E.2d 605, 609 (2011), the Supreme Court of South Carolina considered whether Doe could be denied Waiver services because DDSN had concluded her mental retardation did not onset prior to her eighteenth birthday. The court concluded DDSN could not terminate Doe's services because the pertinent regulation required the onset of disability prior to age twenty-two. *Id.* at 72-74, 727 S.E.2d at 610-11. In discussing the ways DDSN may control the target population for Waiver services, the court concluded:

> In sum, it is clear that South Carolina *could have* listed additional criteria in the waiver application for the purpose of defining the population to whom it would

> provide waiver services. Likewise, DDSN *could have* promulgated regulations incorporating those additional criteria as part of the definition of mental retardation. But no such steps were taken. Rather, South Carolina adopted a broad definition of mental retardation in section 44-20-30, using language that parallels the [Supplemental Security Income] definition, and in Regulation 88-210, DDSN interpreted that definition in a manner consistent with the [Social Security Administration]. DDSN's interpretation of section 44-20-30 in its policy guidelines directly conflicts with Regulation 88-210 and should be disregarded.

Id. at 74, 727 S.E.2d at 611.

Additionally, in the dissent, Justice Hearn indicated "South Carolina can impose more restrictive criteria for mental retardation in its [W]aiver application or in a regulation." *Id.* at 75, 727 S.E.2d 612 (Hearn, J., dissenting). While the ruling in *Doe* was not dependent on a determination that approval of the Waiver renewal by CMS created binding law, it suggests the State may make changes to its program through that process.

Moreover, we find a case from the North Carolina Court of Appeals to be analogous and instructive. In *Arrowood v. North Carolina Department of Health & Human Services*, 535 S.E.2d 585, 587 (N.C. App. 2000) (*rev'd*, 543 S.E.2d 481 (N.C. 2001), NCDHHS sought a waiver from the federal government to implement its "Work First Program." *Id.* at 587. Under "Work First," a recipient signed a letter agreeing to a twenty-four-month limitation on public assistance. *Id.* After the twenty-four-month period expired, Arrowood sued arguing the limitation was not enforceable because it was not promulgated as a regulation under the state's APA. *Id.* at 587-88. The majority agreed, but the dissent was ultimately adopted by the North Carolina Supreme Court. *See Arrowood*, 543 S.E.2d at 481. The dissent determined the following:

> 42 U.S.C. § 1315 allows the Secretary of the United States Department of Health and Human Services (HHS) to waive requirements contained in 42 U.S.C. § 602 that pertain to state plans for Aid to Families with Dependent

> Children (AFDC) in cases of demonstration or pilot projects. On September 14, 1995, Governor Hunt formally submitted a request for authority to operate a statewide welfare demonstration project, entitled *Work First*, to HHS. In April [of] 1996 [,] HHS issued waiver authority to North Carolina to operate the *Work First* program. The waiver gave North Carolina authority to deny AFDC benefits to adults who had received AFDC for 24 months. North Carolina implemented the *Work First* program, including the 24-month time limit for benefits, in August [of] 1996. This waiver authority had the legal effect of superseding existing federal statutes that contain no such provision for time limiting benefits. G.S. 150B-19(4) prohibits an agency from adopting a rule that repeats the content of a law, rule, or federal regulation. The waiver authority cited above had the force and effect of federal law. Furthermore, it was sufficiently clear as to the provisions of the waiver authority. There was, therefore, no need for state regulation, and any such regulation would have been repetitive in violation of G.S. 150B-19.

Arrowood, 535 S.E.2d at 592-93 (Walker, J., dissenting).

Likewise, in this case, section 1915(c) of the Social Security Act, 42 U.S.C.A. § 1396n(c) (2012), enables states to request a waiver of applicable federal Medicaid requirements to provide enhanced community support services to those Medicaid beneficiaries who would otherwise require institutional care. *See also* 42 C.F.R. § 441.300 (2013) ("Section 1915(c) of the [Social Security] Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization."). The State submitted its proposed Waiver, and it was approved by CMS. This Waiver authority had the legal effect of superseding existing federal statutes that would not allow for community-based services. The provisions of the Waiver are clear, and if "the State and the Federal regulations are not in agreement, the requirements of the Federal regulations shall prevail." S.C. Code Reg. 126-399 (2012). Based on all of the foregoing, we conclude approval by state regulation was not required to

give the Waiver's provisions the force and effect of law. Consequently, we affirm the ALC's determination that the 2010 Waiver caps are lawful.

II. Notice and Due Process

Next, Stogsdill contends his due process rights were violated because he did not receive adequate notice of the reduction in services. We disagree.

42 C.F.R. § 431.210 (2013) address the content of notices regarding changes in the Waiver program.

> A notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain—
> (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
> (b) The reasons for the intended action;
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
> (d) An explanation of—
> (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

Id.

In this case, precisely what notice Stogsdill received regarding the reduction in his services is unclear. The record on appeal does not include any notice, but the ALC's order indicates "a general notice was sent out to all DDSN clients notifying them of the *pending* changes and encouraged those affected to work with DDSN Service Coordinators (case managers) to mediate the impact of the new service limits." While such notice would fall short of the requirements of § 431.210, Stogsdill cites to no authority suggesting that this failure, in the absence of prejudice, requires any action. *See Palmetto Alliance, Inc. v. S.C. Pub. Serv.*

Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984) (stating "proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice"); *see also Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (finding the plaintiffs' due process claim failed when they received notice of the agency action enabling them to obtain a hearing before the ALC providing them the opportunities required by due process).

The record demonstrates Stogsdill has fully exercised his opportunity for a hearing and judicial review. As a result, we affirm the ALC's ruling that Stogsdill's due process rights were not violated.[2]

III. Risk of Institutionalization

Having determined the 2010 caps were lawful and that Stogsdill's due process rights were not violated by the inadequacy of DHHS's notice, we turn to the question of whether the application of the caps to his case violates the Americans with Disabilities Act (ADA) as set forth in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999). Stogsdill argues the ALC erred in finding his risk of institutionalization was "speculative" when it considered the reduction in his services. We agree.

In *Olmstead*, the plaintiffs were institutionalized women suffering from intellectual disability and mental illness. *Id.* at 593. They sought community-based care. *Id.* at 593-94. The United States Supreme Court concluded requiring the plaintiffs to be institutionalized and segregated from the population at large discriminated against them in violation of the ADA. *Id*. at 599-602. Therefore, treatment for disabilities is to be provided in the most integrated, least restrictive setting possible. *Id.* at 602 n.13; *see also* 28 C.F.R. § 35.130(d) (2013) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

A number of cases have followed in which Medicaid Waiver recipients protested the elimination of or reduction in their services, arguing the cuts put them at risk of

[2] While we observe Stogsdill suffered no prejudice in this case based on the inadequate notice of proposed changes, we do not condone DHHS's apparent failure to comply with 42 C.F.R. § 431.210 as this regulation is in place to ensure affected recipients have the fullest and fairest opportunity to exercise their rights.

institutionalization in violation of the ADA's integration mandate as interpreted by *Olmstead*.[3] *See M.R. v. Dreyfuss*, 697 F.3d 706, 734-35 (9th Cir. 2012) (granting injunction to plaintiffs opposing reduction in personal care hours as violative of the ADA and indicating "the elimination of services that have enabled [a plaintiff] to remain in the community violates the ADA, regardless of whether it causes them to enter an institution immediately, or whether it causes them to decline in health over time and eventually enter an institution in order to seek necessary care"); *Radaszewski ex rel. Radaszewski*, 383 F.3d 599, 614-15 (7th Cir. 2004) (reversing judgment on the pleadings in favor of agency when plaintiff had potential claim for disallowing twenty-four-hour nursing care that would allow benefit recipient to continue living at home); *Fisher v. Okla. Healthcare Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (holding cap on prescription drug coverage for plaintiffs in community-based Medicaid program did not require institutionalization as prerequisite for bringing ADA claim and claim was stated because plaintiffs would be denied service they could receive if they submitted to institutionalization); *but see Rodriguez v. City of New York*, 197 F.3d 611, 619 (2nd Cir. 1999) (denying injunction to plaintiffs seeking safety monitoring to remain in community setting and stating "*Olmstead* does not, therefore, stand for the proposition that states must provide disabled individuals with the opportunity to remain out of institutions. Instead, it holds only that 'States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide'").

The Fourth Circuit addressed this issue in *Pashby*, *7*09 F.3d at 321-325. Therein, the court affirmed the grant of a preliminary injunction that would prevent the elimination of in-home services to plaintiffs because that action placed plaintiffs at risk of institutionalization in violation of the ADA's antidiscrimination policy. *Id.* at 321-24. In concluding the plaintiffs established a sufficient risk of institutionalization to succeed on the merits of their claim, the court found

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[3] We note there is some discord regarding the extent of the integration mandate in *Olmstead*. The controlling precedent for this case, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), is a 2-1 opinion wherein the dissent states, "North Carolina is not required to maintain any particular level of care to prevent the [plaintiffs] from entering an institution." *Id.* at 335 (Agee, J., dissenting). *M.R. v. Dreyfuss*, 697 F.3d 706, 734-35 (9th Cir. 2012) is also a 2-1 opinion wherein the dissent found plaintiffs failed to meet the burden of demonstrating their claims would succeed on the merits when plaintiffs were not facing immediate threat of institutionalization. *Id*. at 741-42 (Rawlinson, J., dissenting).

interested parties in the case declared the plaintiffs "could not live on their own without in-home PCS [personal care services] or that it would be unsafe for them to do so. Each of these declarants also attested that the [plaintiffs] had no friends or family members who could offer the same amount of care that their aides provided under the in-home PCS program." *Id.* at 322. Additionally, all but two of the declarants indicated the plaintiffs "'may,' 'might,' 'probably' would, or were 'likely' to [face institutionalization] due to the termination of their in-home PCS." *Id.*

In this case, Stogsdill has provided the uncontradicted opinions of his treating physician, Dr. Thomas C. Joseph, and Lennie S. Mullis, a psychologist with DDSN, indicating the reduction in his services places him at risk of institutionalization. Both Stogsdill and his mother testified the reduction in services would place him at risk of institutionalization. This quantum of proof far exceeds that offered by the plaintiffs in *Pashby*.

Additionally, we recognize attending a sheltered workshop may be an option for Stogsdill that could substitute for some of the reduction in his service hours. However, the record reflects he will have little interaction with other individuals who are not intellectually disabled, a situation that causes him great fear and anxiety. Furthermore, Stogsdill's physical limitations would place him in a vulnerable position with respect to other workshop participants who may not suffer from his level of physical disability, and it is unclear whether the required medical care would be available to him in this setting. Mullis attested a sheltered workshop would not be an appropriate placement for Stogsdill for psychological reasons, and Dr. Joseph agreed with her assessment.[4] DHHS has presented no probative evidence contrary to the conclusion that the reduction in services poses a risk of institutionalization. Based on the substantial evidence in the record, we reverse the ALC's conclusion that Stogsdill's risk of institutionalization was speculative.[5]

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[4] Mullis indicated "[a] combination of adult companion services, personal care services and respite services are needed to protect [Stogsdill's] health and welfare and to provide respite so that his parents can continue to provide support in his home to delay institutionalization." Dr. Joseph attested "[Stogsdill] would be at risk of institutionalization if the needed home-based services are not provided."

[5] As a subpart of his risk of institutionalization argument, Stogsdill contends the ALC failed to give Dr. Joseph's opinion the "greatest deference" required under

IV. Fundamental Alteration

Stogsdill next contends the ALC erred in concluding DHHS met its burden as set forth in *Olmstead* of proving that accommodating his needed services would force the State to fundamentally alter the nature of its program. We agree.

The *Olmstead* court recognized a state may have a defense to accommodating a Waiver participant's needs if doing so would present a fundamental alteration to its program. *Olmstead*, 527 U.S. at 603-04. "The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs." *Id.* at 603 (quoting 28 C.F.R. § 35.130(b)(7) (1998)). In evaluating North Carolina's fundamental alteration defense, the *Pashby* court held: "budgetary concerns do not alone sustain a fundamental alteration defense. . . . We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense." *Pashby*, 709 F.3d at 323-24 (internal quotation marks omitted).

Our review of the record reveals no argument other than a general budgetary reduction and financial constraints as the basis for DHSS's fundamental alteration defense. Therefore, we reverse the ALC's finding that providing the requested services to Stogsdill would result in a fundamental alteration of the Waiver program. We remand this case to DDSN for an assessment of required hours and services without reference to the caps in the Waiver.

Justice Kennedy's concurrence in *Olmstead*. Because we determine the record contains substantial evidence to support Stogsdill's risk of institutionalization argument, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing an appellate court need not address an issue when resolution of a prior issue is dispositive).

CONCLUSION[6]

We hold the caps included in the Waiver were not required to be promulgated as regulations to carry the force and effect of law, and Stogsdill was not denied due process by DHHS's inadequate notice in the absence of prejudice. Nevertheless, we find the substantial evidence in the record did not support the ALC's determination that Stogsdill's risk of institutionalization was merely speculative, and we conclude, under *Pashby*, DHHS failed to establish a fundamental alteration defense. Consequently, Stogsdill's case is remanded for consideration of the appropriate services to be provided without the restrictions of the 2010 Waiver. Therefore the order of the ALC is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

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[6] Stogsdill makes a lengthy argument regarding the separation of powers in his brief. However, this issue was neither raised to nor ruled upon by DHHS or the ALC. Therefore, it is not preserved for appellate review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to be preserved for appellate review."). Additionally, we decline to address Stogsdill's remaining arguments regarding reasonable promptness and comparability as they are not necessary to the disposition of the case. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the determination of a prior issue is dispositive).